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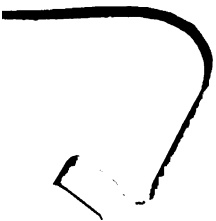
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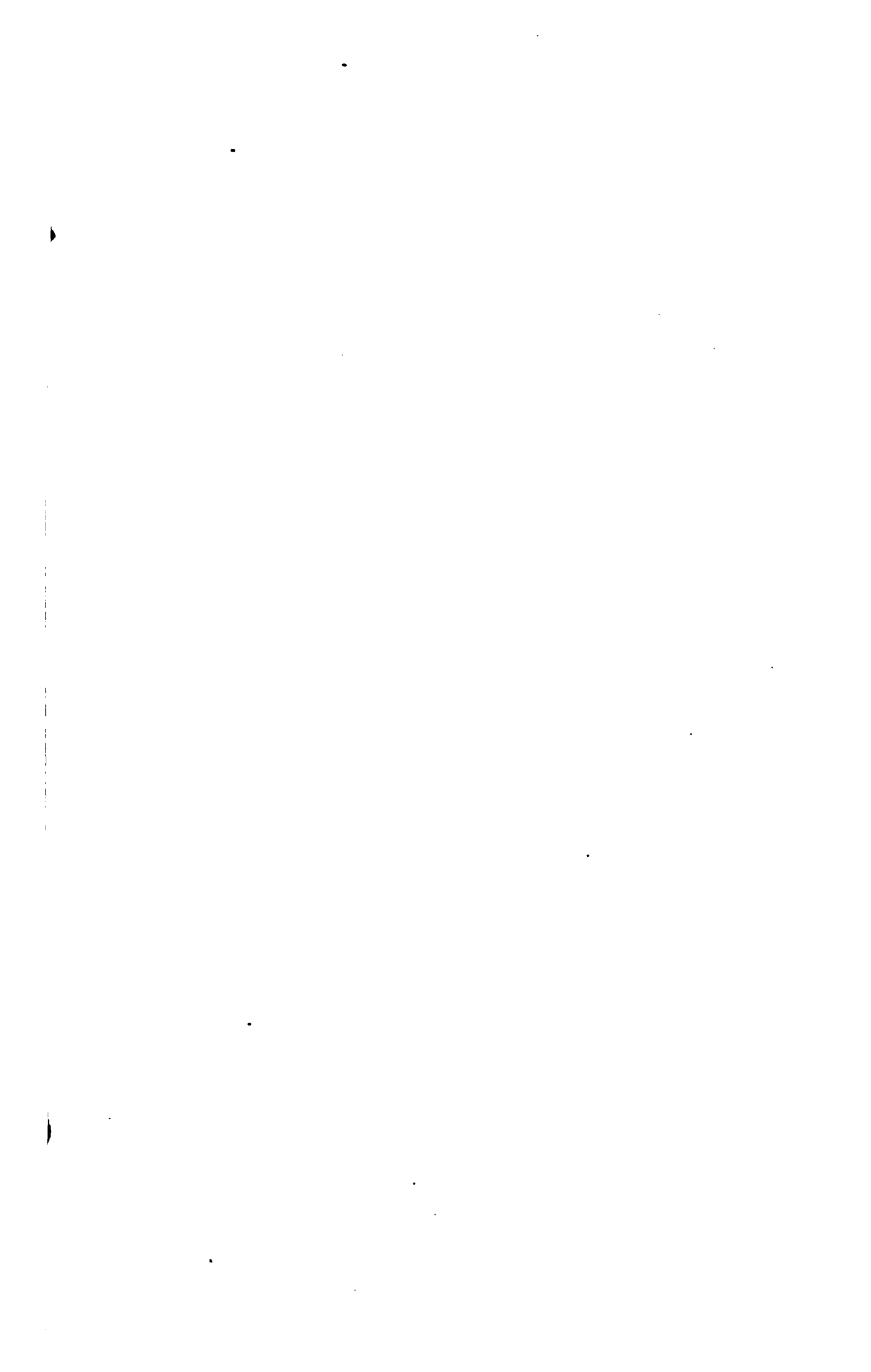


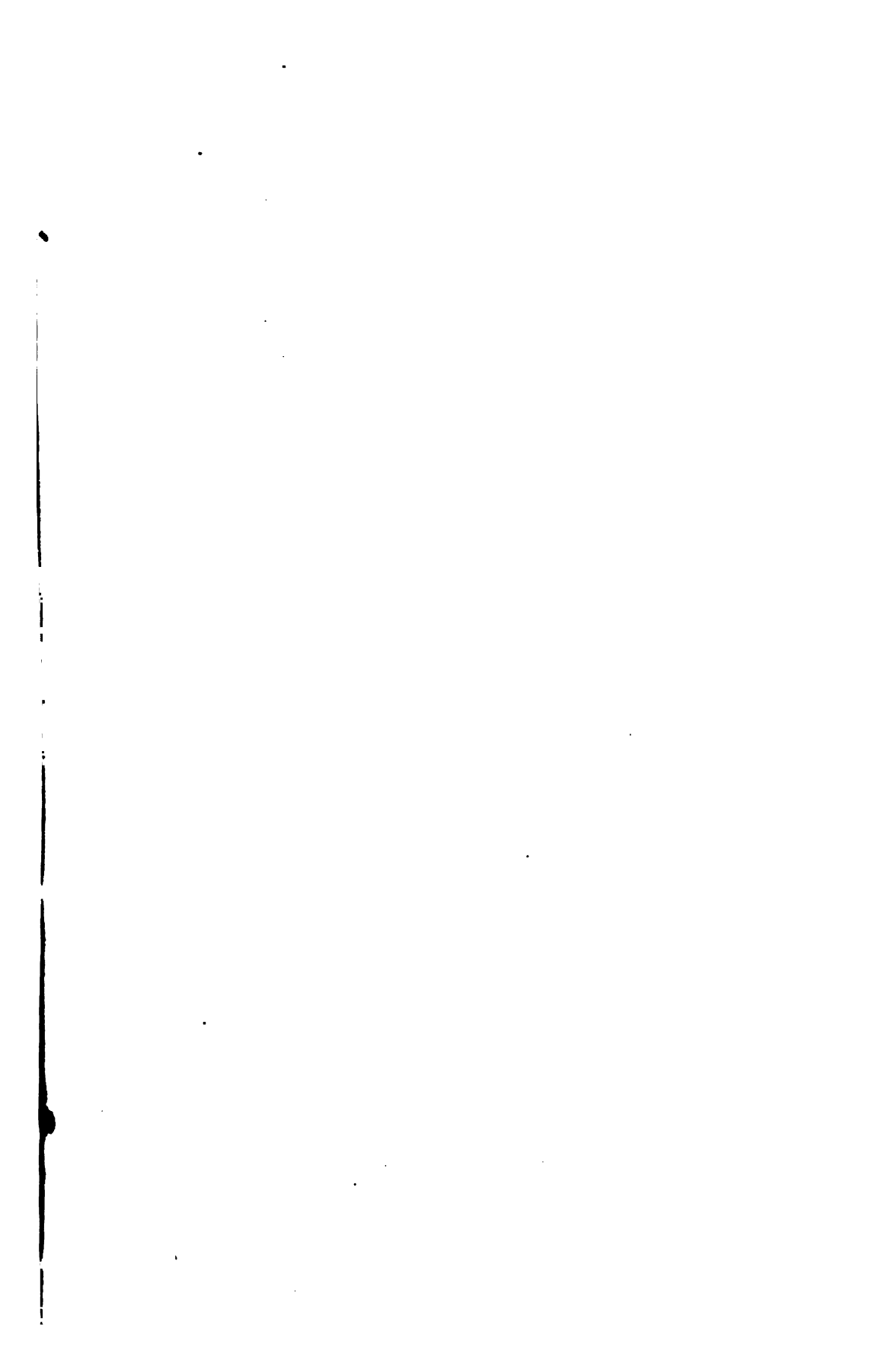
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NOTES
ON THE
CALIFORNIA REPORTS

**SHOWING THE PRESENT VALUE AS AUTHORITY
OF THE DECISIONS OF THE
SUPREME COURT OF CALIFORNIA
AS DETERMINED THROUGH THE
CITATIONS**

**IN SUBSEQUENT DECISIONS OF THIS COURT, THE COURTS OF
LAST RESORT OF SISTER STATES, AND OF
THE FEDERAL COURTS.**

BY

**CHARLES T. BOONE, WILLIAM FOSTER,
JOS. A. JOYCE and ALBERT RAYMOND.**

REVISED TO INCLUDE CITATIONS TO VOLUMES 147 INCLUSIVE.

BY

CHARLES L. THOMPSON.

BOOK I.

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NOTES

ON THE

CALIFORNIA REPORTS

VOLUME I.

By CHARLES T. BOONE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

1 Cal. 9-15. PEOPLE v. SMITH.

Affidavit on Information merely is of little value, p. 11.

Cited in *Menke v. Lydon*, 124 Cal. 163, applying rule to affidavit based on want of information; *Ex Parte Dimmig*, 74 Cal. 167, holding such an affidavit insufficient to cause issuance of warrant. Quoted with approval, *United States v. Collins*, 79 Fed. Rep. 67.

Defects in Affidavit can only be availed of prior to commitment; magistrate may commit for different felony from that charged in affidavit, p. 11.

Cited in *People v. Lee Look*, 143 Cal. 219, refusing to set aside information for murder.

Denied in *United States v. Collins*, 79 Fed. Rep. 68 (So. Dist. Cal.); held, where affidavit was on information only, magistrate had no jurisdiction to issue subpoena for witnesses to determine whether warrant ought to issue; held, also, that principal case, and *People v. Staples*, 91 Cal. 23, on point that after commitment it is too late to object to affidavit for arrest, were virtually overruled by *People v. Christian*, 101 Cal. 471, and *People v. Howard*, 111 Cal. 655. Principal case was not cited in the *Staples*, *Christian*, or *Howard* cases, which seem to decide that accused can be informed against only for offenses charged or included in complaint.

Courts Take Judicial Notice of local division of the country into states, counties, cities, etc., p. 13.

Cited in *Brumagim v. Bradshaw*, 39 Cal. 40, where court recognizes that the Potrero is part of San Francisco; also in note on Judicial Notice to *Lanfear v. Mestier*, 89 Am. Dec. 676, 679.

Depositions taken before committing magistrate are reviewable on habeas corpus, p. 14.

Cited in *Ex Parte Cottrell*, 59 Cal. 442; held, court may review depositions to see if there is cause for commitment. Approved in *Ex Parte Sterne*, 82 Cal. 247; held, if right to thus review depositions was ever doubted, doubt has been resolved by section 1487 of Political Code, providing for discharge of prisoner committed without probable cause; held, also, that although district attorney had filed information after commitment, it was still duty of court to determine question of probable cause, the information being a mere formulation of pleadings.

1 Cal. 18-24. **LADD v. STEVENSON.**

Answer must take issue with material allegations in complaint, or confess and avoid them by new matter, p. 20.

Cited in *Piercy v. Sabin*, 10 Cal. 31, 70 Am. Dec. 697, on point that all new matter must be set up in answer.

Dispossession, by legal order of alcalde, of party in quiet possession, is a forcible entry, p. 21.

Cited in *Turner v. Aldridge*, McAll, 231, in charge to jury, as holding that one unlawfully dispossessed may recover on his prior peaceable possession.

1 Cal. 24-32. **LORING v. ILLSLEY.**

Jurisdiction of appeals from courts of first instance, pp. 28-30.

Referred to, as an instance in *Payne v. Pacific Mail S. S. Co.* 1 Cal. 35. *

Appeal lies only from final judgment, not from interlocutory order, pp. 27, 28.

Cited in *Wells v. Torrance*, 119 Cal. 440, holding order in supplemental proceedings not appealable as final judgment; *McLaughlin v. Kelly*, 22 Cal. 222; held, when trial has been fair, courts usually give final effect to verdict and judgment; *McGuire v. Drew*, 83 Cal. 232; held, definition of "order" excludes a mere ruling on evidence during trial; In re *Smith*, 98 Cal. 640, quoting definition of "order" and holding order allowing amendment to statement on motion for new trial is not appealable; *Cary v. Richardson*, 35 La. Ann. 507, held order finally settling a right in controversy is final and reviewable.

Qualified, as to distinction between judgment and order, in *Belt v. Davis*, 1 Cal. 136, 139.

Purchaser at Sheriff's Sale of interest of master and part owner of vessel acquires no right to control and command; master, as such, has no interest that can be levied upon and sold, pp. 30-32.

Cited in *State Bank v. Green*, 10 Neb. 134; held, subsequent reversal of

judgment, under which execution issued, does not defeat title of purchaser at sale. Cited in note to *Little v. Bunce*, 28 Am. Dec. 371, as to protection of buyer at sheriff's sale.

1 Cal. 32, 33. GONZALES v. HUNTLEY.

Appeal.—Where record on appeal contains only pleadings and judgment, presumption is that proceedings of lower court were regular and its judgment proper, p. 33.

Affirmed, on similar facts, in *Palmer v. Brown*, 1 Cal. 42. Distinguished in *Ringgold v. Haven*, 1 Cal. 116; held, if record includes testimony in lower court, presumption is that "all material things are embodied." Distinguished in *Belt v. Davis*, 1 Cal. 140, where court presumes from the record that no evidence was taken in lower court, though clerk's certificate was defective.

1 Cal. 33-37. PAYNE v. PACIFIC MAIL STEAMSHIP COMPANY.

In Suit for Unliquidated Damages, amount of verdict should be presumed correct, and ought not to be reduced by the trial court unless beyond doubt unjust, p. 36.

Affirmed, on similar facts, in *Lawrence v. Collier*, 1 Cal. 38. Approved in *Payne v. Jacobs*, 1 Cal. 41; held, if trial court ought not to reduce verdict, appellate court will not attempt to exercise the power; and in *George v. Law*, 1 Cal. 365, where reduction of verdict by lower court was affirmed. Cited in note to *Campbell v. Stokes*, 19 Am. Dec. 568, on Writs of Error.

1 Cal. 39-41. PAYNE v. JACOBS.

The Finding of a Jury, or a court acting as such, upon the weight of testimony, will not be reviewed, except for mistake, unlawful interference of either party, or any undue influence whatever, p. 41.

Cited in *Reay v. Butler*, 95 Cal. 214, as being the first of "more than a hundred cases" in California on this point; "so the general rule is clearly established;" also in *Central Pac. R. R. v. California*, 162 U. S. 115, quoting 95 Cal. 214, and adding: "That rule is equally binding on us."

1 Cal. 42-45; 52 Am. Dec. 286. FROTHINGHAM v. JENKINS.

Shipmaster Has Lien on cargo, and is not obliged to part with any till whole freight is paid, p. 44.

Cited, on point that carrier has lien for freight, in note to *Ames v. Palmer*, 66 Am. Dec. 274; note to *Warehouse etc. Co. v. Galvin*, 65 Am. St. Rep. 61, on general subject; note to *Hale v. Barrett*, 79 Am. Dec. 368; on point that delivery of part does not defeat lien on remainder for whole freight, in note to *Adams Exp. Co. v. Harris*, 16 Am. St. Rep.

319, and *Hendricks v. Schmidt*, 68 Fed. Rep. 427; also in note to *Crawford v. Williams*, 60 Am. Dec. 152; payment and delivery are concurrent; consignee is not entitled to delivery till payment is made or tendered.

1 Cal. 45-50. **GUNTER v. SANCHEZ.**

Arbitration.—Submission of a pending case to arbitration operates as a discontinuance at common law, p. 47.

Approved in *Draghicevich v. Vulicevich*, 76 Cal. 380.

General citations, 18 Ill. App. 73.

1 Cal. 51-54; 52 Am. Dec. 238. **COLE v. SWANSTON.**

On Sale of Chattels, delivery and payment are concurrent, p. 54.

Cited in *Campbell v. Moran*, 97 Fed. 482, as to contract to deliver vessel on final payment. See note 64 Am. Dec. 576.

If Seller Can Deliver Part, he may recover price of that, less buyer's damages, p. 54.

Cited on this point in note to *Eckel v. Murphey*, 53 Am. Dec. 611. Cited, as to measure of damages for breach by carrier, note to *Ogden v. Marshall*, 59 Am. Dec. 499.

Special Damage must be specially alleged, p. 54.

Cited on this point in note to *Eckel v. Murphey*, 53 Am. Dec. 603; note to *Treadwell v. Whittier*, 13 Am. St. Rep. 200. Cited in case of damage to highway, in *Lewiston Co. v. Shasta Co.*, 41 Cal. 565.

1 Cal. 55-75. **VON SCHMIDT v. HUNTINGTON.**

Conciliation.—Nature of proceeding discussed, p. 59.

Cited in *De Castro v. Fellom*, 135 Cal. 228, discussing similar proceeding and its effects.

Custom, under Mexican law, sometimes modifies and even contravenes a statute, p. 64.

Approved in *Castro v. Castro*, 6 Cal. 160, holding that by Mexican custom two witnesses were enough for a will, though the law required three or five; and to the same effect, *Tevis v. Pitcher*, 10 Cal. 477. Cited, as example of custom under Mexican law in *Donner v. Palmer*, 31 Cal. 522, regarding record of alcalde's grants; *Gildersleeve v. Mining Co.*, 6 N. Mex. 42, as to form of execution of will, under Mexican laws.

Statute may be Made Retroactive by legislature when not forbidden by constitution of the state or the United States, p. 65.

Cited, as illustration of retroactive law, in dissenting opinion in *City v. R. R. Co.*, 35 La. Ann. 692.

Answer.—When case is heard on bill and answer, all material allegations of answer are presumed to be true, p. 69.

Approved on this point in *Belt v. Davis*, 1 Cal. 142, citing further authorities.

Contract, by reason of which a forfeiture is claimed, should be construed strictly, p. 71.

Cited in *Colman v. Clements*, 23 Cal. 248; held, party claiming forfeiture of mining claim must show that the case comes within strict letter of rule; *Wiseman v. McNulty*, 25 Cal. 237; held, party claiming forfeiture of mining claim must show exact compliance with any covenant to be kept by him as a condition precedent.

Dissolution of a Joint Stock Company, unless consented to by all the members, must be referred to a court, p. 73.

Cited on this point in note to *Skillman v. Lachman*, 83 Am. Dec. 107.

1 Cal. 75-85. **LINEKER v. AYESHFORD.**

Indorsee of Bill of Lading claiming as agent of shipper, has no property in the goods until they come into his possession or unless he has paid advances or charges on them, pp. 80, 81.

Cited in dissenting opinion in *Dodge v. Meyer*, 61 Cal. 428, as deciding that a mere agent of shipper took no title under indorsed bill of lading.

A "Naked Agent" of shipper cannot sue in his own name for non-delivery of goods shipped, p. 83.

Distinguished in *Santillas v. Moses*, 1 Cal. 94, where the plaintiff, being more than "naked agent," was held competent to sue in his own name.

1 Cal. 85-90. **EX PARTE ATTORNEY GENERAL.**

Quo Warranto.—Supreme court, having only appellate jurisdiction, cannot issue writ of quo warranto, pp. 88, 89.

Cited in *People v. Gillespie*, 1 Cal. 343, holding that superior court of San Francisco has no jurisdiction of proceedings on quo warranto; also in *Caulfield v. Hudson*, 3 Cal. 390, as deciding that supreme court had only appellate jurisdiction; and in *Miliken v. Huber*, 21 Cal. 169, on point that supreme court can issue writ of certiorari only in aid of its appellate jurisdiction; cited in *North Point etc. Co. v. Utah etc. Co.*, 14 Utah, 167 (quoted in *Eastman v. Gurrey*, 14 Utah, 171), denying right to appeal from injunction order.

1 Cal. 90-91. **WARNER v. HALL.**

Certiorari.—Supreme court cannot issue writ of certiorari to county court, p. 91.

Affirmed, on similar facts, in *Warner v. Kelly*, 1 Cal. 92.

Jurisdiction.—Court cannot exercise jurisdiction conferred by constitution until mode of exercise is prescribed by statute, p. 91.

Denied in *People v. Jordan*, 65 Cal. 648; held, supreme court may establish procedure for its appellate jurisdiction, where none is prescribed by law. Says of principal case, quoting Hayne on New Trial, section 181, that power of court to frame process for its jurisdiction "does not seem to have been understood." Cited, in dissenting opinion, in *In re Jessup*, 81 Cal. 482, on point that right of legislature to control procedure of courts, in respect even to inherent powers, has always been recognized.

1 Cal. 94-98. **STEVENS v. ROSS.**

Judgment by default is a final judgment, from which an appeal lies, p. 97.

Approved in *Perrott v. Owen*, 7 S. Dak. 457. Cited, in *Trustees v. R. R. Co.*, 16 Fla. 730, on point that judgment by default must conform to the cause of action; and in *Kidd v. Mining Co.*, 3 Nev. 385, on point that where judgment by default is irregular, appeal is a proper remedy.

1 Cal. 98-100. **HARRIS v. BROWN.**

Verbal Contract for sale of land is void, p. 100.

Approved in *Hoen v. Simmons*, 1 Cal. 121; 52 Am. Dec. 293, citing further authorities.

1 Cal. 108-119. **RINGGOLD v. HAVEN.**

Nonsuit.—Trial court can compel nonsuit when evidence does not warrant verdict for plaintiff, pp. 113-115.

Approved in *Dalrymple v. Hanson*, 1 Cal. 127, where nonsuit held wrongly refused; and in *Mateer v. Brown*, 1 Cal. 221, 222, 52 Am. Dec. 304, where nonsuit held rightly refused; and in *Territory v. Miller*, 4 Dak. 172. Cited in note on Compulsory Nonsuit *French v. Smith*, 24 Am. Dec. 620, 622; and in *Hopkins v. Railroad*, 96 Tenn. 436, holding that in Tennessee demurrer to evidence takes the place of compulsory nonsuit, though "cumbersome, antiquated, and in nature of things can seldom be successfully invoked."

Appeal.—Where the testimony is sent up to appellate court, presumption is that all material things are embodied, p. 116.

Approved in *Owen v. Morton*, 24 Cal. 378, holding that where statement on motion for new trial did not contain all the evidence, "it will be presumed that the omitted evidence authorized the decision and judgment unless there be something in the record to overcome such presumption;" and in *Hidden v. Jordan*, 28 Cal. 312, held, the word

"case," as used in 1 Cal. 116, is analogous to "statement" under section 195 of Practice Act; as to points not specified in statement, presumption is there was evidence to sustain verdict; principal case supports this view, though departed from in some later cases, "perhaps inconsiderately." *Nicholl v. Littlefield*, 60 Cal. 240, held, there being no statement showing evidence on which nonsuit was granted, ruling cannot be reviewed.

Nonsuit, ground for, held waived, testimony for defendant having supplied defect in plaintiff's case, p. 117.

Approved, on similar facts, in *Smith v. Compton*, 6 Cal. 26; *Schlesinger v. Mallard*, 70 Cal. 334, and cited on this point in note to *French v. Smith*, 24 Am. Dec. 624.

Measure of Damages, for failure of carrier to deliver goods, is value of goods at port of delivery, pp. 118, 119.

Approved, in *Hart v. Spalding*, 1 Cal. 214.

The principal case is wrongly cited in *Humphreys v. Switzer*, 11 La. Ann. 321, on the point that it is necessary to prove nondelivery by the carrier, which was not referred to in the decision.

1 Cal. 119-123; 52 Am. Dec. 291. **HOEN v. SIMMONS.**

Estoppel.—Defendant who enters into possession of land under plaintiff's title is estopped from questioning it, p. 120.

Approved in *Ellis v. Jeans*, 7 Cal. 416, as to assignee of grantee under conditional agreement to convey, as against vendee without notice under later deed from original grantor; also in *Walker v. Sedgwick*, 8 Cal. 402, where in suit to enforce vendor's lien vendee disputed vendor's title; also in *Hicks v. Lovell*, 64 Cal. 20, 49 Am. Rep. 682, in ejectment by vendor against vendee; and cited on this point in note to *Civens v. Mullinax*, 53 Am. Dec. 706; note to *Gosson v. Donaldson*, 68 Am. Dec. 729; note to *Redmond v. Bowles*, 73 Am. Dec. 157; note to *Relfe v. Relfe*, 73 Am. Dec. 469.

Verbal Contract for sale of land will not be specially enforced, p. 121.

Cited, on point that part performance of parol contract may render it enforceable, in note to *Gangwer v. Fry*, 55 Am. Dec. 581; note to *Parrell v. McKinley*, 58 Am. Dec. 213; note to *Barnes v. Teague*, 62 Am. Dec. 202; note to *Wynn v. Garland*, 68 Am. Dec. 201; note to *Maddox v. Rowe*, 68 Am. Dec. 538; note to *Thompson v. Thompson*, 68 Am. Dec. 649; note to *Blanchard v. McDougal*, 70 Am. Dec. 465.

Written Contract has no force until signed and delivered, p. 121.

Cited on this point in note to *Mississippi etc. S. S. Co. v. Swift*, 41 Am. St. Rep. 556.

Verbal Contract.—Party seeking equitable enforcement of verbal contract must show his substantial compliance therewith, p. 121.

Approved in *Miller v. Cameron*, 45 N. J. Eq. 96, held, plaintiff must allege in bill his readiness to perform. Cited in note to *Garretson v. Vanloon*, 54 Am. Dec. 496, on point that averment of offer to perform is necessary. Cited, on point that plaintiff must show he has taken all proper steps to perform, in note to *Young v. Daniels*, 63 Am. Dec. 486; note to *Johnson v. Hubbell*, 66 Am. Dec. 783; note to *Cooper v. Tyler*, 95 Am. Dec. 445.

Statute of Frauds.—"A writing was as necessary for the transfer of lands in Mexico, as it is in the United States," p. 123.

Approved in *Tohler v. Folsom*, 1 Cal. 210, 211, on point that verbal contract, of itself alone, could not transfer land under Mexican law. But in *Sanford v. Lick*, 7 Cal. 490, *Burnett, J.*, dissenting, claims that these two cases decide that "parol sale of land in presenti, with delivery of possession, there being no adverse claim, would at the time be valid under Mexican law." Approved in *Hayes v. Bona*, 7 Cal. 158, holding a written conveyance invalid under Mexican law for lack of date and proper signature; held, also, that while under Spanish law parol conveyance would not be void per se, yet in California, by the custom of the country, contracts for sale of land were required to be in writing, stating names of parties, thing sold, date of transfer, and price paid. Cited in *Maxwell Co. v. Dawson*, 151 U. S. 595, with later California cases, as showing that the state supreme court has uniformly held parol conveyance void by Mexican law; held, unnecessary to decide whether this was the law in New Mexico before it became a territory, because the civil law has been supplanted there by territorial legislation. Cited in *Noe v. Card*, 14 Cal. 608, in discussion of tax on transfer of land under Mexican law.

1 Cal. 123, 124. **SWANSON v. SUBLETTE.**

Execution.—Property held as security for debt is not liable to levy on execution at suit of another creditor, p. 124.

Approved in *Berson v. Nunan*, 63 Cal. 552; held, property covered by chattel mortgage cannot be attached until payment of mortgage is made according to section 2969 of the Civil Code.

1 Cal. 131, 132. **PARKER v. SHEPARD.**

Judgment by default, an hour before time specified in summons for appearance of defendant, is irregular, p. 132.

Cited, as example of appeal being a proper remedy for irregular default, in *Kidd v. Mining Co.*, 3 Nev. 385.

1 Cal. 134-143. **BELT v. DAVIS.**

Judgment.—Order of district court, vacating judgment of court of first instance, is a final judgment, pp. 136-139.

Approved in *Zoller v. McDonald*, 23 Cal. 136, holding that order of

county court, dismissing appeal from justice's court, is a final judgment; also in *Sacramento etc. R. R. Co. v. Harlan*, 24 Cal. 338, and *Phillips v. Pease*, 39 Cal. 584, holding confirmation by district court of report of commissioners to be a final judgment; also in *State v. Logan*, 1 Nev. 514, where order quashing indictment was held final and appealable; also in *Perkins v. Sierra Nevada Co.*, 10 Nev. 413, holding that all that is required to make a judgment final is that it should determine the issues involved in that suit. Cited in *Lalande v. McDonald*, 2 Idaho, 287, to support definition of final judgment; *County v. Canal Co.*, 131 Ill. 512, holding that a final judgment determines rights of parties in the particular suit, not in the subject of litigation; but, in dissenting opinion, this is said to apply only to suits to vacate a judgment (p. 519); also in *Hines v. Driver*, 89 Ind. 341, where order granting new trial was held to be appealable; and in *Gillellen v. Martin*, 73 Miss. 698, where decree on bill of review was held final; *Swain v. Savage*, 55 Neb. 688, applying rule to judgment of dismissal. Cited in note to *Williams v. Field*, 60 Am. Dec. 428, 436, as to what is a final judgment; and in same note, page 431, that an order granting new trial is final.

Judgment.—Presumption is that no evidence was adduced, when the judgment states that cause was heard on the pleadings, p. 140.

Cited, *Owen v. Morton*, 24 Cal. 378, on point that it will be presumed that omitted evidence authorized the judgment, unless something in the record overcomes the presumption.

1 Cal. 143-151; 52 Am. Dec. 295. **PEOPLE v. TURNER.**

Jurisdiction of supreme court is appellate only, except in habeas corpus, and includes power to issue writs of mandamus, pp. 145-149.

Approved, as to extent of jurisdiction, in *White v. Lighthall*, 1 Cal. 348; and in *Hyatt v. Allen*, 54 Cal. 355, 359, holding that under new constitution the court can issue original writ of mandamus; and in *Ex Parte Hollis*, 59 Cal. 408, where jurisdiction to punish for contempt was held reviewable by supreme court on habeas corpus. Cited in *Peacock v. Leonard*, 8 Nev. 250, on point that proceedings on certiorari are appellate. N. B. Note to 52 Am. Dec. 295, is cited, on topic of Mandamus to Inferior Courts, in note to *Arberry v. Beavers*, 55 Am. Dec. 806, and note to *Ex Parte Mahone*, 68 Am. Dec. 112.

Punishment for Contempt is fine and imprisonment, not disbarment, pp. 149, 150.

Cited, on this point, in *Peyton's Appeal*, 12 Kan. 405; note to *State v. Kirke*, 95 Am. Dec. 340, 343.

Disbarment.—Court has inherent power to disbar an attorney for misconduct; but he is entitled to notice and opportunity for defense, p. 150.

Approved in *Fletcher v. Daingerfield*, 20 Cal. 430, holding that a

district court has no right to disbar an attorney and adjudge him infamous, because the facts did not support a motion made by him. Cited as an example in *Ex parte Robinson*, 19 Wall. (86 U. S.) 513; "there must be citation before hearing, and hearing or opportunity of being heard before judgment;" In *re Boone*, 83 Fed. 947, holding petition sufficient; In *re Walkey*, 26 Colo. 162, discussing procedure under local statutes. Also cited, on point that offense of attorney need not be indictable, in *State v. McClaugherty*, 33 W. Va. 259; *Baker v. Commonwealth*, 10 Bush, 598; In *re Davis*, 93 Pa. St. 121; 39 Am. Rep. 731. Cited, as to inherent power and notice, in *State v. Schultz*, 11 Mont. 432, in case of revocation of physician's license by board of medical examiners; also cited in note to *Clark v. People*, 12 Am. Dec. 186, on point that judgment is not merely of contempt, but of removal from office. Cited, on point of notice to respondent, also that proceeding is quasi criminal, in *Peyton's Appeal*, 12 Kan. 405, 409; and on point of notice to respondent in note to *State v. Kirke*, 95 Am. Dec. 341; and in note to *Burns v. Allen*, 2 Am. St. Rep. 848, on point that this power is not for punishment but for protection. N. B. Note to 52 Am. Dec. 295, is cited, viz., in note to *Myers v. Myers*, 58 Am. Dec. 694, on point that court must have jurisdiction of the person; in note to *State v. Kirke*, 95 Am. Dec. 333, as to rights of attorney; on page 335 of last-named note, that proceeding is quasi criminal.

Mandamus is proper remedy to compel lower court to vacate order of disbarment, pp. 150, 151.

Distinguished in *People v. Turner*, 1 Cal. 153, 156, where mandamus held not proper remedy for reversal of a judgment punishing attorney for contempt. Approved in *Cowell v. Buckelew*, 14 Cal. 642, holding that mandamus does not lie to compel clerk of district court to issue order of sale, but application must first be made to the district court for a ruling; also in *Walls v. Palmer*, 64 Ind. 495, holding that a writ does not lie when attorney has been properly disbarred. Cited, as example of state practice, in *Ex parte Bradley*, 7 Wall. (74 U. S.) 379, holding mandamus to be proper remedy from United States supreme court to supreme court of District of Columbia, to revoke irregular order of disbarment of attorney. Cited, on principal point in note to *State v. Kirke*, 95 Am. Dec. 344, and note to *Burns v. Allen*, 2 Am. St. Rep. 862; also on topic of mandamus to compel judicial action, in note to *Puckette v. Hicks*, 4 Am. St. Rep. 247.

1 Cal. 152-156. **PEOPLE v. TURNER.**

Contempt.—Court, at common law, has arbitrary power to preserve order, p. 153.

Cited, on point of inherent power to punish for contempt, in *Ex parte Terry*, 128 U. S. 304, republished in 13 Saw. 463; and, on same point, *Kregel v. Bartling*, 23 Neb. 862.

Contempt.—Court has inherent power to punish for, p. 153.

Cited in *Burns v. Superior Court*, 140 Cal. 4, applying rule in case of disobedience of notary's subpoena.

Contempt in presence of court may be punished instantly, without proof, p. 155.

Approved in *Ex parte Terry*, 128 U. S. 309, republished in 13 Saw. 468.

Where Contempt is committed out of court, accused is entitled to be heard in defense, p. 155.

Approved in *State v. Horner*, 16 Mo. App. 195.

Judgment for Contempt should show, on its face, the facts on which it is based, p. 155.

Cited in *Overend v. Superior Court*, 131 Cal. 285, further holding order annulable on certiorari. See note to *State v. Galloway*, 98 Am. Dec. 414; also in *State v. Judges*, 32 La. Ann. 1262, as "1 Cal. 181," on point that warrant on conviction for contempt should show that opportunity for defense was given the accused. N. B. See same case *Ex parte Field*, 1 Cal. 187, for further citations on this point.

Mandamus is not proper remedy to compel reversal of judgment for contempt, p. 156.

Cited on this point in note to *People v. Turner*, 1 Cal. 143; 52 Am. Dec. 303.

Certiorari.—"Such other order as may be just" being applied for, certiorari is a proper remedy, p. 156.

Approved in *Stuttmaster v. Supreme Court*, 71 Cal. 323, holding that writ will not lie where there is an appeal from order complained of; also in *Ex parte Henshaw*, 73 Cal. 497, where habeas corpus was refused, as the facts constituting contempt appeared clearly of record. Cited, on point that certiorari is proper remedy, in *State v. Horner*, 16 Mo. App. 200, and note to *Mullen v. People*, 22 Am. St. Rep. 425. Approved in *Landis v. Olds*, 9 Minn. 86, holding that where "such order as may be just" is asked for, the court may award any relief compatible with the facts.

1 Cal. 158-160. **GROGAN v. RUCKLE.**

See same case, on rehearing, 1 Cal. 193-197.

1 Cal. 160-162. **LEDLEY v. HAYS,**

In **Replevin** possession of servant is possession of master, p. 161.

Approved on this point, *Goodwin v. Garr*, 8 Cal. 617.

Replevin.—Where sheriff takes goods of a wrong person under an

execution, he is liable in trespass or replevin without previous demand, p. 161.

Approved in *Paice v. O'Neal*, 12 Cal. 495, holding that demand is required only where original possession is lawful, and where the action is based on unlawful detention: also in *Boulware v. Craddock*, 30 Cal. 191, which held that the principal case was impliedly approved in *Daumiel v. Gorham*, 6 Cal. 44, and said further that if *Taylor v. Seymour*, 6 Cal. 512, is to be understood as laying down a different rule, "we prefer to follow *Ledley v. Hays*." (*Taylor v. Seymour* held that sheriff was not liable to real owner of goods unless owner had made claim and demand for goods.) *Wellman v. English*, 38 Cal. 584, holding that all cases, if any, since the principal case and contrary to it, were overruled by *Boulware v. Craddock*, 30 Cal. 190. Cited in *Harpending v. Meyer*, 55 Cal. 560, as holding that "exemption from being sued without previous demand does not apply to sheriffs who seize upon execution property in possession of but not belonging to the execution debtor." Cited in *Burchett v. Purdy*, 2 Okla. 396, as to similar levy; *Fuller Desk Co. v. McDade*, 113 Cal. 363, as in accord with "the correct rule," that sheriff may "seize any personalty found in the defendant's possession, if he have no reason to suppose it to be the property of another; though a different doctrine seems to be taught in *Boulware v. Craddock*, 30 Cal. 190, and *Wellman v. English*, 38 Cal. 583." Cited, on principal point, in note to *Carpenter v. Inness*, 25 Am. St. Rep. 258.

1 Cal. 162-165. SOUTER v. THE SEA WITCH.

Statute must be strictly construed, p. 163.

Approved, on this point, by *Tucker v. The Sacramento*, 1 Cal. 403, and *Ray v. The Harbeck*, 1 Cal. 452. Cited in *Taylor v. Umatilla Co.*, 6 Or. 404, on point that effect must be given to all words of a statute.

Statute.—Ship lately arrived in San Francisco from New York is not a "vessel navigating waters of this state," p. 165.

Approved in *McQueen v. Ship Russell*, 1 Cal. 166; held, giving of bonds for release of vessel does not confer jurisdiction, because judgment must be against the vessel, not against obligors on the bond.

1 Cal. 167-179. ROWE v. CHANDLER.

Judgment in suit against joint defendants may be for one defendant and against another, pp. 177, 178.

Distinguished in *Stearns v. Aguirre*, 6 Cal. 183, holding that principal case decided that common law distinction between nonjoinder and misjoinder had been abolished, but did not decide that separate judgments could be taken where joint liability was proven in a joint action. (This case was overruled by *Lewis v. Clarkin*, 18 Cal. 399.) Approved in

Shain v. Forbes, 82 Cal. 583, citing section 578 of the code of Civil Procedure as a re-enactment of section 145 of the Practice Act referring to overruling of 6 Cal. 183, and holding that the common law rule has been changed in this state; also in *Atlantic etc. Ry. Co. v. Laird*, 164 U. S. 101, quoted from opinion in *Shain v. Forbes*, 82 Cal. 583, and holding that in suit against two railways by passenger for personal injuries, joint tortfeasors can be sued jointly or severally, and recovery had against either; and in California, even if the action is on contract, the same rule applies. Cited in *Conkun v. Fox*, 3 Mont. 211, and *Knutz v. Wise*, 16 Mont. 558, where, under statute, in suit against several partners, misjoinder was held waived, not being pleaded in the answer. Approved, as an "able opinion," in *North Star Co. v. Stebbins*, 3 S. Dak. 546, construing similar section of code, and holding that the rule applies to suits against partners, where liability becomes several against those who have been served. Approved in *Bloomington v. Du Rell*, 1 Idaho, 38, where in suit against three partners, judgment was held properly rendered against two.

Denied in *Fetz v. Clark*, 7 Minn. 165, holding that in suit against several defendants on a joint contract, plaintiff must recover against all or none; "in California, the courts seem to have decided both ways; *Rowe v. Chandler*, 1 Cal. 167; *Sterling v. Hanson*, 1 Cal. 478." (In 1 Cal. 478, the court referred to joinder of two defendants who had no joint interest or liability, but expressed no opinion as to whether this was error.)

1 Cal. 180. **PERRY v. COCHRAN.**

Evidence, claimed to be newly discovered, must be fully set forth in motion for new trial on that ground, p. 180.

Cited, note to *Forester v. Guard*, 12 Am. Dec. 143, on this point.

1 Cal. 183-185. **WALKER v. HAUSS HIJO.**

Mechanics' Lien statute must be strictly complied with by one claiming under it, p. 185.

Approved in *Davis v. Livingston*, 29 Cal. 286, as to notice by subcontractor of extent of his claim; also in *Shackelford v. Beck*, 80 Va. 578, where it was held that filing a claim for "balance of account rendered" was not a compliance with the statute prescribing that a contractor must file "a true account."

1 Cal. 187, 188. **EX PARTE FIELD.**

Certiorari.—Order punishing for contempt is vacated on certiorari for not specifying on its face the facts of contempt, p. 188.

Cited in *Spring Valley Co. v. Bryant*, 52 Cal. 135, on point that in most California cases certiorari has been issued only to an inferior
Notes Cal. Rep.—2.

court; held, writ does not lie against board of supervisors to review passage of an ordinance, the proceeding being legislative, not judicial. Cited in *Ex parte Kilgore*, 3 Tex. App. 253, on point that order punishing for contempt should specify facts of contempt; also in note to *Clark v. People*, 12 Am. Dec. 186, on principal point. See note to *People v. Turner*, 1 Cal. 152, ante, for further citations.

1 Cal. 188-189. **PEOPLE v. TURNER.**

Mandamus.—Motion for attachment of district judge, for failure to obey mandamus, denied, it appearing that he had substantially complied with the mandate, p. 189.

Cited in note to *Burns v. Allen*, 2 Am. St. Rep. pp. 862, as example of refusal of attachment.

1 Cal. 190, 191. **PEOPLE v. TURNER.**

Attorney At Law.—Removal from and restoration to office.—A person admitted as an attorney and counselor of the supreme court cannot be removed from office by a lower court, and, if so removed, a mandamus may issue to restore him, although the party may have a remedy by action, it appearing that such remedy would be inadequate and would subject the party to a great delay, p. 191.

(Insufficient grounds for the issue of an attachment for noncompliance with the writ of mandamus in this case, see *People v. Turner*, 1 Cal. 189.)

Citations: If the judgment of the lower court suspending an attorney from practice was irregular or improper, it would seem that he was entitled to his remedy by mandamus: *Case of Lowenthal*, 61 Cal. 126. Mandamus is the proper remedy to restore an attorney to his rights in cases of disbarment, when an inferior court has decided erroneously, or has unjustly exercised its power, or has exceeded its jurisdiction: Note to *Burns v. Allen*, 2 Am. St. Rep. 862; also, *People v. Turner*, 1 Cal. 143. If an attorney, who has obtained a license, and taken the proper oath, in conformity with the requirements of the Alabama code, is prohibited from practicing in the mayor's court in Mobile, his right to a mandamus is clear, both upon principle and authority: *Withers v. State*, 36 Ala. 268; citing *People v. Turner*, 1 Cal. 189. In Florida, there is held to be no want of power in the county court, in a proper case, and upon proper proceedings, to disbar one of its attorneys, but its judgment cannot extend beyond a denial of the privileges of an attorney in that court, and if the inferior court has decided erroneously, the appropriate remedy is by a writ of mandamus, rather than an appeal from the order of the inferior court, or writ of error: *State v. Kirke*, 12 Fla. 278, 285; 95 Am. Dec. 320, commenting on the decision in *People v. Turner*, 1 Cal. 189.

1 Cal. 193-197. **GROGAN v. RUCKLE.**

Rehearing—May be Directed When.—The supreme court retains control of a cause on appeal until the remittitur is filed with the court below, and may direct a rehearing at any time before the remittitur has been so filed, but not afterward, p. 194.

Affirmed in *Mateer v. Brown*, 1 Cal. 231, in which case a rehearing had been granted, and a second time argued. It was objected that the court had not the power to review its former judgment. But the court held that the remittitur not having been sent to, nor filed with, the court below, the court above still had control over the cause. The ruling in the principal case, that the supreme court loses all jurisdiction over a case after the remittitur is filed in the court below, is affirmed in *Blanc v. Bowman*, 22 Cal. 25. And so in *Rowland v. Kreyenhagen*, 24 Cal. 58. But if it appears that fraud or imposition has been practiced upon the court or the opposite party, the appellate court will assert its jurisdiction and recall the case: *Rowland v. Kreyenhagen*, 24 Cal. 59. In *re Seydel's Estate*, 14 S. Dak. 118, circuit court cannot, after remand to county court, grant rehearing. The power to grant rehearings is fully discussed, and the doctrine of the principal case applied with approval, in a case which states the rule to be, that from the time an appeal has been perfected until a remittitur has been regularly issued and transmitted to the lower court, the jurisdiction of the case is in the appellate court, which has the power to make any order concerning it, including an order for a rehearing: In *re Jessup*, 81 Cal. 466, 468. See, also, *Legg v. Overbagh*, 21 Am. Dec. 119; *People v. Sprague*, 57 Cal. 147; *De Baker v. Carillo*, 52 Cal. 473.

Rehearing Jurisdiction not Lost.—Where, after an order made granting a rehearing, the remittitur is filed in the court below, jurisdiction to reconsider the cause is not thereby taken away, p. 195.

As to this point, examined, explained, and approved in *Rowland v. Kreyenhagen*, 24 Cal. 58; *Hazard v. Cole*, 1 Idaho, 305; In *re Jessup*, 81 Cal. 466. In a Florida case, *Merchants' Nat. Bank v. Grunthal*, 39 Fla. 394, the supreme court was misled into reversing a judgment on a false record, and it issued its remittitur, which was filed in the court below. Subsequently, the falsity of the record was shown, and it was held that the appellate court had not lost jurisdiction of the cause, and that its entry of judgment of reversal should be vacated, and the cause recalled and restored to its docket: Note to *Legg v. Overbagh*, 21 Am. Dec. 121.

Indorsement—Denial of Under Oath.—In an action by an indorsee against the maker of a promissory note, the latter need not deny the indorsement under oath, p. 196.

Reconsidering and affirming *Grogan v. Ruckle*, 1 Cal. 158. Approved and followed under a similar state of facts, in *Youngs v. Bell*, 4 Cal. 201.

Denials in Answer—Time to object thereto.—To a complaint alleging

the making of a note and the indorsement thereof, an answer of the general denial, in the terms of the old general issue in assumpsit, would entitle the plaintiff to judgment on motion in the court below to strike out the answer as a nullity. But he should raise his objection to the answer in the court below, and will not be permitted to say to the appellate court, for the first time, that the answer does not, in a proper form, controvert the allegations of the complaint, p. 196.

All new matter of defense must be stated in the answer. And when, in an action of ejectment to recover the possession of land, the defendant simply denied the allegations of the complaint, he was not permitted to introduce in evidence a copy of the record of a former recovery: *Piercy v. Sabin*, 10 Cal. 22-31; 70 Am. Dec. 697, citing the principal case.

Rehearing—Points considered on.—On a rehearing, a party will not be permitted to raise, and the court will not consider, any point which was not urged on the first argument, p. 197.

This ruling is approved in *People v. Northey*, 7 Cal. 635.

1 Cal. 206, 207. **DE BOOM v. PRIESTLY.**

Pleading.—Filing an answer after demurrer overruled waives the demurrer, p. 206.

The rule here stated is dissented from in *Reynolds v. Lincoln*, 71 Cal. 190, on the ground that it has become inapplicable and would work injustice under a code provision that a party may both demur and answer at the same time. The same view is taken in *Curtiss v. Bachman*, 84 Cal. 218, citing section 472 of the Code of Civil Procedure, providing that "a demurrer is not waived by filing an answer at the same time." And the court observes: "A fortiori, the demurrer is not waived by the filing of an answer, upon leave given by the court, subsequently to the filing and overruling of the demurrer." But the case is cited and the rule approved in *Vantilburgh v. Hamilton*, 2 Mont. 414, where the demurrer to the complaint was on the ground of uncertainty. And so in *Loukey v. Wells*, 16 Nev. 275. So in *Pence v. Durbin*, 1 Idaho, 551, the court holding that all objections to a pleading are waived by answering, except such as may properly be raised upon a motion in arrest of judgment.

Special Contract.—Where a special contract for work and labor is proved, but a deviation from the contract is also shown, testimony as to the value of the plaintiff's services is properly admitted, p. 207.

Cited with approval in support of the rule that the common counts may be resorted to in actions on contracts, within certain defined limits, in *Castagnis v. Balletta*, 82 Cal. 257. The rule is recognized as sound law, but was held not to be applicable in the case of *O'Connor v. Dingley*, 26 Cal. 20. In the latter case, the contract had been fully performed, on which performance money was not to be paid, but a note was to be

executed, payable twelve months after date. There was no breach of the contract in this respect, and it was held that an action could be sustained for a failure or refusal to execute the note, but the use of the common counts by the pleader was not available, at least until the period of credit had expired.

Same—Compensation.—Where the special contract is deviated from by consent, the plaintiff cannot recover thereon, but it may still be used to determine the value of the work so far as it can be followed, p. 207.

Approved and applied in the similar case of *Wheeden v. Fiske*, 50 N. H. 127, 128. Approved also in *Norton v. Browne*, 89 Ind. 336, where the question was whether a special contract for work and labor had been abandoned. It was held that if the building erected could not be identified by the contract, the one could have no relation to the other, and the contract could not be resorted to for the purpose of determining the rights of the parties growing out of the erection of the building.

1 Cal. 207-213. **TOHLER v. FOLSOM.**

Verbal Contract for Sale of Land, of itself alone, is not sufficient under Mexican law, to transfer title, p. 210.

Affirming as to this point, *Hoen v. Simmons*, 1 Cal. 119; 52 Am. Dec. 291, and see note, 294, 295.

Specific Performance.—But where there was a verbal contract of sale in praesenti, the title deeds delivered, permission given to the vendee to enter, which he did, and made valuable improvements on the land, a specific performance was properly decreed, p. 212.

Distinguished between the circumstances of this case and that of *Hoen v. Simmons*, 1 Cal. 119; 52 Am. Dec. 291. The ruling here stated is commented on and approved in the dissenting opinion of Burnett, J., in *Stafford v. Lick*, 7 Cal. 490, 491, in which case possession of the premises was taken under the conveyance, and also of the title papers. In *Abell v. Calderwood*, 4 Cal. 93, which was a bill to enforce the specific performance of a verbal contract for the sale of land, the ruling is disapproved, and held to be in no sense authority upon the construction, or upon the effect of the California statute of frauds.

New Trial will not be granted, where it appears that it would not result in any manner different from the former trial, p. 213.

Approved and applied in *Hazard v. Cole*, 1 Idaho, 291, which was an equitable action, and the motion for a new trial denied.

1 Cal. 213-214. **HART v. SPALDING.**

Measure of Damages for nondelivery of goods by a carrier is the value of the goods at the port of discharge, p. 214.

Affirming the rule asserted in *Ringgold v. Livingston*, 1 Cal. 108.

Attorney and Client.—An attorney, by virtue of his retainer, may bind his client by consenting to an order of the court, p. 214.

Applied in support of the rule that the client has no right to control his attorney in the due and orderly conduct and management of the case, in *Board of Commrs. v. Younger*, 87 Am. Dec. 167, note. In the principal case, the court decided that the plaintiff should recover the price of the goods in suit, or at his election the goods themselves, and that his attorney had the power to make the election. So cited and approved in *Clark v. Randall*, 76 Am. Dec. 264, note.

1 Cal. 216-220. **MENA v. LE ROY.**

Jurisdiction.—Alcaldes in California were authorized to perform all the functions of judges of first instance in districts where there were no such judges, p. 219.

Approved in *Panaud v. Jones*, 1 Cal. 508, a case involving the construction and validity of wills under Spanish laws. Approved also in *Braly v. Reese*, 51 Cal. 461, an action of ejectment, in which the power of an alcalde to appoint a guardian for an infant, and to order the sale of an infant's property, is fully examined. In the dissenting opinion of Catron J., in *United States v. Castillero*, 2 Black, 210, the principal case is cited as giving the settled construction of the alcalde's power in California.

1 Cal. 221-231; 52 Am. Dec. 303. **MATEER v. BROWN.** S. C. on rehearing, 1 Cal. 231.

Nonsuit.—Power of compulsory nonsuit exists, p. 221, affirming *Ringgold v. Haven*, 1 Cal. 108.

Cited as authority to ruling stated, notes, 24 Am. Dec. 621; 56 Am. Dec. 48; 59 Am. Dec. 471; and 64 Am. Dec. 631.

Same.—Where party moves for a nonsuit upon a specific ground, he cannot, on appeal, assume a different position, p. 222.

Approved, *People v. Banvard*, 27 Cal. 474, action of quo warranto to determine right to office; *Bellevue Water Co. v. Bellevue*, 3 Idaho, 749, in support of judgment of nonsuit respondent confined on appeal to grounds stated in the district court; *Brown v. Warren*, 16 Nev. 239, action of ejectment.

Same.—If plaintiff's evidence will not authorize a jury to find a verdict for him, or, if the court would set it aside, if so found, as contrary to the evidence, it is the duty of the court to order a nonsuit, p. 222.

Approved, *Moore v. Murdock*, 26 Cal. 525, but in view of the evidence in the cause, which was an action for the conversion of sheep, the court did not feel justified in ordering a nonsuit under the rule stated; so, in *Herbert v. Dufur*, 23 Oreg. 467, action to recover for services per-

formed, and holding that a nonsuit should not be granted if the evidence offered tends to show facts sufficient to sustain the action, though remotely. Cited, notes to 24 Am. Dec. 622; 60 Am. Dec. 711; and 79 Am. Dec. 78.

Evidence.—Declarations of agent or servant are admissible in evidence against the principal, only when they form a part of the *res gestae*, p. 223.

Approved, *Innis v. Steamer Senator*, 1 Cal. 461, 54 Am. Dec. 307, holding that the declarations of the master of a vessel, made the next morning after collision of the vessel with a steamer, were no part of the *res gestae*; *Donner Land and Lumber Co. v. Insurance Co.*, 77 Ala. 188, and applied to agent of corporation; so, in *Meyer v. Virginia etc. R. R. Co.*, 16 Nev. 349, as to declarations of agent in charge of a station and warehouse belonging to defendant; distinguished, *Gerke v. Cal. Steam Nav. Co.*, 9 Cal. 256; 70 Am. Dec. 651, holding that the declarations of the master of a steamboat, whilst running a river, respecting fire communicating from the chimneys of the boat to crops on the banks of the river, were admissible to establish the liability of the owners of the boat, in an action against them to recover for the destruction of the crops; *Pacific Livestock Co. v. Gentry*, 38 Or. 286, statements of superintendent of company trying to acquire land that occupant was company's employee are evidence against company in suit between company and occupant. Cited, discussing subject at length, notes to 53 Am. Dec. 776; 56 Am. Dec. 320; 62 Am. Dec. 458; 63 Am. Dec. 627; and 64 Am. Dec. 83.

Innkeeper.—Is the insurer of the goods of his guest, and is bound to keep them safe from burglars and robbers without, as well as from thieves within, his house, pp. 229, 230.

Approved, *Pinkerton v. Woodward*, 33 Cal. 600, 602, 91 Am. Dec. 663, 665, a similar case of loss of gold dust; *Russell v. Fagan*, 7 Houst. (Del.) 397, holding an innkeeper bound for the safekeeping of the beast of his guest. Cited, *Moore v. Development Co.*, 87 Cal. 487, 22 Am. St. Rep. 260, where, conceding, without deciding, that under the law of the state an innkeeper is an insurer of the goods of transient guests placed in the inn, it is held that he is not liable to a boarder for the loss of baggage destroyed as the result of a purely accidental fire. Cited as authority to ruling stated, notes to 7 Am. Dec. 453; 61 Am. Dec. 530; 66 Am. Dec. 752; 67 Am. Dec. 268; 69 Am. Dec. 221; 71 Am. Dec. 326; 5 Am. Rep. 525; 18 Am. Rep. 131; and 53 Am. St. Rep. 476.

Innkeeper can be held to such strict liability only for such goods as are brought into his house by travelers in the character of guests, p. 230.

Cited, *Pinkerton v. Woodward*, 33 Cal. 598; 91 Am. Dec. 661, as authority that the innkeeper may be held responsible for the property of the guest, placed under his care, after the owner of the property has become a guest at the inn; *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 46, 38 Am. Rep. 788, that an innkeeper is not bound to receive the goods

of a person who only desires the use of the inn as a place of deposit; notes to 7 Am. Dec. 450; and 69 Am. Dec. 222, bearing on the subject.

General citation: 32 Fla. 533.

1 Cal. 231, 232. **MATEER v. BROWN.**

A Judgment is Erroneous, if founded in part on incompetent evidence, unless the appellate court can clearly see that such evidence was without effect, p. 232.

This ruling is approved as authority in support of the proposition that a party moving for a verdict should be confined on appeal to the grounds therein specified, to the same extent and for the obvious reasons that limit the inquiry of an appellate court to the ground specified in an objection to the introduction of evidence upon the trial, in *Mattoon v. Fremont etc. Co.*, 6 S. Dak. 198.

Supreme Court retains control of cause on appeal, until the remittitur is filed with the court below, after which its control ceases, p. 231, affirming *Grogan v. Ruckle*, 1 Cal. 193.

Affirmed, *Blanc v. Bowman*, 22 Cal. 25; so, in *Rowland v. Kreyenhagen*, 24 Cal. 58, but holding that if there has been fraud in procuring the dismissal of an appeal, the appellate court will recall the remittitur and stay proceedings in the court below, and assert its jurisdiction even after the adjournment of the term. Referred to, *In re Jessup*, 81 Cal. 469, as to practice on rehearing. Cited, note to 21 Am. Dec. 119, 121.

1 Cal. 232-253; 52 Am. Dec. 312. **PEOPLE v. NEGLIGENCE.**

Mining License.—The state has power to require foreigners to pay a license fee for the privilege of working the gold mines in the state, pp. 238, 242.

The ruling here stated is fully concurred in by Field, J., in an opinion in which he dissented from the judgment of his associates, in *Lin Sing v. Washburn*, 20 Cal. 534, 584, holding that the act of April 26, 1862, for the protection of free white labor against competition with Chinese coolie labor, was in conflict with the constitution of the United States. He could not see how such act could be held to be in conflict with the federal constitution without overruling the principal case, where the subject of the taxing power of the state "was ably and elaborately considered by Mr. Justice Burnett." References to the principal case as sustaining the power of a state to enact license laws are also as follows: *People v. Mayor of Brooklyn*, 55 Am. Dec. 288, note; *People v. Coleman*, 60 Am. Dec. 594, note; *Ash v. People*, 83 Am. Dec. 742, note; *Allentown v. Telegraph Co.*, 33 Am. St. Rep. 820, note; *Denver City Ry. Co. v. Denver*, 52 Am. St. Rep. 246; Note to *Southern Ass'n v. Norman*, 56 Am. St. Rep. 374, on taxation of foreign corporations; also as to the power of the state to tax all officers and posts of profit, trades, professions,

and occupations, in *New Orleans v. Telephone etc. Co.*, 8 Am. St. Rep. 508, note; *State v. Conlon*, 48 Am. St. Rep. 236, note. The subject of mining licenses is now regulated by act of March 30, 1853, and the subsequent amendments thereto.

Taxation.—The constitutional provision, declaring that taxation shall be equal and uniform throughout the state, applies only to direct taxation upon property, p. 252.

Approved and adopted as the basis of decision in *People v. Coleman*, 4 Cal. 46, 52; 6 Am. Dec. 586, which sustains the constitutionality of the California revenue act of May, 1853. Approved also in *Emery v. San Francisco Gas Co.*, 28 Cal. 360, a case involving the question of the power to impose assessments upon lots in a city fronting on a street to defray the expenses of street improvements. The ruling is likewise approved as a sound construction of the constitutional provision in *People v. McCreery*, 34 Cal. 448, 450, where the matter is very fully discussed.

1 Cal. 254-294. *SUNOL v. HEPBURN.*

Actual Possession of Land in a person is not made out by the mere fact that his cattle and horses had roamed over and grazed upon the land, p. 262.

Approved in *Sheldon v. Mull*, 67 Cal. 301, which holds, however, that fencing or inclosing the land is not essential to possession.

Color of Title.—A deed void upon its face, as being in violation of law, cannot give even color of title, p. 278.

Approved in *Woodworth v. Fulton*, 1 Cal. 308, denying the power of an alcalde to convey lands. The principle is approved but the case distinguished in *Brown v. O'Connor*, 1 Cal. 421. In the latter case, the plaintiff in an action to recover land had a grant which, though defective, afforded him a colorable claim of title, and having had possession under it, and never having abandoned it, his right to recover as against any one who could not set up a superior legal title was asserted. The principal case is likewise distinguished in *Hicks v. Coleman*, 25 Cal. 131; 85 Am. Dec. 110, where the deed under which the plaintiff claimed title was valid upon its face, and there was no adverse possession of the land in any other party at the time. Similarly distinguished, also, in *Gunn v. Bates*, 6 Cal. 272, where the court says that the opinion in the principal case turned upon the point that the deed through which the plaintiff claimed was void, and could not therefore qualify the possession. In *Wilson v. Atkinson*, 77 Cal. 485, 493; 11 Am. St. Rep. 306, the deed under consideration, though void on its face, was not in violation of law, and it was held sufficient to give color of title, under which a claimant of title in good faith might form an adverse possession. The decision in the principal case was said to be based upon the peculiar language of the Spanish law, and of but little weight in determining

what should be the rule under the present code provision, section 322 of the Code of Civil Procedure. The dissenting opinion of Hastings, C. J., in the principal case is cited to the point that a void deed may be a good basis for an adverse possession, in *La Frambois v. Jackson*, 18 Am. Dec. 489, note.

A New Trial is Properly Denied where it is clear that the result would be the same as on the former trial, p. 285.

Approved in *Hazard v. Cole*, 1 Idaho, 291.

1 Cal. 295-322. WOODWORTH v. FULTON.

Alcaldes' Grants.—Grants made by an American alcalde, during the continuance of the war between the United States and Mexico, are void, and the grantees acquired neither title nor color of title under them, p. 305.

This ruling is adhered to and applied in *Reynolds v. West*, 1 Cal. 325; *Folsom v. Root*, 1 Cal. 275; *San Francisco v. Clark*, 1 Cal. 387; *Fisher v. Salmon*, 1 Cal. 414; 54 Am. Dec. 297; and the principle of the decision is approved in *Brown v. O'Connor*, 1 Cal. 421, but the case is distinguished. In *Cohas v. Raisin*, 3 Cal. 451, 453, the court sustained a grant made by an American alcalde during the war with Mexico, and while California was in the military occupation of the United States, expressly overruling the principal case as to this point. In subsequent California decisions, the subject of alcaldes' grants has undergone thorough discussion, and the doctrine announced in *Cohas v. Raisin*, 3 Cal. 451, 453, is recognized as a part of the law of property of the state: See *Welch v. Sullivan*, 8 Cal. 187, 198, 203; *Treadwell v. Payne*, 15 Cal. 498; *Hart v. Burnett*, 15 Cal. 530, 558, 598, 619, in all of which the principal case is examined and referred to as being overruled. So in *Merryman v. Bourne*, 9 Wall. 598, 602, a case before the supreme court of the United States by writ of error to the circuit court for the district of California, where the premises in dispute were the same as those involved in the principal case. The principal case is referred to as being overruled, as respects the validity of alcaldes' titles, in *Gaines v. Hale*, 26 Ark. 215, where the subject of title to Indian country is fully discussed.

Ejectment.—Acts making out a prior possession, sufficient to sustain ejectment, must be definite, positive, and notorious, p. 309.

Referred to as an authority in *Brown v. O'Connor*, 1 Cal. 421. The dissenting opinion of Hastings, C. J., in the principal case is referred to in *Sunol v. Hepburn*, 1 Cal. 286, 289, as containing a full examination of the different kinds of possession for the recovery of which possessory actions are sustained in Spanish and civil wars; and is also referred to as sustaining the position that a void deed may be a good basis for an adverse possession, in *La Frambois v. Jackson*, 18 Am. Dec. 489, note. This position is also sustained in *Wilson v. Atkinson*, 77 Cal. 493; 11 Am. St. Rep. 306, in which the court says that the decision in the prin-

cipal case, holding that a deed void upon its face, could not aid the adverse possession of the occupant, is of but little weight in determining what should be the rule under the present code provision.

General citations: Fed. Cas. No. 9,480; 8 W. Va. 264.

1 Cal. 322-329. **REYNOLDS v. WEST.**

Alcaldes' Grants.—A grant made by an American alcalde, during the continuance of the war between the United States and Mexico, is void, p. 325.

Approving, as to this point, *Woodworth v. Fulton*, 1 Cal. 295; *Hays v. United States*, 175 U. S. 258, as holding that neither alcalde nor justice could make valid grant of public lands.

Same.—A grant in San Francisco by a Mexican alcalde, before the war between the United States and Mexico, is valid, and cannot be disturbed.

Affirmed and the principle applied in the similar case of *Brown v. O'Connor*, 1 Cal. 420. Referred to in *Cohas v. Raisin*, 3 Cal. 451, and said to operate as an abandonment by the court of the first two grounds taken in the case of *Woodworth v. Fulton*, 1 Cal. 295, namely: 1. That San Francisco was not a pueblo; and 2. That, conceding it to be a pueblo, there was no legislation, general or special, which vested in it the title to the land. Also referred to in this connection in *Hart v. Burnett*, 15 Cal. 559, 598.

Same.—The presumption is in favor of the validity of every grant issued in the forms prescribed by law, and the burden of proof lies upon those who controvert their validity, p. 326.

Approved and applied in *Payne v. Treadwell*, 16 Cal. 227, 241, in which the validity of alcaldes' grants is discussed at length; *Crespin v. United States*, 168 U. S. 213, discussing powers of prefects under Mexican law.

1 Cal. 331, 332. **EX PARTE KYLE.**

Attorney Has no Lien upon a judgment procured by him in favor of his client as a compensation for his services. Such lien extends only to costs given by statute, p. 332.

Cited in *Gage v. Atwater*, 136 Cal. 173, permitting substitution of attorney by client notwithstanding his indebtedness to former attorney.

Approved in *Mansfield v. Dorland*, 2 Cal. 509, and is said to settle the question as to the lien of the attorney for his costs, in *Russell v. Conway*, 11 Cal. 103. Also approved in *Humphrey v. Browning*, 46 Ill. 485; 95 Am. Dec. 453, holding that the claim of an attorney to compensation is no lien upon the real estate recovered in ejectment, prosecuted by him. Cited in *Renick v. Ludington*, 16 W. Va. 390, but the right of an attorney to a lien as a compensation for his services on the judgment or decree procured by him, is maintained. And so in *Stewart*

v. Flowers, 44 Miss. 519, 530, 531; 7 Am. Rep. 711, 720. So in Warfield v. Campbell, 38 Ala. 527; 82 Am. Dec. 727, holding that such lien will prevail over an equitable set-off afterward acquired by the defendant. The principal case is also cited in an extended note to Hanna v. Island Coal Co., 51 Am. St. Rep. 258, 259, wherein the authorities bearing upon the subject of the attorney's lien are very fully collected and collated. So in an earlier note to the case of Andrews v. Morse, 31 Am. Dec. 757, 758.

1 Cal. 336, 337. **SEAMAN v. MARIANI.**

Reference.—An ordinary suit at law should not be referred, except upon agreement of the parties, p. 337.

Applied, where the action was to recover a balance of account for goods sold and delivered and work and labor performed, in Hendy Machine Works v. Construction Co., 99 Cal. 423.

1 Cal. 337-342. **OSBORNE v. ELLIOTT.**

Conditions Precedent.—Where promises are dependent, neither party can sue the other, without showing performance, or offer to perform, p. 338.

In Folsom v. Bartlett, 2 Cal. 164, the purchase price of land was payable in installments, the vendor agreeing to convey on payment of the last installment. It was held, on the authority of the principal case that a tender of conveyance by the vendor was a condition precedent to the right to sue after all the installments had become due. So in Hill v. Grigsby, 35 Cal. 662, citing the principal case. Also, in Rourke v. McLaughlin, 38 Cal. 200, holding that the vendor may in such case sue upon all of the installments, except the last, without the tender of a conveyance.

1 Cal. 342-344. **PEOPLE v. GILLESPIE**

Jurisdiction.—The superior court of the city of San Francisco has no jurisdiction of quo warranto proceedings, p. 343.

Followed in People v. King, 1 Cal. 345. Explained in Seale v. Mitchell, 5 Cal. 403, and holding that such court had constitutionally all the powers specified in the act creating it. So in Vassault v. Austin, 36 Cal. 696, and further holding that its judgments import the same absolute verity as those of the district courts. Affirmed in Ex parte Stratman, 39 Cal. 518, on constitutional grounds, reviewing the cases.

1 Cal. 345-347. **SOULE v. HAYWARD.**

Partnership.—A partner is not subject to arrest in an action against him, brought by his copartner, p. 346.

Cited as authority, holding that a partner cannot commit a crime by

any acts relating to the possession of the partnership property, in *State v. Matthews*, 129 Ind. 283.

Same—What Constitutes.—Where the owner of goods sells a half interest therein to another, to be disposed of on joint account, this constitutes a partnership between them, p. 346.

Cited in support of the proposition that if goods are bought on joint account or treated as joint property, or it is agreed that they shall be joint property though bought with the funds of one, the parties will be deemed partners in the goods as well as in the profits and losses; *Gray v. Blasingame*, 110 Ga. 346, holding partnership shown by facts stated; *Welch v. Insurance Co.*, 23 W. Va. 311.

1 Cal. 347-348. **WHITE v. LIGHTALL.**

Appellate Jurisdiction of supreme court extends only to those cases in which the legislature authorizes it to entertain appeals, p. 348.

Approved *People v. Turner*, 1 Cal. 143, as to the principle there stated by which the extent of supreme court jurisdiction is to be determined. Cited in *Hyatt v. Allen*, 54 Cal. 355, as to the jurisdiction of the supreme court to issue writs necessary or proper to the complete exercise of its appellate jurisdiction. Examined as to this point in *People v. Jordan*, 65 Cal. 648, and cited on the same subject in *People v. Turner*, 52 Am. Dec. 303, note.

1 Cal. 353-354. **YOUNGE v. PACIFIC MAIL STEAMSHIP COMPANY.**

Remote and Contingent Damages are not Recoverable in an action against a passenger carrier for nonperformance of his contract to carry a passenger, p. 354.

Approved as to the rule of damages in *Muldrow v. Norris*, 2 Cal. 78; 56 Am. Dec. 316; so in *Hansley v. Railroad Co.*, 115 N. C. 609; 44 Am. St. Rep. 480, 483; so in *Turner v. Great Northern Ry. Co.*, 15 Wash. 226; 55 Am. St. Rep. 883, earnings of passenger as an attorney. Cited in *Ransberry v. N. A. etc. Co.*, 22 Wash. 480, but allowing damages caused by delay in transportation, and stating measure of damages generally.

New Trial will be Granted for erroneous instructions which may have influenced the verdict, p. 354.

Cited as authority in support of the rule that a judgment will be reversed where instructions on a material point are contradictory and repugnant in *Brown v. McAllister*, 39 Cal. 577; and to the same effect also in *Fridenberg v. Robinson*, 14 Fla. 141; *Goode v. State*, 16 Tex. App. 413.

1 Cal. 355-358. **DUNBAR v. ALCALDE OF SAN FRANCISCO.**

A Municipal Corporation is not Liable for the destruction of a build-

ing, in pursuance of the direction of its officers, where no statute exists creating such liability, p. 358.

Followed in *Correas v. San Francisco*, 1 Cal. 452, which was an action to recover damages for the pulling down of a building by order of the mayor during the raging of a fire. The principle approved in *Spring Valley Water Works v. San Francisco*, 61 Cal. 38; so in *Field v. Des Moines*, 39 Iowa, 579, 581, 583, 585; 18 Am. Rep. 49, 52, 53, 55; so in *Hale v. Lawrence*, 47 Am. Dec. 208, note; *Bishop v. Mayor etc.* 50 Am. Dec. 403, note; *Goddard v. Inhabitants etc.*, 30 Am. St. Rep. 399, note.

Eminent Domain does not embrace destruction of building by municipal authorities, nor is it liable therefor, p. 356.

Cited in *Wallace v. Richmond*, 94 Va. 223, applying rule to destruction of intoxicating liquors; *Aitken v. Wells River*, 70 Vt. 311, 67 Am. St. Rep. 675, as to burning of buildings and destruction of dam. Approved as authority in *Field v. Des Moines*, 39 Iowa, 587; 18 Am. Rep. 57.

General Powers of Corporation must be Restricted by the nature and objects of its institution, p. 356.

This principle approved in *Union Water Co. v. Fluming Co.*, 22 Cal. 627.

1 Cal. 362-363. **WALTON v. MINTURN.**

Pleading.—A defendant should set forth the true nature of his defense in his answer, p. 363.

Cited to the point that all new matter must be set up in the answer, in *Piercy v. Sabin*, 10 Cal. 30; 70 Am. Dec. 697; so in *Atchison etc. R. R. Co. v. Washburn*, 5 Neb. 125; *Bishop v. Stevens*, 31 Neb. 791; *Prall v. Peters*, 32 Neb. 834. Cited in *Singer v. Manufacturing Co.*, 17 Utah, 157, 70 Am. St. Rep. 776, as to allegations of invalidity of corporate meetings.

Report of Referee upon Facts of Case stands the same as the verdict of a jury, p. 363.

Approved in *McHugh v. Peck*, 29 Tex. 149.

General citations: 18 Ill. App. 73.

1 Cal. 363-365. **GEORGE v. LAW.**

Practice of Denying New Trial when plaintiff remits a part of verdict, recognized, p. 365.

Referred to as an instance of such practice, and approving the same, in *Davis v. Southern Pac. Co.*, 98 Cal. 17, 18. Also referred to in this connection in *Nudd v. Wells*, 11 Wis. 416; *Vinal v. Cove*, 18 W. Va. 61.

1 Cal. 365-368. **KELLY v. CUNNINGHAM.**

Damages for Collision are not Recoverable, where the injury complained of resulted from the negligence of both parties, p. 367.

Cited in *Sawyer v. Eastern Steamboat Co.*, 46 Me. 403, 74 Am. Dec. 465, as declaring the rule in courts of common law and discussing the rule applicable in courts of admiralty.

1 Cal. 369-371. **PERSSE v. COLE.**

Judgment will be Modified in the supreme court, so as finally to settle the controversy, when the rights of the parties appear from the record to be fully ascertained, p. 371.

Cited as correctly construing the statute on the subject in *Wiley v. Morrow*, 1 Wash. Ter. 480.

1 Cal. 371-373. **KENDALL v. VALLEJO.**

Pleading.—New matter must be specially pleaded in the answer, p. 372.

Cited as sustaining this rule in *Piercy v. Sabin*, 10 Cal. 30; 70 Am. Dec. 697.

1 Cal. 373-374. **HOPPE v. ROBB.**

Verdict will not be Disturbed on Appeal where the evidence is conflicting, p. 374.

Affirmed as to this point, in *Griswold v. Sharpe*, 2 Cal. 23.

1 Cal. 374-378. **FOLSOM v. ROOT.**

Judgment.—Presumption in Favor of.—Supreme court will presume on appeal that the evidence was sufficient to sustain the judgment, where the record does not embody the testimony, p. 377.

Affirmed on the principle of stare decisis in *McFadden v. Jones*, 1 Cal. 453.

1 Cal. 378-379. **TYSON v. WELLS.**

Appeal.—Acceptance of costs not a waiver of the right to appeal, p. 379.

Referred to in *Clark v. Ostrander*, 13 Am. Dec. 549, note, as holding a doctrine contrary to the line of decisions there cited.

1 Cal. 379-386. **PEOPLE v. McCAULEY.**

Jurisdiction.—A district judge might properly hold court in a district other than the one for which he was elected, p. 381.

Explained and recognized as authority for the rule here stated in *People v. Wells*, 2 Cal. 207. Referred to in the dissenting opinion of De Witt, J., in *Wallace v. Helena Electric Ry. Co.*, 10 Mont. 45, where it is said that "the argument ab inconvenienti cannot prevail nor is it of weight in the face of positive law, but in doubtful cases, and where two constructions are possible, it availeth much."

Change of Venue.—Affidavits for a change of venue in a criminal case must state the facts and circumstances from which the conclusion is deduced that a fair and impartial trial cannot be had, and must not be upon information and belief, p. 383.

Cited in *Higgins v. San Diego*, 126 Cal. 314, as to applications for change for bias of judge; *State v. Spotted Hawk*, 22 Mont. 53, sustaining affidavit in criminal case. Affirmed to be the correct rule of practice in this respect in *People v. Yoakum*, 53 Cal. 568; *Territory v. Egan*, 3 Dak. Ter. 125; *Territory v. Mauton*, 8 Mont. 103; *Peters v. United States*, 2 Okla. Ter. 135; *State v. Chapman*, 1 S. Dak. 418; *Shattuck v. Myers*, 74 Am. Dec. 244, note; approved and applied on applications for change of venue in civil actions, in *Greeno v. Wilson*, 27 Fla. 500; *Kennon v. Gilmer*, 5 Mont. 263.

Qualification of Juror.—A hypothetical opinion, formed from merely reading what purported to be newspaper reports, does not disqualify a person from sitting as juror in a criminal case, p. 385.

Recognized as a correct statement of the rule, in *People v. Brown*, 59 Cal. 354; also in *Territory v. Bryson*, 9 Mont. 38, holding that the opinion of the juror must be fixed and unqualified in order to disqualify him from sitting. And such is the view taken in *Smith v. Eames*, 36 Am. Dec. 529, note, where the authorities are collected and examined. Referred to in *State v. Millain*, 3 Nev. 460, as fully upholding and enforcing the statute on the subject enacted by the legislature of California at its first session, and approving the construction of the statute there given.

Instructions are to be Given with reference to the testimony on the trial, p. 385.

Cited and applied as the correct ruling in *People v. Byrnes*, 30 Cal. 207, in which case there was no evidence tending to prove murder in the second degree.

Appeal.—Where the charge is returned on appeal, but no testimony, the appellate court will not undertake to decide as to the correctness or incorrectness of the charge, p. 386.

Affirmed in the analogous case of *People v. Baker*, 1 Cal. 405. Also affirmed in *People v. Best*, 39 Cal. 691.

1 Cal. 386-387. **SAN FRANCISCO v. CLARK.**

Obstructions of Street.—Whether driving piles in a city street is an obstruction is a question of fact for the jury, p. 387.

Affirming *Woodworth v. Fulton*, 1 Cal. 295, as to the proper rejection of the alcalde's grant offered in evidence. Distinguished in *Clark v. McCarthy*, 1 Cal. 454, in which case the plaintiff was doing an act that rendered a street impassable, which the public was daily using; while

in the principal case, the defendant was doing the only thing by which a street could be made of use, which was before impassable.

1 Cal. 387-393. **DWINELLE v. HENRIQUEZ.**

Public Administrator is Personally Liable upon contracts made in relation to estates upon which he administers, unless provided otherwise by the contract, p. 392.

Cited in *Briggs v. Breen*, 123 Cal. 659, 665, applying rule to employment by executor; *Moffitt v. Rosencrans*, 136 Cal. 418, holding executrix bound by her unauthorized contract, when she is also the beneficial owner of property affected. Cited as authority respecting the personal liability of an executor or administrator upon contracts made by him in his representative capacity, in *Gurnse v. Maloney*, 38 Cal. 88; 99 Am. Dec. 353; *Estate of Page*, 57 Cal. 242. Also Cited in *In re Couta*, 87 Cal. 482, the court saying, "where the representative of the estate has a doubt as to the legality of the claim, or the amount that should be paid for services rendered or materials furnished in the course of administration, it is proper for his own protection, as well as for the protection of the heirs, that the court should determine, after notice to all persons interested, whether the estate is liable at all, and, if so, in what amount."

1 Cal. 393-395. **MACONDRAY v. SIMMONS.**

Mechanics' Liens do not Exist under Mexican law, p. 394.

Followed by *Stowell v. Simmons*, 1 Cal. 452.

Joinder of Causes of Action.—In an action to enforce a claim against A. the plaintiff may contest the validity of a conveyance from A to B, p. 395.

Criticised in *Thompson v. Caton*, 3 Wash. Ter. 36, and not followed as authority.

Pleading.—Objection to misjoinder of causes of action must be taken by demurrer or answer, or the same is waived, p. 395.

Cited to the point that when there is a misjoinder of actions, the defendant should demur specially, or he will be deemed to have waived the objection, in *Warner v. Smith*, 4 Utah, 245.

1 Cal. 396-399. **ELLIOTT v. OSBORNE.**

Injunction.—Party is not bound to obey injunction until after due service thereof on him, p. 397.

Explained in *Farnsworth v. Fowler*, 55 Am. Dec. 723, note, as constituting an exception to the prevailing doctrine on the subject. Referred to in *United States v. Debs*, 64 Fed. Rep. 755, but conceding the weight of authority to be that one who has actual notice of an injunction is bound by it.

Notes Cal. Rep.—3.

1 Cal. 399-402. **GARDET v. BELKNAP.**

Statute of Frauds.—A delivery of goods, to take a cause out of the statute of frauds, must be such as to place the property under the control and power of the vendee, p. 401.

Cited as authority in note to *Shindler v. Houston*, 49 Am. Dec. 331, 334, where the subject is discussed at large.

1 Cal. 403-405. **PEOPLE v. BAKER.**

Affidavit for Change of Venue insufficient in criminal case when it states that a jury cannot be selected, from a certain place in the county, who would give the prisoner an impartial and fair trial, p. 404.

Cited in *Territory v. Corbett*, 3 Mont. 56, where the affidavit was particular in regard to the excitement and prejudice against defendant in a certain locality only; that is, the county seat; and it was declared insufficient; also in note to 74 Am. Dec. 244, upon change of venue, "Impartial Trial in County Impossible."

Affidavit on motion to continue criminal cause must show due diligence in endeavoring to procure witnesses and in preparing for trial, p. 404.

Cited in *Gladden v. State*, 12 Fla. 572, where the language of the court in the principal case is quoted as directly in point, and interference was refused upon an affidavit which failed to show: 1. When the subpoena was issued; or 2. That the witness had been served; or, 3. Any reason for want of service; or, 4. The residence of the witness.

Testimony of Juror to defeat own verdict cannot be received, p. 405. Such a rule is no less necessary in criminal than in civil cases.

Cited in *People v. Murphy*, 146 Cal. 506, affidavits as to declarations of jurors are admissible to defeat verdict; *Boyce v. California Stage Co.*, 25 Cal. 475, where it is held that a verdict cannot be impeached by the affidavits of jurors except when the verdict is arrived at by a resort to the determination of chance—this was a civil case; *People v. Azon*, 105 Cal. 633, where the same ruling is made as in the principal case and also in the case last above noted, the court saying that the point has always been decided the same way, and the case decided that it was not admissible to prove, by the affidavits of jurors or of other parties as to their statements that the jury were guilty of misconduct by reading newspaper reports of the trial—this case was a criminal one; *Kelley v. State*, 39 Fla. 134, applying rule to declarations of juror after verdict as to bias and prior opinion; *Griffiths v. Montandon*, 4 Idaho, 379, under Revised Statutes, section 4439, subdivision 2, jurors' affidavits not receivable to impeach verdict unless verdict obtained by resort to chance; *Territory v. Taylor*, 1 Dak. 487, where the rule is expressly affirmed in a criminal libel case in an exhaustive opinion which

also holds that, under the statute, verdicts found by a resort to chance may be impeached by affidavits of jurors; and in *People v. Ritchie*, 12 Utah, 194, quoting from the court in the principal case. The action was criminal libel, and it was held that the verdict could not be impeached by the affidavit of a juror as to certain measurements having been taken by him during the trial, and that he communicated the result to the other jurors. Such impeachment was also prohibited by statute, except in cases of a verdict induced by a resort to chance; *Kelley v. State*, 39 Fla. 134, holding that juror may not impeach his own verdict by an affidavit made after the verdict that he had formed and expressed an opinion, before the trial.

1 Cal. 406-409. **PEOPLE v. CLARK.**

Statute takes effect the moment of its approval by the legislature where it is declared to take effect from and after its passage, p. 407.

Cited in *Scoville v. Anderson*, 131 Cal. 594, construing Code Civ. Proc. 12; *McGinley v. Laycock*, 94 Wis. 208, defining "from" as used in statute. *Coal Co. v. Barbur*, 47 Kan. 30, on the point that the great weight of authority is to the effect that a statute which is to take effect "from and after its passage" takes effect upon the day of its passage. The case also holds that the precise time of the publication of a statute may be shown where it is to be of force "from and after its publication," and an act is affected by the hour of publication of the statute, although the principal case is not cited in this last point; *Dowling v. Smith*, 9 Md. 280, where the court quotes therefrom as follows: "If no time be specified when a statute shall be in force, it ought to go into effect from and after its passage; that is, from the point of time when its existence is perfected;" and holds that if a statute is to take effect from its passage the time is reckoned from the date of engrossment, and not from the date of passage; *Parkinson v. Brandenburg*, 35 Minn. 295, where it is declared that the "great weight of authority is to the effect that a statute which is to take effect 'from and after its passage' takes effect upon the day of its passage," and in computing the time when it takes effect the day of its passage is to be excluded; *Arrowsmith v. Hamering*, 39 Ohio St. 577, where the act was to take effect "from and after its passage," and it was held that the statute took effect from the commencement of the day of its passage, and not from its expiration; that is, from the moment of its approval by the governor; *Briggs v. McBride*, 17 Or. 646, where it is declared that the words "from and after its passage" and like expressions mean that statutes "shall take effect and be in force from and after their passage; that is, from and after the time when the law-making power shall have done every act necessary under the constitution to their complete enactment as laws;" and it was held that where the governor vetoes an act which is to "be in force from and after its approval by the governor," and such act is subsequently passed, it takes effect from and after its passage.

Statutes.—Particular time of day when statutes approved may be shown for the purpose of determining the right to an office. The action was in the nature of quo warranto. The relator claimed an office by appointment under a law passed on a particular day. The defendant claimed the office by election on the same day, p. 408.

Cited in *Craig v. Godfrey*, 1 Cal. 416, 54 Am. Dec. 300, to the effect "that a day is not to be considered as a unit to the prejudice of the rights of a party," and that "the very point of time when an act was done" could be inquired into, the case holding that a memorandum of sale by an auctioneer under the statute of frauds must be made at the very time of sale; *Fowler v. Pierce*, 2 Cal. 170, as sustaining the point that parol evidence was admissible in the case before the court to show that a certain statute was not approved until the day after adjournment of the legislature. But in *Sherman v. Story*, 30 Cal. 276, 279, this last case is denied as to parol evidence, the court saying, however, that possibly it could be distinguished. See, also, *Parkinson v. Brandenburg*, 35 Minn. 296; 59 Am. Rep. 328, noted below. Cited in *Davis v. Whidden*, 117 Cal. 622, where the language of the principal case on this point is quoted with approval and applied to inconsistent acts approved on the same date, holding also, however, that a presumption exists that they were printed and published in the chronological order of their approval; *Parks v. Soldiers' and Sailors' Home*, 22 Colo. 101, the court saying that "priority should be given as of the time of day of the taking effect of the several acts" of the legislature concerning certain appropriations, when made in excess of the revenue applicable thereto; *Galveston etc. Co. v. Lynch*, 22 Tex. Civ. App. 338, as to repealing act; *Parkinson v. Brandenburg*, 35 Minn. 296, 59 Am. Rep. 326, where it is declared that the tendency now is to hold that the statute takes effect only from the exact moment of its approval, and that when necessary to determine conflicting rights, courts will inquire as to the exact hour of its passage.

Doubted as to parol proof in *Parkinson v. Brandenburg*, 35 Minn. 296; 59 Am. Rep. 328, where the court says: "It certainly does not seem fit or proper that the time of the commencement of a law, whenever the question arises, should be left to depend upon the uncertainty of parol proof, or upon anything extrinsic to the law itself and the authenticated recorded proceeding in passing it." See, also, *Sherman v. Story*, 30 Cal. 276, 279, noted above.

Cited in *Arrowsmith v. Hamering*, 39 Ohio St. 577, to exactly the same effect as above stated in the principle case; *Levinsville v. Savings Bank*, 104 U. S. 478, where the facts are stated and the doctrine approved as declared in the principal case, the words of the court therein being given upon this point, and it was held that courts will take cognizance of fractions of a day when necessary to determine conflicting rights; *Lapeyre v. United States*, 17 Wall. 203, where it is decided that, if justice requires it, the true time of the passage of a statute may be shown, even to fractions of a day, and a certain proclamation was held to have

taken effect when it was signed by the President and sealed with the seal of the United States officially attested.

When Statute Itself Gives no Time for Publication, it should go into effect from and after the time when its existence is perfected. This "rule is deemed to be fixed beyond the power of judicial control, and no time is allowed for the publication of the law before it operates when the statute itself gives no time," p. 407.

Cited in nearly the same language in *Parkinson v. State*, 14 Md. 200; 74 Am. Dec. 533; and it was held that if the statute does not provide when it shall take effect it becomes a law on a certain date after the legislature adjourns, but, if the act declares the time of its taking effect, it will operate at that time whether then published or not.

General citation; Fed. Cas. No. 17,080.

1 Cal. 409, 410. SMITH v. CHICHESTER.

Judgment by district court after adjournment at time fixed by law is invalid and will be reversed on appeal. This case rested upon the act of March 16, 1850, as amended April 18, 1850, for organizing district courts and fixing their terms and places of holding same, p. 409.

Cited in *Coffenberry v. Horrill*, 5 Cal. 493, where upon appeal the rendition and entry of a judgment by the district court, there being no legal term, was held error and ground of reversal; *Peabody v. Phelps*, 7 Cal. 53, where upon appeal a judgment entered in vacation was held void; *Wicks v. Ludwig*, 9 Cal. 175, where the court says: "It is absolutely essential to the validity of a judgment that it be rendered by a court of competent jurisdiction, at the time and place, and in the form prescribed by law. . . . No trial can be had or judgment entered except in term time." In this case the judgment was entered in vacation, upon a trial had by stipulation after adjournment of the court for the term, and the judgment was declared a nullity and not the subject of appeal. Cited in *Norwood v. Kenfield*, 34 Cal. 333, where the language last above quoted was used, and it was held that a county judge could not, at chambers, grant a continuance of a case which was pending and set for trial for a future day in the county court. It was also decided that the trial and judgment so rendered were void, since the term appointed for trial failed, the court not being open and no adjournment had, and that consent could not create a court or confer jurisdiction where none existed. The judgment from which the appeal was taken was vacated. Cited in *Bates v. Gage*, 40 Cal. 184, upon the point that if a court could not legally be holden on the day and at the place of trial, said trial was not before any court; as where by operation of law the court is adjourned in that county and its term commenced in another county. It was also held that a stipulation could not confer jurisdiction in such case.

Commented upon in *People v. Jones*, 20 Cal. 55, which holds that

there is nothing in the constitution which prohibits the legislature from authorizing a judgment to be entered in vacation, upon filing the decision or findings of the court, on a trial duly had at regular term; that neither the principal case nor *Wicks v. Ludwig*, 9 Cal. 175, conflict as to entry of judgment.

Changed by legislature in 1851, after the decision in the principal case, the Practice Act expressly providing for entry of judgment in term or vacation: Practice Act, sec. 144; *People v. Jones*, 20 Cal. 55.

Present Code Provisions.—Under section 73 of the Code of Civil Procedure, the superior court is always open for the entry of judgment or an order. Section 74 of the Code of Civil Procedure does away with terms of court, and section 664 of the Code of Civil Procedure provides for entry of judgment in twenty-four hours upon trial by jury after verdict rendered, except in certain specified instances.

Appeal taken from judgment rendered in vacation as appeared of record was entertained and judgment reversed, p. 410.

Cited in *Skinner v. Beshoar*, 2 Colo. 387, as being in "accord with the current of decisions elsewhere on this point;" the court also cites *Coffenberry v. Horrill*, 5 Cal. 493, and *Peabody v. Phelps*, 7 Cal. 53, as cases where an appeal was entertained under like facts. But, immediately preceding this declaration, the court cites *Wicks v. Ludwig*, 9 Cal. 175, to the effect that appeals can only be taken from judgments of the court, it appearing in this last case that the judgment had been given in vacation under stipulation and was declared a nullity. See what is stated above as to code provisions.

1 Cal. 410-412. **HEATH v. LENT.**

Levy on Real Estate Alone, where the debtor has never been disturbed or molested in its possession, is ground for nominal damages only, p. 411.

Cited in *Tisdale v. Major*, 106 Iowa, 4, 68 Am. St. Rep. 265 (and note 270), holding attaching creditor not liable for damages under facts stated; *Trawick v. Martin Brown Co.*, 79 Tex. 463, as contrary to the ruling in that state where such levy affords no ground for actual damage; *Anderson v. Sloane*, 72 Wis. 583, 7 Am. St. Rep. 897, upon the general rule, but the rule of the principal case as to nominal damages was extended in this case, which was one of wrongful seizure of plaintiff's goods under execution.

Counsel Fees constitute no part of damages in action on bond for damages accruing from a wrongful suing out of an attachment, p. 412.

Cited in *Anderson v. Sloane*, 72 Wis. 583, 7 Am. St. Rep. 897, upon the general rule as to assessment of damages, but in this case the court allowed counsel fees in proceedings to set aside certain judgments and executions under which the goods of plaintiff were wrongfully seized;

also in note to 77 Am. Dec. 155, 157, as to "Recovery of Attorney's Fee on Attachment and Other Similar Statutory Bonds"; note to 81 Am. Dec. 473, as to counsel fees as "Damages." Denied in *Thaie v. Quan*, 3 Cal. 216, 219, to the extent of holding that counsel fees to procure the dissolution of an injunction was part of the damages in an action upon the injunction bond for damages for wrongfully suing out the writ, for in such a case the loss was direct and of necessity differing from a case where the loss was consequential: *Elder v. Kutner*, 97 Cal. 494, upon the authority of the last case and to the extent there stated, and it was decided that there must be an allegation that counsel fees have actually been paid for defending the attachment suit in an action against the sureties on an attachment bond.

Damages which are too remote, contingent or conjectural will not be allowed for the wrongful suing out or levy of a writ, p. 412.

Cited in *Harris v. Finberg*, 46 Tex. 96, where it was held that the value of defendant's time while attending court or any such incidental expense could not be allowed as damages, whether the suing out and levy of a writ of sequestration was malicious or merely wrongful; *Anderson v. Sloane*, 72 Wis. 583, 7 Am. St. Rep. 897, to the effect that in an action to recover for the illegal seizure of goods, no malice being proved, or any intent to oppress the party whose goods are seized, the jury should not be permitted to assess damages not readily ascertained by certain proof and which are purely speculative, and damages for loss of profits from interruption of business, injury to feelings, etc., were excluded; and in note to 81 Am. Dec. 474, as to remote or speculative damages.

That One Only of Coplaintiffs is entitled to damages who has been wrongfully attached when an action is brought for such wrongful levy, p. 412.

Cited in *Tebo v. Betancourt*, 73 Miss. 872, 55 Am. St. Rep. 575, where the language of the court in the principal case (p. 412) on this point is quoted, and it is held that a defendant who owned none of the property attached could recover damages, under an action on the attachment bond, for expenses incurred in defending the attachment; also in note to 81 Am. Dec. 470, as to "Parties" in "Actions on Attachment Bonds."

General citation: 18 Ill. App. 344.

1 Cal. 415-416; 54 Am. Dec. 299. **CRAIG v. GODFREY.**

Auctioneer's Memoranda of Sale under the statute of frauds must be made at the very time of sale to bind vendee. The memorandum constitutes a contract, and the auctioneer is the agent of each party at time of sale, p. 416.

Cited in *Jelks v. Barrett*, 52 Miss. 323, where the same points are held,

although it is said that the memorandum may be made immediately after the bidding, and the making of the memorandum by the auctioneer or his clerk is a sufficient signing; also, upon the points above stated, in notes to 54 Am. Dec. 299; 60 Am. Dec. 760; 61 Am. Dec. 255; 66 Am. Dec. 549; 69 Am. Dec. 297; 70 Am. Dec. 381, 647; 96 Am. Dec. 271; 100 Am. Dec. 388.

1 Cal. 416, 417. **BURT v. SCRANTON.**

Judgment by Default before expiration of time for answer will be reversed, and the time for answering excludes the day of service of summons. The case came up on appeal, p. 417.

Cited in *Maud v. Wear*, 55 Cal. 26, where the same rule was applied, even though notice of appearance for defendant had been given the day before default entered; *Burns v. Loeb*, 59 Miss. 169, where it was declared that a judgment by default entered before the time given by statute to defendant to plead would be reversed except it were affirmatively shown that defendant had subsequently taken some step waiving the irregularity, and that it was not sufficient to show that no action was taken at the term at which the error was committed; *Barber v. Briscoe*, 8 Mont. 219, as to entry of default upon amended complaint; *Palmer v. McMaster*, 8 Mont. 195, where the court said: "A judgment by default entered too soon is as much a nullity as if it had been taken on a defective service," and holds that in taking a judgment by default the statute should be strictly followed; *Kidd v. Four-Twenty Min. Co.*, 3 Nev. 385, upon the point that where a default is irregularly taken and erroneously entered an appeal is a proper remedy. The case was one where the summons stated two different periods as the time for answering, and it was held that default could not be taken till after the expiration of the longest period named.

1 Cal. 417, 418. **WEBB v. WINTER.**

Consignee named in bill of lading is prima facie owner of goods named therein until carrier is notified to the contrary, p. 418.

Cited in *Neimeyer etc. Co. v. Burlington etc. Co.*, 54 Neb. 334, discussing right of stoppage in transitu. Note 38 Am. Dec. 417, where effect of bills of lading as evidence of title is fully considered.

1 Cal. 419-421. **BROWN v. O'CONNOR.**

Prior Continuous Possession and documentary title, although defective, entitles to recovery of land against one who cannot set up a superior title, p. 421.

Cited in *Turner v. Aldridge*, McAll. 231, where the language of court is quoted as follows: "However defective the title of the plaintiff may be, there was testimony tending to show that he was in prior peaceable possession of the premises; and it is to be presumed that the jury

found that the plaintiff had the prior and best right to the possession"; and it was held that a prior peaceable possession, coupled with documentary title, entitles to recovery against a mere trespasser.

1 Cal. 422. **DAVIS v. GREELY.**

Interest as Damages on a debt may be allowed in a reasonable sum, in the absence of any statute regulating interest, p. 422.

Cited in *Heidenheimer v. Ellis*, 67 Tex. 429, where it was held that interest cannot be allowed *eo nomine* unless expressly provided for by statute, but in many instances it may be assessed as damages when necessary to indemnify a party for an injury, though the statute be silent upon the subject. In this case there was a stated account to be paid in cash upon the delivery of goods, the sale of which constituted its consideration and which had been declared when the accounting was had. Cited in *Godbe v. Young*, 1 Utah, 61, where it was held that, although there is no statute regulating interest, a reasonable rate should be allowed as damages, and the language of the court in the principal case is quoted; also in note to 6 Am. Dec. 193, where the question of interest as damages and other points relating to interest are fully considered.

1 Cal. 423-425. **BROWN v. HOWARD.**

Usage.—Persons carrying on trade, contract with reference to known usages of that trade, unless the contrary appear, and the usage becomes part of the contract, p. 424.

Cited in *Union Ins. Co. v. American F. Ins. Co.*, 107 Cal. 333, 48 Am. St. Rep. 144, where the court applies the language of the principal case to the effect above stated, to a case concerning the custom among fire insurance companies, granting reinsurance, as to charging premiums and writing policies.

1 Cal. 426, 427. **YOUNG v. STARKEY.**

Arbitrators are entitled to pay from both parties, and both parties are liable for the whole amount, p. 427.

Cited in *Russell v. Page*, 147 Mass. 284, where the same rule was stated, but the principal case was cited upon the point that, if one party pays the whole fee, he is entitled to recover from the other party a moiety of the sum so paid, while under the principal case there was an agreement between the submitting parties affecting, as between them, the amount to be paid; *Alexander v. Collins*, 2 Ind. App. 179, holding arbitrator entitled to recover from person selecting him despite agreement between parties to share expenses, in absence of plea in abatement for nonjoinder.

1 Cal. 428. THOMPSON v. MANROW.

Exemplification of Foreign Judgment attested and certified according to act of Congress is admissible as evidence, p. 428.

Cited in *Parke v. Williams*, 7 Cal. 247, where the same ruling was made, and it was also declared that the legislature could require a less, but not a greater, amount of proof than prescribed by Congress; *Hynes v. Cowen*, 15 Kan. 643, where the rule was not only applied, but it was held that, if the certificate of the presiding judge as to the correctness of the attestation states more than required by law, the certificate is not thereby made insufficient.

Identity of person prima facie evidenced by identity of name, p. 428.

Cited in *Lee v. Murphy*, 119 Cal. 368, as to identity of mortgagee and acknowledging notary; *People v. Thompson*, 28 Cal. 218, where the rule was applied to houses as well as persons under two counts in an indictment for entering a dwelling-house with intent to steal; *Carleton v. Townsend*, 28 Cal. 221, where the rule was applied to identity of name in two deeds, even though they recited the residence of the person to be at different places; *Stapleton v. Pease*, 2 Mont. 553, where the rule was applied; *W.*, as a witness, having testified as to his signature as county recorder to a jurat, and it was held that *W.* as a witness and *W.* as county recorder were prima facie the same persons; *Bradford v. Rogers*, 2 Posey (Tex.), 62, as sustaining the point that parol evidence is admissible to identify the parties to a judgment which does not state defendant's Christian name. The principal case, however, does not go to a greater extent than as above stated.

1 Cal. 429-436; 54 Am. Dec. 300. ROGERS v. HUIE.

New Trial on ground of surprise.—Reasonable diligence to obtain attendance of witnesses must be shown, p. 433.

Cited in *Case v. Coddington*, 38 Cal. 194, where it is held that since defendant knew that plaintiff could not sustain a certain issue without the production of certain evidence, it was his fault or misfortune that he neglected or was unable to adduce sufficient rebutting evidence; *Hoskins v. Hight*, 95 Ala. 287, to the effect, substantially, that due diligence must be exercised; it being held that the first duty of a party surprised at the trial or upon the discovery of a mistake that will prejudice his interest is to take proper legal steps to continue or delay the case; that he cannot neglect this duty in the hope of obtaining a verdict, and then obtain a new trial; *State v. Gardner*, 33 Or. 153, holding new trial properly denied; notes to 55 Am. Dec. 743; 58 Am. Dec. 488; 60 Am. Dec. 185; 63 Am. Dec. 138.

On Motion for New Trial, affidavits should set out the evidence relied on; affidavits of witnesses should also be obtained, if possible, p. 433.

Cited in *Case v. Coddington*, 38 Cal. 194, where the affidavit was declared

insufficient in that defendant did not show sufficient excuse for his failure to obtain affidavits of witnesses; nor did he set out the memoranda by which he expected to convince one of his witnesses that he was wrong in his testimony.

Auctioneer Selling Stolen Property is liable to true owner although the act is done innocently, p. 433.

Cited in *Swim v. Wilson*, 90 Cal. 130, 25 Am. St. Rep. 113, where the court quotes the language used in the principal case on this point and applies it to the sale by a stockbroker of stolen certificates of stock indorsed in blank; *Koch v. Branch*, 44 Mo. 544, 545, 100 Am. Dec. 326, where it was held that the sale of stolen property by an agent for the benefit of his principal, though both are innocent, amounts to a conversion and makes such factor or agent liable; *Mohr v. Langan*, 162 Mo. 497, 498, holding auctioneer liable under facts stated; also in notes to 56 Am. Dec. 366; 70 Am. Dec. 230; 76 Am. Dec. 176; 35 Am. St. Rep. 497.

Whether overruled.—The rule in the principal case is opposed to the doctrine declared when it came again before the court in 2 Cal. 571; 56 Am. Dec. 363. But the court, in *Swim v. Wilson*, 90 Cal. 130, 25 Am. St. Rep. 113, says: "This latter decision, however, cannot be sustained on principle, is opposed to the great weight of authority, and has been practically overruled in the later case of *Cerkel v. Waterman*, 63 Cal. 34."

Receiver and Vendor of stolen property is liable in damages, p. 434.

Cited in note to 87 Am. Dec. 482, as relating to the point of "action for breach of warranty of title to personal property"; note to 95 Am. Dec. 567; extended note to 3 Am. St. Rep. 205, relating to "Owners' Remedies," and other matters of sales; note to 6 Am. St. Rep. 306, under heading "Conversion; What Necessary to Maintain Trover."

Sales in market overt protecting the buyer unknown to our laws, p. 435.

Cited in extended note to 3 Am. St. Rep. 197, waiving this and similar matters relating to sales.

1 Cal. 437, 438. **DENNISON v. SMITH.**

Bill of Particulars.—Too late to object at trial to want of verification, p. 438.

Cited in *Robbins v. Benson*, 11 Or. 516, where the rule was applied to the verification of an account not made strictly in accordance with the statute, said account having been kept for more than a month and objected to at trial, the court holding that a failure to object within a reasonable time precluded the party; *Isham v. Parker*, 3 Wash. 774, where a motion had been made for an additional account, but the motion lay dormant, and no objection was made to the insufficiency

of the bill of particulars until the trial, when it was held too late to object.

Defective Bill of Particulars should be returned on motion made for order for further account, p. 438.

Cited in *Providence Tool Co. v. Prader*, 32 Cal. 637, 91 Am. Dec. 600, where the rule was applied in a case where the bill was too general; it being also held that the party receiving such bill could not proceed as if no bill had been rendered.

1 Cal. 439-441. **MATTER of HOLDFORTH.**

Fraud must be shown on arrest of agent or a demand on him by his principal and a refusal by him to pay, p. 440.

Cited in *Ex parte Prader*, 6 Cal. 240, where it is held that no person can be imprisoned for debt under the constitution except in cases of fraud.

Statute must yield to constitution where the former permits acts prohibited by the latter, p. 440.

Cited in *Ex parte Prader*, 6 Cal. 240, where the seventy-third section of the Practice Act is held to be in violation of article 1, section 15, of the constitution, relating to imprisonment for debt, and it was declared that a person could not be imprisoned under a judgment in a civil action for assault and battery; *State ex rel. Carcass v. Judge*, 32 La. Ann. 724, as being, with other cited cases, to the effect that, where laws are repugnant and contradictory, the more recent repeal the former. The court also refers to the principal case with other authorities as being those in which, after a prohibition had been enacted, the legislature had absolutely and unconditionally recalled the prohibition and legalized acts previously forbidden.

1 Cal. 441-444. **BRYANT v. MEAD.**

Action for Gambling Debt cannot be sustained, p. 443.

Cited in *Gahan v. Neville*, 2 Cal. 81, where the defendant set up an indebtedness for money won at play, and the rule of the principal case was followed; *Carrier v. Brannan*, 3 Cal. 329, where the court says of the rule in the principal case: "This has ever since been regarded as the settled law of the state upon this subject." This action was to recover money lost at play in a gambling house. Cited in *Johnston v. Russell*, 37 Cal. 675, merely as being a case upon the general subject, but not covering the question before the court as to wagers on elections; *Scott v. Courtney*, 7 Nev. 422, and applied to money won at "faro" in a public gambling house.

Doubted in *Haight v. Joyce*, 2 Cal. 66, 56 Am. Dec. 311, where it was held that notes given for a gambling consideration are valid in the hands of a bona fide indorsee, except a statute makes such notes void.

Licensing gaming-houses does not legalize gambling debts. The statute authorizing the license is permissive only and removes the misdemeanor, p. 444.

Followed in *Carrier v. Brannan*, 3 Cal. 329, in a suit to recover money lost at play in a gaming-house. Cited in *Scott v. Courtney*, 7 Nev. 422, and applied to exactly the same point; *Kinney v. Hynds*, 7 Wyo. 33, holding money lost not recoverable back, under local statutes.

1 Cal. 446, 447. **MIDDLETON v. BALLINGALL.**

Where Goods are Sold to Arrive, action by either party depends upon arrival as a condition precedent, p. 447.

Cited in note to 20 Am. Dec. 673, upon the nature of contracts of sale of goods to arrive at specified place.

1 Cal. 448-450. **YOUNG v. PEARSON.**

Demurrer to whole complaint will be overruled if any cause of action is shown by complaint, though partly insufficient, p. 449.

Cited in *Clark v. Smith*, 66 Cal. 653, where the demurrer was taken to the whole cause of action, and some part of it was not barred by the statute of limitations, which bar was the ground of demurrer.

Law of Place of execution of contract governs, p. 450.

Cited in *Cochran v. Ward*, 5 Ind. App. 97, 51 Am. St. Rep. 235, in the argument of the court in a case where the controversy related to the *lex fori* and the *lex loci contractus*, a parol lease of lands having been made in another state contrary to the statute of frauds there, and the action to enforce being brought in Indiana.

1 Cal. 450, 451. **DE BRIAR v. MINTURN.**

Master may discharge servant at any time where no definite period of employment is fixed, p. 451.

Cited in *Finger v. Kock etc. Co.*, 13 Mo. App. 311, where it was held that an indefinite hiring at so much per day, per month, or per year could be terminated by either party at will; *Evans v. St. Louis etc. Ry. Co.*, 24 Mo. App. 118, where it was decided that fixing the rate of compensation as at so much per year, etc., does not fix the period of hiring at one year, etc.; *Martin v. Insurance Co.*, 148 N. Y. 121, where the rule of the principal case, as well as that of the two citing cases above noted, is adopted, although the court says: "The decisions on this point in the lower courts have not been uniform." *Spieder etc. Co. v. Teeters*, 18 Ind. App. 480, and *McKinney v. Publishing Co.*, 34 Or. 514, holding employment terminable at will; *Greer v. Arlington etc. Co.*, 1 Penne. (Del.) 588, and *Booth v. National etc. Co.*, 19 R. I. 698, holding hiring to have been for indefinite term, though at yearly salary.

Approved and distinguished in *Harrington v. K. C. Cable Ry. Co.*,

60 Mo. App. 229, where the principal case was held properly decided; the case at bar was, however, said not to belong to the same class, since the contract therein was for steady and constant employment so long as plaintiff should properly do the work; the consideration being the release of a valuable cause of action against defendant for damages for personal injuries.

1 Cal. 452. **CORREAS v. SAN FRANCISCO.**

Municipality is not liable for destroying building to prevent conflagration, p. 452.

Cited in *Union Water Co. v. Murphy's etc. Co.*, 22 Cal. 628, as sustaining the proposition that a corporation has no other powers than those granted expressly or by necessary implication under its charter, and its general powers must be restricted by the nature and object of its institution; *Gianfortone v. New Orleans*, 61 Fed. 72, holding city not liable for death resulting from mob attack on prison, notwithstanding negligence of police. The principal case does not, however, so decide, except possibly by implication in referring to the principle underlying *Dunbar v. San Francisco*, 1 Cal. 355.

1 Cal. 455-458. **WEBER v. SAN FRANCISCO.**

Street Assessment, penalty for nonpayment of, cannot be imposed by city council at rate of one per cent per day, p. 456.

Cited in *Bucknall v. Story*, 36 Cal. 71, as sustaining the proposition that the court will not restrain a void sale creating no cloud upon title. It was held that a tax collector could not add five per cent for delinquency of owner, and that a sale is void where property at the time of sale is not liable for the entire amount of tax for which sold.

Street Assessment Sale will not be enjoined for technical irregularities unless owner offers to do equity, p. 457.

Cited in *Couts v. Cornell*, 147 Cal. 462, 463, refusing to enjoin execution of tax deed to state on account of defective description in assessment where no offer to pay just taxes made; *Ellis v. Witmer*, 134 Cal. 253, holding assessment improperly annulled under facts stated; *Erickson v. Cass Co.*, 11 N. Dak. 510, where some of plaintiffs signed petition for construction of drain, others sold right of way and others took contracts for construction, they are estopped from asserting invalidity of assessments.

Estoppel.—Injunction to restrain sale under street assessment will not lie unless suit is brought before work is done. It is inequitable to enjoin the sale after the benefit is received, p. 458.

Cited in *Lent v. Tillson*, 72 Cal. 433, where the court declares that the injunction testing the power to do similar acts must be sought before the work is done, and it is held that the failure to challenge pro-

ceedings for street improvements while in progress operates as an estoppel; see, also, dissenting opinion in *Lent v. Tillson*, 72 Cal. 435, where the principal case is also cited; *Esterbrook v. O'Brien*, 98 Cal. 674, quoting from the court in the principal case; *Ricketts v. Spraker*, 77 Ind. 382, in support of the proposition that there may be an estoppel in cases of assessments for local purposes, as also in cases of assessments of general taxes. In this case an injunction was denied. Cited in *Patterson v. Baumer*, 43 Iowa, 483, which was a case of constructing a ditch for drainage under a statute, and it was declared that the law would not permit land-owners to remain silent until after the work was done and then raise objections to defeat the collection of taxes, and that equity would not interfere; *Robinson v. Burlington*, 50 Iowa, 241, which was an action to recover the amount of a special assessment, alleged to have been wrongfully collected. The assessment was irregular and invalid, but the doctrine of estoppel was relied on, since it was claimed that plaintiff saw the improvement being made and failed to object. It was found, however, that under the facts there was no estoppel, although the rule in the principal case would otherwise have been followed. Cited in *Twiss v. Port Huron*, 63 Mich. 542, where a bill in equity was filed for relief from street assessments, and the court declared that the doctrine of estoppel should apply, the party having known the facts but had failed to object, although requested so to do, before the authorities; *Barker v. Omaha*, 16 Neb. 271, where an abutting property owner failed to object to an improvement until after completion of the work, and an injunction to restrain collection of the assessment for want of notice was not sustained; *Travis v. Ward*, 2 Wash. 33, which was a suit by taxpayers for injunction to restrain payment of warrants for building a county road. The doctrine of estoppel was applied, on the ground that said taxpayers had themselves signed the petition for improvement, had knowledge of the facts and failed to object. Also cited in note to 69 Am. Dec. 204, where the questions as to injunctions in this class of cases are fully considered, pp. 198-205.

Where Remedy at Law is adequate, equity will not prevent sale for assessments, p. 458.

Cited in *Brecknall v. Story*, 36 Cal. 71, where it was declared that there was a remedy at law in case of a void sale creating no cloud upon title. Approved in *Esterbrook v. O'Brien*, 98 Cal. 674, where the court says: "So long as the moral obligation to pay any portion of the tax exists, a court of equity will not lend its aid to prevent a cloud upon the title, but will leave the party to his remedy at law."

1 Cal. 459-462; 54 Am. Dec. 305. **INNES v. THE STEAMER SENATOR.**

Appeal, without moving for new trial in court below, may be taken, p. 459.

Cited in notes to 33 Am. St. Rep. 72; 39 Am. St. Rep. 339.

Vessels.—Omission of vessel to keep light and watch at night when moved in harbor in usual track of vessels is negligence, p. 460.

Cited in note to 36 Am. Dec. 237; extended note to 45 Am. Dec. 55; note to 60 Am. Dec. 568.

Declarations of Agent must be part of *res gestae* to be admissible, p. 461.

Cited in *Garfield v. Knights Ferry Water Co.*, 14 Cal. 37, where the rule is stated. The alleged admission here was a certain paper, but there was no proof to show the agency at the date of the writing, and it was declared not a part of the *res gestae*. Also cited in note to 52 Am. Dec. 312; extended note to 58 Am. Dec. 776; 56 Am. Dec. 328; 58 Am. Dec. 507; 62 Am. Dec. 458; 63 Am. Dec. 627; 64 Am. Dec. 83; 73 Am. Dec. 316; 78 Am. Dec. 499; 91 Am. Dec. 703; extended note to 95 Am. Dec. 65, 72; 37 Am. St. Rep. 41. Distinguished in *Dopman v. Hoberlin*, 5 Cal. 414, as bearing no analogy on the ground that the question asked of the witness in the principal case was neither speculative or hypothetical, while in the case at bar the question asked was hypothetical; *Gerke v. California etc. Co.*, 9 Cal. 256, 70 Am. Dec. 651, where the declarations of a master of a steamboat while sparks were setting fire to grain fields were held part of the *res gestae*.

Though Agent's declarations wrongly admitted, subsequent testimony by him to exactly the same facts may not operate unfavorably, p. 462.

Cited in note to 70 Am. Dec. 390.

Improper Evidence is ground for new trial when it is admitted against objection, p. 462.

Cited in note to 35 Am. St. Rep. 472.

1 Cal. 462-469. GUNTER v. GEARY.

Appeal.—Statement of facts or bill of exceptions must be made. Exceptions cannot be gathered from the clerk's minutes, p. 464.

Cited in *Castro v. Armesti*, 14 Cal. 39, quoting from the principal case on this point, and adding: "This ruling was reaffirmed in *Pierce v. Minturn*, 1 Cal. 470, and has not since been disturbed;" *Spence v. Scott*, 97 Cal. 182, where numerous cases in this state are cited, and it was held that upon appeal the question as to error in striking out parts of an answer could not be presented without a bill of exceptions; *Lobdell v. Hall*, 3 Nev. 530, where it is said that "the rule is well settled that exception cannot be shown" by the clerk's entry alone. It was held in this case that in either a statement on motion for new trial or on appeal any exception taken during the trial could be shown, although there should be no note of the same..

Eminent Domain.—Just compensation must be made for land taken for public use, the party being in actual possession, p. 465.

Cited in *Sacramento Valley R. R. v. Moffatt*, 7 Cal. 579, where the rule was applied in favor of defendants, who were in actual possession under claim of title, although the commissioners had reported that third persons, not parties to the proceedings, had claimed the lands. The case was one of condemnation of land for a railroad; *San Francisco etc. R. R. Co. v. Mahoney*, 29 Cal. 117, where the court says: "The payment or tender of the money awarded is a condition precedent to the right of the company to enter upon the land for the purposes of construction; and without compliance with the requirement, such entry may be enjoined by a court of equity or prosecuted for in trespass at law." The case was one of condemnation of land for a railroad. It was also held that the commissioners had no power to pass upon title.

Common Nuisance may be abated by any one, although not an immediate obstruction or injury, p. 466.

Cited in *State v. Flannagan*, 67 Ind. 147, where a traveler without a breach of the peace broke down a toll-gate which had remained out of repair an unreasonable time contrary to the statute.

Nuisance.—Question for jury whether a certain obstruction, as a wharf, is a nuisance, p. 467.

Cited in *Blanc v. Klumpke*, 29 Cal. 159, where the nuisance was in a highway by water; *People v. Davidson*, 30 Cal. 384, where the court says, "all the authorities concur in holding that whether any given encroachment upon a public or private right is a nuisance or not is a question of fact." The action was a bill to restrain erection of a wharf.

Nuisance.—Obstruction below low-water mark is presumptively a detriment to the public, p. 468.

Cited in *Folsom v. Freeborn*, 13 R. I. 208, where it is said that, "if the erection does extend below low-water mark and is not ancillary to navigation, it may, perhaps, be regarded as *prima facie* a public nuisance."

State Sovereignty.—Damages cannot be had for removing obstruction from lot below low-water mark appropriated as a public slip, p. 469.

Cited in *Rood v. Wallace*, 109 Iowa, 8, on point that title to bed of navigable lake is in state; *Bass v. State*, 34 La. Ann. 499, 503, where it is said: "No injury, wrong, or damage can be done or can result for the commission of an act authorized by law, and therefore none can be recovered" against the state. The case was one of alleged tortious construction of a levee.

State Right over Navigable Water may be delegated to individuals, natural or corporate, p. 469.

Notes Cal. Rep.—4

Cited in *Bass v. State*, 34 La. Ann. 499, where it is held that if the state has a legal right to undertake a public work likely to entail private injury it may delegate its power to agents.

1 Cal. 470-475. **PIERCE v. MINTURN.**

Pleadings.—Answer waives a demurrer previously interposed, p. 471.

Cited in *Pence v. Durbin*, 1 Idaho, 561, where an answer after demurrer overruled is held to waive all defects in pleading except those which may be raised on motion in arrest of judgment; *Fisher v. Scholte*, 30 Iowa, 222, where the demurrer and answer were both filed on the same day, each extending to the entire petition, and the rule of waiver was applied; *Vantilburgh v. Hamilton*, 2 Mont. 414, where it was held that answering to the merits and going to trial waived all defects in the complaint, even though the demurrer ought to have been sustained; *Lonkey v. Wells*, 16 Nev. 275, where the right to rely upon a defect for non-joinder of parties or uncertainty and ambiguity was held to have been waived by answering upon the merits after demurrer overruled; *Young v. Martin*, 3 Utah, 486, where it is declared that whatever might, owing to the code, be the rule in California, nevertheless the decision in the principal case was the law throughout the United States, except where changed by statute.

Criticised in *Reynolds v. Lincoln*, 71 Cal. 190, as being in effect an unjust rule, and the court declares that merely formal defects are waived by pleading over, after demurrer overruled, but as to those which affect the substantial rights of the parties the later practice of the court is not that a party has waived error by pleading after demurrer overruled.

Rule changed in *Curtiss v. Bachman*, 84 Cal. 218, citing the principal case, and the court says that "ever since this amendment (Code of Civil Procedure, section 472) the practice has been to review rulings on demurrer on appeal from a judgment notwithstanding a subsequent answer."

Appeal.—Statement of Facts or bill of exceptions must be made. Exceptions cannot be gathered from the clerk's minutes, p. 471.

Affirmed in *Castro v. Armesti*, 14 Cal. 39, upon exactly the same point; see *Gunter v. Geary*, 1 Cal. 462-469.

Boundaries.—Description in lease is sufficient where boundaries are reasonably ascertainable and premises are in possession under the lease, p. 472.

Cited in *Weaver v. Shipley*, 127 Ind. 534, where the court says: "The practical location of the boundaries of the leased premises, coupled with the subsequent possession of the same by the tenants by and with the landlord's knowledge and consent, is a sufficient location of the property."

Estoppel by Subordination.—Tenant or subtenant cannot dispute the landlord's title, p. 472.

Cited in *Ellis v. Jeans*, 7 Cal. 416, where it is said: "It seems to be well settled that when a party enters into possession of land claiming under another and in subordination to his title, he is estopped from questioning it." This was a case of ejectment and estoppel to deny title from a common grantor. Cited in *Walker v. Sedgwick*, 8 Cal. 402, where the same rule was declared, and it was said that if a purchaser does not obtain the title which the deed purports to convey he cannot be permitted to retain possession of the land and deny the title under which he entered.

1 Cal. 475-478. CARRINGTON v. PACIFIC MAIL STEAMSHIP COMPANY.

If instructions are correct in their entirety a new trial will not be granted, although there are repugnant instructions in the record, p. 478.

Cited in *People v. Salorse*, 62 Cal. 144, where the court says: "As an entirety, these instructions correctly laid down the law of the case, and the verdict returned by the jury was according to the evidence. That being the case, this court will not set aside the verdict and grant a new trial, even if it should find in the record an erroneous instruction which was not calculated to mislead the jury."

1 Cal. 478-481. STERLING v. HANSON.

Defendants who have no joint interest and are under no joint liability should not be joined, p. 480.

Cited in *Fetz v. Clark*, 7 Minn. 224, where it is held that in case of joinder, plaintiff must recover against all or none, the court saying: "In California, the courts seem to have decided both ways: *Rowe v. Chandler*, 1 Cal. 167; *Sterling v. Hanson*, 1 Cal. 478." The facts, however, do not justify this remark as to the principal case, except to the extent of the rule therein above stated. In this citing case the action was against several as partners.

1 Cal. 481-485. BROOKS v. MINTURN.

Pleadings.—Answer waives demurrer previously interposed, p. 481.

Cited in *Curtiss v. Bachman*, 84 Cal. 218; *Vantillburgh v. Hamilton*, 2 Mont. 414; *Lonkey v. Wells*, 16 Nev. 275.

Criticised in *Reynolds v. Lincoln*, 71 Cal. 190, as not the later practice.

See ante, *Pierce v. Minturn*, 1 Cal. 470, where the last four citing cases are considered upon this point.

Principal Undisclosed may sue, though agent contracts in his own name, p. 482.

Cited in *St. Louis etc. Ry. Co. v. Thatcher*, 13 Kan. 567, where the same rule is declared; *Chandler v. Coe*, 54 N. H. 572, where the rule as applied to written contracts not under seal is declared to be fully recognized in the cases there cited.

Demurrage.—Lay days include Sundays no custom existing to the contrary. Working lay days in the contract exclude Sundays and holidays, p. 483.

Cited in *Branch v. Wilmington etc. R. R. Co.*, 77 N. C. 354, where a penalty was prescribed by statute at so much per day for delay in local shipments beyond a certain number of days and Sunday was held one of the days of permitted demurrage; *Pederson v. Eugster*, 14 Fed. Rep. 422, where the rule in the principal case was applied to "working days" in a charter party.

Charterer is not liable for demurrage when vessel is detained by United States revenue officers, pp. 483, 484.

Cited in *Holyoke v. Depew*, 2 Ben. 342, where the vessel had been quarantined and the authorities prohibited the loading of certain cargo. The charter-party contained no exception of restraints of princes, and it was held that the vessel and not the charterer must bear the loss.

1 Cal. 485-487. **PUGH v. GILLAM.**

State Courts May Take Jurisdiction of action between foreigners as in case of suit of seamen against master for wages for wrongful discharge here, both being foreigners, p. 486.

See note to *Eingartner v. Steel Co.*, 59 Am. St. Rep. 871, on Transitory Actions. Note to 13 Am. Dec. 568, as to actions in tort between foreigners upon the high seas.

1 Cal. 488-515. **PANAUD v. JONES.**

Will.—Two witnesses were sufficient to a will by custom of California, p. 500.

Cited in *Castro v. Castro*, 6 Cal. 160, to the same point; *Tevie v. Pitcher*, 10 Cal. 478, where it is said the force of custom as to the execution of wills is recognized; *Emerie v. Alvarado*, 64 Cal. 565, as to the sufficiency of the execution and attestation of a will; *Gildersleeve v. Mining Co.*, 6 N. Mex. 42, sustaining sufficiency of execution and attestation of will, executed according to Mexican custom. See, also, note to *Stevens v. Leonard*, 77 Am. St. Rep. 460, 466, on attestation of wills.

Wills were nuncupative and sealed under Mexican law, p. 501.

Cited in *Castro v. Castro*, 6 Cal. 160, to the same point.

Custom and Precedent.—Where authorities conflict, that construction will be adopted which accords with former conditions of things and which will best effectuate the parties' intentions, p. 505.

Cited in the Matter of Will of Warfield, 22 Cal. 71, to the point that "courts feel themselves constrained to uphold, where it is possible, contemporaneous interpretation of statutes, under which interpretation rights of property have for many years been acquired; *Donner v. Palmer*, 31 Cal. 522, and applied as to granting and recording alcaides' grants.

Custom Acquires the Force of Law and may be in opposition to law and according to law, p. 498.

Cited in *Castro v. Castro*, 6 Cal. 161, to the same point; *O'Donnell v. Glenn*, 9 Mont. 465, where the language of the principal case on this point is quoted; *Slidell v. Grandjean*, 111 U. S. 421, where it is said that the usages and customs prevailing in the province of Louisiana affecting the alienation of lands are to be respected in considering the rights of grantees of the former government; that usages long established and followed have to a great extent the efficacy of law.

Evidence of a Custom as to execution of wills is admissible, p. 500.

Cited in *Adams v. Norris*, 23 How. 365, to the same point; *Castro v. Castro*, 6 Cal. 161, to the same point.

Alcalde may be subscribing witness to will, p. 504.

Cited in *Tevie v. Pitcher*, 10 Cal. 478, where a *sindico* attested.

Will dictated and executed in presence of alcalde, certified to by him, signed by him and two witnesses, and registered by him, becomes a public writing, and needs no further probating, pp. 506, 507.

Cited in *Adams v. De Cook*, 1 McAll. 255, as supporting the proposition that there must be some connection between the judicial authority and the execution of wills.

Wife Becomes Owner of One-half the Common Property on the death of her husband under the Mexican law, p. 515.

Cited in *In re Buchanan's Estate*, 8 Cal. 510, to same point; *Scott v. Ward*, 13 Cal. 470, where it is declared not to conflict with *In re Buchanan's Estate*, 8 Cal. 507; *Packard v. Arellanes*, 17 Cal. 536, where the construction in the principal case of the act of April, 1850, section 11, is approved; also extended note as to community property in 86 Am. Dec. 628-630.

Wife's Interest in Community Property during marriage is a revocable and feigned dominion in and possession of one-half, while the husband during marriage is the real owner and has irrevocable dominion, pp. 515-517.

Cited in *Mayberry v. Whittier*, 144 Cal. 325, stating nature of interest on division of community property on divorce; *Spreckels v. Spreck-*

els, 116 Cal. 346, quoting from the court in the principal case on this point; also, in extended note as to community property in 86 Am. Dec. 628, 630.

Husband and Wife—Common Property.—Property acquired by the husband after marriage was common property under the Mexican law and that so acquired subsequently is by statute, p. 514.

Cited in *In re Buchanan's Estate*, 8 Cal. 510, to the same point; *Dye v. Dye*, 11 Cal. 169, where the court says: "If in some respects the Mexican law was the same as the statute it was not, we believe, in all respects, nor was it in respect to all property acquired by the parties during the coverture, within the Mexican dominions;" also, in extended note as to community property in 86 Am. Dec. 628-630.

Husband had control and disposition of common property on death of wife, under the Mexican law, p. 514.

Cited in *Scott v. Ward*, 13 Cal. 470, where it is declared not to conflict with *In re Buchanan's Estate*, 8 Cal. 507; also in *Noe v. Card*, 14 Cal. 612, but not considered because deemed unnecessary for the determination of the case.

Estate in Law consists of residue after all debts have been paid, and all community property is liable for such debts, p. 517.

Cited in *Frankel v. Boyd*, 106 Cal. 613, to the same point.

Common Property does not vest on mother's death in children; their interest is not perfected till after the father's death, under the Mexican law, and the father might dispose of said property, p. 517.

Cited in *Scott v. Ward*, 13 Cal. 470, where it is declared not in conflict with *In re Buchanan's Estate*, 8 Cal. 507. Cited in dissenting opinion to *Yancy v. Batte*, 48 Tex. 74, where the father sold community property after the death of his wife, and the heirs were permitted to recover one-half the land.

Denied in *Thompson v. Craig*, 24 Tex. 598, 599, where the different provisions of the Spanish law are considered fully, and a doctrine stated in conflict with that of the principal case.

1 Cal. 519-533. PEOPLE v. FITCH.

Power of Governor to Fill Vacancies in office is limited by the period when the people or the legislature can elect or appoint, on the arrival of which his power ceases, and the right of appointment returns to the original appointing power, p. 536.

Cited in *People v. Mizner*, 7 Cal. 525, a case where the power to appoint was vested in the governor with the advice and consent of the senate, and the incumbent's term expired during recess of the legislature and the governor appointed a successor and it was held that the appointee could hold for the full term subject to defeat by the nonconcurrence of the senate; *People v. Langdon*, 8 Cal. 15, where the

language of the principal case is quoted as follows: "The right of the legislature to elect and control the state printer cannot be defeated by any inference in favor of the appointing power of the governor." The action was quo warranto to try title to office of resident physician of insane asylum; *People v. Stratton*, 28 Cal. 392, where it was held that, if the law provides a mode for filling a vacancy in an office other than by appointment by the governor, the latter has no power to appoint to the vacancy; *Weeks v. Gamble*, 13 Fla. 18, where the construction of the constitution as to the governor's power to fill an office until the next election was held not to mean the unexpired term of office; *Kimball v. Alcorn*, 45 Miss. 156, where it was held that the governor under a similar law could not fill a vacancy to office during the session of the legislature; *State ex rel. Holmes v. Finnerud*, 7 S. Dak. 243, but said not to aid in the solution of the question before the court as the constitutional provision as to filling vacancies differed in the principal case; cited also in *Commissioners v. George*, 104 Ky. 270; also in extended note to 13 Am. St. Rep. 129, 130, covering the principles involved in this principal case.

Power to Appoint to Office includes the power to fill vacancies unless otherwise expressly provided by law, p. 536.

Cited in *Gorham v. Campbell*, 2 Cal. 137, to exactly the same point, a case where the justices of the peace failed to elect associate justices of the court of sessions and the county judge appointed for that term; *Sawyer v. Haydon*, 1 Nev. 80, where the language of the court in the principal case is quoted.

Failure of Government to Approve official bond does not vacate office where incumbent has, within proper time, given a sufficient bond and deposited it in proper office, pp. 520, 536.

Cited in *People v. Scannell*, 7 Cal. 440, to exactly this point.

Quo Warranto to try title to office was brought, judgment below was reversed, and the respondent was ousted, pp. 520, 536.

Cited in *People v. Olds*, 3 Cal. 177, 58 Am. Dec. 406, as supporting the proposition that not mandamus but quo warranto is the proper remedy to try title to office; that the statute provides a plain, speedy, and adequate remedy. Except by implication, however, the principal case goes no further than as above noted.

Contemporaneous Legislative Exposition fixes construction of a statute, p. 536.

Reaffirmed in *Morton v. Broderick*, 118 Cal. 484, and *Lord v. Dunster*, 79 Cal. 485, to exactly the same point and applied also to the constitution.

VOLUME II.

By CHARLES T. BOONE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

2 Cal. 17-24. **GRISWOLD v. SHARPE.**

Practice.—On a trial by the court, the mode of reserving questions of law is to ask the court to decide them, and note the refusal in a bill of exceptions, p. 23.

Approved as the proper rule of practice in this respect, in *Estate of Page*, 57 Cal. 239; *Wilson v. Wilson*, 64 Cal. 94. Rule applied in *Spence v. Scott*, 97 Cal. 182, where the only question on appeal was whether the court below erred in striking out certain portions of the answer.

Attachment Lies only in cases specified in statute, p. 24.

Cited in *Smith v. Armour*, 1 Penn. 365, denying writ in action on tort.

Attachment.—An order wrongfully refusing to dissolve an attachment will be reversed on appeal, p. 24.

Approved in *Taaffe v. Rosenthal*, 7 Cal. 518. But overruled in *Allender v. Fritts*, 24 Cal. 448, holding that under present practice, on an appeal from a final judgment, the court cannot review an order refusing to dissolve an attachment. Criticised in *Williams v. Glasgow*, 1 Nev. 537, but the rule applied in the particular case.

2 Cal. 25-31. **McCANN v. BEACH.**

Evidence.—Best evidence nature of case will admit of must be adduced, p. 31.

Followed as authority in *Macy v. Goodwin*, 6 Cal. 581.

Sufficiency of Preliminary Proof of loss of instrument, p. 31.

Approved in *Bagley v. Eaton*, 10 Cal. 147, 148, holding that the testimony may be given orally or offered by affidavit. Cited as embodying the correct principle as to nature of search for lost instrument, in *Folsom v. Scott*, 6 Cal. 462.

Deposition of Witness residing in the county where suit is pending can only be taken by a commissioner for such county, pp. 29, 30.

Approved and followed in *McCann v. Beach*, 2 Cal. 33. Examined in *Darby v. Heagerty*, 2 Idaho, 261, and said to be no longer authority to the point that statutory provisions for depositions must be strictly construed.

2 Cal. 34. JOHNSON v. CARRY.

Garnishee.—Liability dates from service of affidavit and writ, p. 36.

Cited in *Broadway etc. Co. v. Wolters*, 128 Cal. 167, holding sheriff's return of service not sufficient alone as basis for judgment against garnishee.

2 Cal. 39-53. FOWLER v. SMITH. S. C. again on a rehearing granted, 2 Cal. 568-571, affirming the judgment of the court below.

Instructions upon abstract questions are properly refused, p. 45.

Cited in *Richards v. Fanning*, 5 Or. 359, sustaining refusal where evidence not in record.

Pleading—Eviction.—In action for purchase money of land, conveyed by deed without covenants, want of title in the vendor is no defense, unless vendee has been evicted, p. 44.

Examined in *McGary v. Hastings*, 39 Cal. 364; S. C. 2 Am. Rep. 457, and dissented from, so far as it is held necessary that the eviction should be by process of law, consequent on a judgment. It is cited in argument of counsel to the point that the doctrine of caveat emptor will not be applied to protect the vendor, except in cases free from fraud, in *Wright v. Carillo*, 22 Cal. 598.

International Law.—Laws of a conquered or ceded territory remain in force until changed by the new sovereign, p. 48.

Cited in dissenting opinion of Rhodes, J., in *Ryder v. Cohn*, 37 Cal. 92, acknowledging the full force of the reasons and suggestions advanced.

2 Cal. 54-56. WILSON v. MIDDLETON.

Appeal—Record.—Errors at trial must be reviewed on bill of exceptions, p. 56.

Cited in *Spence v. Scott*, 97 Cal. 182, as to order striking out parts of answer.

Vindictive Damages may be given in civil action for a personal injury, though the act be punishable criminally, p. 56.

Cited as authority to this effect, in *Bundy v. Maginess*, 76 Cal. 534; and so, in the following cases: *Smith v. Bagwell*, 19 Fla. 126; S. C. 45 Am. Rep. 18; *McWilliams v. Bragg*, 3 Wis. 431; *Brown v. Evans*, 8 Sawyer, 488; S. C. 17 Fed. Rep. 914, 915; *Austin v. Wilson*, 50 Am.

Dec. 773, note, reviewing the authorities at length; *Baldwin v. Fries*, 46 Mo. App. 295. The ruling is also referred to and considered in the following cases, in which the allowance of exemplary damages is very fully discussed: *Hendrickson v. Kingsbury*, 21 Iowa, 391; *Reddin v. Gates*, 52 Iowa, 214; *Pegram v. Stortz*, 31 W. Va. 268, 279, 287.

2 Cal. 57-58. **MONTGOMERY v. LEAVENWORTH.**

Appeal cannot be Prosecuted by a stranger to the record, p. 58.

Cited as authority to this proposition, in *State v. Florida*, etc. R. R. Co., 15 Fla. 730.

2 Cal. 59-60. **EX PARTE WATSON.**

Habeas Corpus.—Proceedings to effect return of fugitives from justice, sustained, p. 60.

Cited as an authority sustaining the principle upon which the conduct of judicial tribunals in reference to the return of fugitives is authorized, in *Morrell v. Quarles*, 35 Ala. 550.

2 Cal. 60-64. **HOTALING v. CRONISE.**

Mechanics' Lien.—Describing the property with convenient certainty in the lien notice is sufficient, p. 63.

Ruling approved as authority in the following analogous cases: *Tibbits v. Moore*, 23 Cal. 213, where the description was "a quartz mill, being at or near the town of Scottsville in Amador county, known as Moore's New Quartz Mill." So. in *Tredinnick v. Mining Co.*, 72 Cal. 81, the description being in substance the same. Also, in *Williamette S. M. Co. v. Kremer*, 94 Cal. 210; *Lumber Co. v. Washburn*, 29 Oreg. 168; *Taylor v. Netherwood*, 91 Va. 92. Doubted in *Drexel v. Richards*, 48 Neb. 738, where the property was described as the "Bartlett & Downing Block in Kearney, Buffalo county, Nebraska," and the description held insufficient.

Same.—Transfer of property before the lien is filed for record cannot affect the lien, p. 64.

Cited as authority to this effect, in *Kellenberger v. Boyer*, 37 Ind. 192. Also cited in *In re Coulter*, 2 Sawyer, 49; S. C. 5 Bank. Reg. 70, holding that under the lien act of Oregon, the commencement of proceedings in bankruptcy does not impair or affect the lien or the right of the lien creditor to continue it by filing the notice.

Statutes in Derogation of Common Law should be construed strictly, p. 63.

Referred to as authority on statutory construction, in *Galbreath v. Davidson*, 25 Ark. 494.

2 Cal. 64-67. HAIGHT v. JOYCE, 56 Am. Dec. 311.

Negotiable Instruments.—Notes given for a gaming consideration are valid in the hands of a bona fide indorsee, p. 66.

Rule applied in the similar case of *Thorne v. Yontz*, 4 Cal. 323; so where the note was procured from the maker through fraud, in *Bedell v. Herring*, 77 Cal. 574; S. C. 11 Am. St. Rep. 309; approved in *Boughner v. Meyer*, 5 Colo. 75; S. C. 40 Am. Rep. 141; In re *Coulter*, 2 Sawy. 42, Fed. Cas. No. 3,276; and cited as authority in *Bedell v. Herring*, 11 Am. St. Rep. 309, note; *Monroe v. Smelly*, 78 Am. Dec. 548, note.

2 Cal. 68-71. THOMPSON v. ROWE.

Taxation.—Under the act of 1851, the Court of Sessions was invested with power to tax for county purposes, p. 71.

Distinguished in *Laforge v. Magee*, 6 Cal. 285, holding that a board of supervisors has no power to set apart a portion of the revenue of the county, as a fund for current expenses.

2 Cal. 74-79. MULDROW v. NORRIS, 56 Am. Dec. 313; S. C. again, 12 Cal. 331.

Arbitration and Award.—Arbitrators may make award on equitable principles, p. 77.

Cited in *In re Connor*, 128 Cal. 282, where cited also on point that arbitrators need not state reasons for award, and at page 281 on question of review of errors committed by arbitrators on hearing.

Arbitration and Award.—Courts of equity will set aside awards for fraud, mistake, or accident, p. 79.

Explained in *Tyson v. Wells*, 2 Cal. 130, as deciding that the court will not disturb the award of an arbitrator, or report of a referee, unless the error which is complained of, whether it be of law or fact, appears on the face of the award. So, in *Headley v. Reed*, 2 Cal. 325; *Grayson v. Guild*, 4 Cal. 125; *Peachy v. Ritchie*, 4 Cal. 207. Cited as authority, holding that an award cannot be impeached because contrary to law and evidence, in *Carsley v. Lindsay*, 14 Cal. 394. Also cited as authority that equity will interfere and set aside an award obtained by the fraud or misbehavior of one of the parties, in *Craft v. Thompson*, 51 N. H. 544. Cited as to grounds for setting aside awards in the following cases: *Railroad Co. v. Moore*, 73 Am. Dec. 786, note; *Remelee v. Hall*, 76 Am. Dec. 145, note; *Davis v. Cilley*, 84 Am. Dec. 90, note; *Chambers v. Crook*, 94 Am. Dec. 642, note; *Jackson v. Roane*, 35 Am. St. Rep. 242, note; *In re Curtis*, 42 Am. St. Rep. 208, note.

Same.—An award bad in part may be enforced for the part that is good, p. 79.

Approved as authority in *Williams v. Walton*, 9 Cal. 146; explained

in *Muldrow v. Norris*, 12 Cal. 345, 346, holding that the award, as left after the decision in the principal case, was insufficient to support an action.

Damages.—Contemplated and contingent profits cannot be allowed as damages, p. 78.

Cited in *Crow v. Irrigation Co.*, 130 Cal. 314, as to damages for breach of contract to deliver water. See *Worcester v. Manufacturing Co.*, 66 Am. Dec. 219, note; *Van Winkle v. Wilkins*, 12 Am. St. Rep. 303, note; *Hitchcock v. Knights of Maccabees*, 43 Am. St. Rep. 428, note.

2 Cal. 80-81. **McDOUGAL v. ROMAN.**

Mandamus.—Judgment for a mandamus against the state treasurer, affirmed without costs, p. 81.

Cited in *Power v. May*, 123 Cal. 152, but held not to sustain denial of costs of mandamus; cited as an instance recognizing the right to sue a state officer, when the state cannot be sued, to require the performance of a mere ministerial duty, in *Railroad Co. v. Miller*, 19 W. Va. 416.

2 Cal. 81-82. **GAHAN v. NEVILLE.**

Gaming.—Money won at play cannot be recovered at common law, p. 81.

Cited and applied in *Johnson v. Russell*, 37 Cal. 675, where money was paid over according to the terms of a wager upon the result of an election.

2 Cal. 86-87. **RUSSELL v. FORD.**

One Partner cannot Sue his Copartner for a partnership transaction without praying for an account and settlement of the partnership business, p. 87.

Cited as authority in support of this rule, in *Stevens v. Baker*, 1 Wash. Tr. 317; *Harris v. Harris*, 39 N. H. 53. So, in *Haynes v. Short*, 88 Ala. 566, holding that the prayer should have been for the settlement of the whole partnership, and not for a settlement of one item that entered into the partnership account. Cited to the point that one mining partner cannot sue another in an action at law, in *Skillman v. Lachman*, 83 Am. Dec. 110, note.

Reversal.—If complaint fails to show good cause of action, judgment will be reversed, p. 87.

Cited in *Ketchum v. Crippen*, 37 Cal. 228, where the complaint was dismissed because of failure to show a cause of action.

2 Cal. 88-90. **INGRAHAM v. GILDEMEESTER.**

Judgment.—In suit against partners, judgment can be taken only against those served with process, p. 89.

In such case the judgment obtained against the partnership is uniformly considered void so far as the interest of the partner not served is concerned; *Wood v. Watkinson*, 44 Am. Dec. 570, where the principal case and other authorities are considered. Cited as authority that on appeal a judgment by default will be reversed, when the record shows no service of notice, and no appearance by the defendant, in *Schloss v. White*, 16 Cal. 68; and is cited to nearly the same effect, in *Hunt v. Ellison*, 32 Ala. 207. Affirmed on rehearing, 2 Cal. 483.

2 Cal. 90-92. BOTTOMLY v. RECTOR OF GRACE CHURCH.

Mechanics' Lien.—In suit to enforce, it must be averred and proved that the lumber was expressly furnished for the building in question, p. 91.

Followed in *Houghton v. Blake*, 5 Cal. 240; approved and applied in *Holmes v. Richet*, 56 Cal. 310; S. C. 38 Am. Rep. 54; *Patent Brick Co. v. Moore*, 75 Cal. 211; *Cohn v. Wright*, 89 Cal. 88; *Roebing Sons Co. v. Irrigation Co.*, 99 Cal. 490; *Gordon v. Canal Co.*, 1 McAllister, 515; and *Hill v. Bowers*, 45 Kan. 593, case of a claim to a lien upon land for material furnished for fencing. Referred to in argument of counsel, in *Rogers v. Currier*, 13 Gray, 132; also referred to in *Odd Fellows' Hall v. Masser*, 64 Am. Dec. 679, in note on the subject.

Mechanics' Lien Law, being in derogation of the common law, must be construed strictly, p. 97.

Approved in *McAlpin v. Duncan*, 16 Cal. 127; *Davis v. Livingston*, 29 Cal. 286; *Eclipse Manuf. Co. v. Nichols*, 1 Utah, 257; *Schackleford v. Beck*, 80 Va. 578; and *Chapin v. Paper Works*, 79 Am. Dec. 273, note, where numerous instances of construction are given.

2 Cal. 92-94. SMITH v. POLACK.

Reference.—Consent of party to order of reference must be in writing, or entered on the minutes, p. 94.

Approved and applied in *Benham v. Rowe*, 2 Cal. 261, and held not to conflict with the decision in *Russell v. Elliott*, 2 Cal. 245. Explained as intended to apply to a case at common law, in which the party was entitled to a jury trial, and not to extend to cases in equity, in *Smith v. Rowe*, 4 Cal. 7.

Jury Trial.—Right of trial by jury cannot be waived by implication, p. 94.

Affirmed in *Platt v. Havens*, 119 Cal. 248.

Attorney and Client.—Agreement of attorney to conclude client must be in writing, p. 94.

Cited in *Board of Commissioners v. Younger*, 87 Am. Dec. 167, note, where the power of an attorney to bind his client is fully discussed.

2 Cal. 95-99. LEECH v. WEST.

Appeal.—Right to have case stated is waived by failure to frame a case within twenty days after appeal taken, p. 98.

Distinguished in *People v. Martin*, 6 Cal. 478, holding that a party's right to appeal is not defeated by the fact that a bill of exceptions was not signed until more than ten days after the trial. Cited as authority, for dismissing appeal for failure to file transcript in thirty days, in *Mill Company v. Johnston*, 5 Utah, 149. So, in *Seeley v. Sebastian*, 3 Oreg. 563, holding that an order enlarging time to make and serve statement must be made within the time prescribed by law. So, in *Clark v. Crane*, 57 Cal. 633, with respect to an order extending the time to give notice of a motion for a new trial.

2 Cal. 99-100. THOMPSON v. MONROW. 56 Am. Dec. 318.

Common Law.—Is presumed to be in force in other states, unless the contrary be shown, p. 100.

Cited as authority to this point, in *Flagg v. Baldwin*, 38 N. J. Eq. 223; S. C. 48 Am. Rep. 311; *Houghtaling v. Ball*, 59 Am. Dec. 333, note; *Blystone v. Burgett*, 68 Am. Dec. 661, note; *Rape v. Heaton*, 76 Am. Dec. 280, note; *Connor v. Trawick*, 79 Am. Dec. 62, note; *Lanfear v. Mestier*, 89 Am. Dec. 673, note; *City of Parsons v. Lindsay*, 13 Am. St. Rep. 292, note; *Commonwealth v. Graham*, 34 Am. St. Rep. 258, note; *Burdiet v. Railroad Co.*, 45 Am. St. Rep. 549, note.

Interest is Not Recoverable on judgment of another state without proof that the law of such state allows interest thereon, p. 100.

Approved as authority in *Cavender v. Guild*, 4 Cal. 253; *Lanfear v. Mestier*, 89 Am. Dec. 674, note; *Olson v. Veazie*, 43 Am. St. Rep. 858, note.

Interest.—At common law, judgments do not carry interest, p. 100.

Cited as authority to this point in *Crone v. Dawson*, 19 Mo. App. 220. Also, in *Bensimer v. Fell*, 29 Am. St. Rep. 791, note, where it is added that this rule has been altered in most, or perhaps in all, of the states.

Appeal.—Appellate court will presume in favor of judgment below, unless the record clearly shows error, p. 100.

Approved as authority in *Federico v. Hancock*, 1 Ariz. Ter. 513; *Barber v. Hall*, 60 Am. Dec. 303, note; *Hyde v. State*, 67 Am. Dec. 640, note; and is cited to the point that the rulings and judgment of the trial court are presumed correct, in *Searls v. Knapp*, 49 Am. St. Rep. 875, note.

General citation: *Schroeder v. Boyce*, 127 Mich. 35.

2 Cal. 101-102. **BUZZELL v. BENNETT.**

Infancy is a Good Defense to an action on an executory contract, though the defendant does not disaffirm on coming of age, p. 102.

Cited as authority in *Craig v. Van Bebber*, 18 Am. St. Rep. 674, note, adding the qualification, provided the infant does not retain the specific consideration.

2 Cal. 103-105. **GLADWIN v. STEBBINS.**

Ejectment.—It is sufficient for the plaintiff to aver that he was lawfully entitled to the possession of the premises, p. 105.

Cited in *Jones v. Memmott*, 7 Utah, 341, 343, as overruled by *Payne v. Treadwell*, 16 Cal. 245. Overruled as to this point in *Payne v. Treadwell*, 5 Cal. 312; *Same v. Same*, 16 Cal. 246, holding that the averment is clearly a mere statement of a conclusion of law.

Mere Trespasser is not entitled to notice to quit, p. 105.

Cited in *Clark v. Missouri etc. Co.*, 59 Neb. 60, applying rule to action for rents and profits against trespasser. See *Stedman v. McIntosh*, 42 Am. Dec. 135, note.

2 Cal. 106-107. **LIGHTSTONE v. LAURENCEL.**

Appeal.—Judgment of affirmance for failure of appellant to appear will be set aside, if he had not actual notice of argument, p. 106.

Examined and referred to with approval, in *Lovett v. State*, 29 Fla. 396.

2 Cal. 107-114. **BILLINGS v. BILLINGS.** 56 Am. Dec. 319.

Fraud.—Question of fraudulent intent is one of fact, p. 113.

Cited as authority to this point, in *Linn v. Wright*, 70 Am. Dec. 291, note; *Brown v. Mitchell*, 11 Am. St. Rep. 757, note; *Mooney v. Davis*, 13 Am. St. Rep. 431, note.

Insolvency.—Power to assignee to sell on credit is presumptive evidence of fraud, p. 114.

So cited in *Hutchinson v. Lord*, 60 Am. Dec. 389, note; *Keep v. Sander-son*, 60 Am. Dec. 406, note. Cited to the point that a power given to the trustee to sell on credit will not per se vitiate a deed of trust, in *Kyle v. Harveys*, 25 W. Va. 728; and such is the doctrine maintained in West Virginia. *Id.*

Fraud.—Where the law declares the facts conclusive evidence of fraud, a verdict against such conclusion will be set aside; but if the facts are merely presumptive evidence of fraud, the jury may find against the presumption, p. 114.

Construed and adhered to in *Smith v. Morse*, 2 Cal. 541, 542, a case

declared to be precisely similar. Also cited as authority in *Chenery v. Palmer*, 6 Cal. 122; S. C. 65 Am. Dec. 495. Cited on subject of fraud inferred from circumstances, in *McDaniel v. Baca*, 56 Am. Dec. 342, note; who to determine question of fraud, in *Chenery v. Palmer*, 65 Am. Dec. 496, note; *Mills v. Howeth*, 70 Am. Dec. 333, note; *Williams v. McFadden*, 11 Am. St. Rep. 350, note.

2 Cal. 118-120. **BROWN v. GRAVES.**

Appeal.—No review of facts on appeal, without a motion for new trial in court below, p. 120.

Followed in *Smith v. Phelps*, 2 Cal. 121. Approved in *Brown v. Tolles*, 7 Cal. 399, but declared otherwise as to errors of law, occurring in the court below. Approved and adopted as the correct practice, in *Whitmore v. Shiverick*, 3 Nev. 303.

2 Cal. 122-131. **TYSON v. WELLS.**

When contract of sale is complete before delivery, p. 125.

Approved in *Mason v. Lievre*, 145 Cal. 522, where corporate stock sold as result of correspondence and there was complete offer and acceptance, with direction to draw on vendor for price, without directions as to delivery, and vendor set apart stock as requested, sale was complete.

Reference.—Reference statute is in aid of the remedy by arbitration, and does not alter its principles, p. 130.

Approved in *Headley v. Reed*, 2 Cal. 325, holding that the report of a referee has the same legal effect as the award of an arbitrator.

Appeal.—Award of arbitrator or report of referee will not be disturbed on appeal, except for error appearing on the face thereof, p. 131.

Approved in *Grayson v. Guild*, 4 Cal. 125, and applied in case of the report of a referee. Cited in *Gibson v. Gibson*, 24 Neb. 411, where it is said that "while this rule is pertinent to the California courts alone, and may be irrelevant beyond, there has been no occasion for its disregard in this case." Also cited in *Muldrow v. Norris*, 56 Am. Dec. 317, note.

Reference.—Exceptions must be taken to the rulings of the referee during the trial, and certified by him, p. 131.

Approved as correct rule of practice, in *Phelps v. Peabody*, 7 Cal. 52, 53; *In re Connor*, 128 Cal. 281, holding errors of arbitrators not reviewable on ex parte affidavit.

Same—Appeal.—If no exceptions be embodied in the report, showing that the referee erred in fact, nor the rule of law pointed out by which he arrived at his conclusions, the court cannot disturb the report, and an order granting a new trial will be reversed, p. 131.

Overruled in *Cappe v. Brizzolara*, 19 Cal. 608, holding that the doctrine of *Notes Cal. Rep.*—5

trine thus laid down is in direct repugnance to the statute relating to new trials, and cannot be maintained.

2 Cal. 132-133. **REISS v. BRADY.**

Appeal.—Order improperly dissolving an attachment will be reversed, p. 132.

Referred to in *Newell v. Whitwell*, 16 Mont. 263, as recognizing the prevailing procedure on motion to dissolve an attachment. So, in *Harmon v. Jenks*, 84 Ala. 77. Criticised in *Williams v. Glasgow*, 1 Nev. 537, but adopted as a rule of practice, and as authority for the review of the action of the court below in dismissing the attachment in the case.

2 Cal. 135-138. **PEOPLE v. CAMPBELL.**

Office and Officers.—An election is not defeated by the neglect of an officer to perform a mere ministerial duty, p. 137.

Cited as sustaining the general rule, that "when time is prescribed to a public body in the exercise of a function in which the public is concerned, the period designated is not of the essence of the authority, but is a mere directory provision," in *Jacobs v. Murray*, 15 Cal. 223. Also cited as authority in *Taylor v. Taylor*, 10 Minn. 113, to the same point.

2 Cal. 138-143. **SALMON v. HOFFMAN.** 56 Am. Dec. 322.

Vendor's Lien.—A vendor has a lien on the land sold, for the purchase money, if he has taken no security for its payment, though the title has been conveyed, p. 142.

Affirmed on the principle of *stare decisis* in *Cahoon v. Robinson*, 6 Cal. 226, and holding that the lien attaches on the land in the hands of the administrator of the purchaser. Doctrine approved in *Hill v. Grigsby*, 32 Cal. 59; and affirmed in *Tripp v. Duane*, 74 Cal. 91. Referred to as treating of the nature of the vendor's lien, generally, in *Baum v. Grigsby*, 81 Am. Dec. 156, note; *Moore v. Anders*, 60 Am. Dec. 559, note; *Walton v. Hargroves*, 97 Am. Dec. 432, note.

Same.—Where title is not conveyed, vendor's position is analogous to that of mortgagee, p. 143.

Approved in *Willis v. Wozencraft*, 22 Cal. 617. Explained and limited to the precise ruling stated, in *Cent. Pac. R. R. Co. v. Mudd*, 59 Cal. 591. Cited as authority in *Moriarty v. Ashworth*, 19 Am. St. Rep. 205, note.

Same.—Vendor may insist on payment of purchase money as condition of delivering deed, p. 141.

Referred to as authority for the proposition that the vendee need not aver tender of deed to vendor for execution in his plea to an action

by the vendor for the purchase money, in *Young v. Daniels*, 63 Am. Dec. 486, note.

Same.—Vendee in possession cannot reclaim purchase money on account of defective title, unless he was evicted or disturbed, p. 143.

Cited in *Halle v. Smith*, 128 Cal. 419, further considering right of vendee to recover for value of improvements made; as authority for the proposition that a vendee of land, having entered into possession, is estopped from denying his grantor's title, in *Walker v. Sedgwick*, 8 Cal. 403; *Hicks v. Lovell*, 64 Cal. 20; S. C. 49 Am. Rep. 682; *Relife v. Relife*, 73 Am. Dec. 469, note; and is referred to as authority on the subject of the vendee's right to relief on ground of defective title, in *Fernandez v. Dunn*, 65 Am. Dec. 608, note; *Cooper v. Singleton*, 70 Am. Dec. 340, note.

Deed Executed by Agent in Own Name, though inoperative as a conveyance, will be good as an agreement, and the principal may be decreed to convey, p. 142.

Approved as authority in the similar case of *Butler v. Kaulback*, 8 Kan. 676. Referred to on subject of suit by principal on contract made by agent, in *Machias Hotel Co. v. Coyle*, 58 Am. Dec. 714, note; and referred to as distinguishing the case of *Fisher v. Salmon*, 1 Cal. 413, in 54 Am. Dec. 299, note.

Party Cannot ask Rescission of Contract where its completion was defeated by his own fault, p. 142.

Cited as authority to this point, in *Gunther v. Ullrich*, 33 Am. St. Rep. 37, note; *Redish v. Smith*, 45 Am. St. Rep. 786, note; and is referred to as to rescission of contract in equity, in *Goshen Township v. Shoemaker*, 80 Am. Dec. 390, note.

Caveat Emptor Applies in sales of land in absence of fraud, warranty, etc., p. 143.

Cited to the point that purchaser buys at his own risk if put on his guard that title is defective, in *Herod v. Blackburn*, 94 Am. Dec. 51, note.

2 Cal. 145-149. **KILBURN v. RITCHIE.** 56 Am. Dec. 325.

Appeal.—Appellate court will presume that declarations were properly excluded, unless the record shows their admissibility, p. 148.

Cited as bearing on the subject of the admissibility of declarations of third persons, in *Wetmore v. Mell*, 59 Am. Dec. 610, note; *Commonwealth v. Harwood*, 64 Am. Dec. 50, note.

Same.—Presumption is in favor of judgment below, unless the record clearly shows error, p. 148.

Approved as authority to this point, in *Morgan v. Hugg*, 5 Cal. 410; *Federico v. Hancock*, 1 Ariz. Ter. 513.

Same.—Nonprejudicial error is no ground for reversal of judgment, p. 148.

Cited in *Seabury v. Stewart*, 58 Am. Dec. 260, note; and in *Chase v. Washburn*, 59 Am. Dec. 630, note, as authority to the point stated.

Notice to Quit is only Necessary where the relation of landlord and tenant exists, p. 148.

Applied in *Dodge v. Walley*, 22 Cal. 229; S. C. 83 Am. Dec. 63, holding that a grantor in warranty deed, remaining in possession, is not entitled to notice to quit from his grantee. So, in *Joy v. McKay*, 70 Cal. 446, holding that the death of the landlord terminates a tenancy at sufferance or at will, and the tenant holding over it not entitled to notice to quit. Cited as authority on the subject, in *Carroll v. Ballance*, 79 Am. Dec. 361, note.

Setoff.—Defendant who entered under a bond for a deed from the plaintiff, cannot set off his improvements against damages for use and occupation, pp. 148, 149.

Cited as bearing on matter of setoff, in *Moss v. Shear*, 85 Am. Dec. 99, note; and to the point that a mere bond to convey will not ordinarily constitute color of title, in *Tate v. Southard*, 14 Am. Dec. 584, note.

2 Cal. 149. BUCKLEY v. STEBBINS.

Appeal taken Merely for Delay may be dismissed, and damages awarded against appellant, p. 149.

Approved as correct procedure, in *Duncan v. Grady*, 99 Cal. 554; *McFadden v. Dietz*, 115 Cal. 699, in which cases it appeared from uncontradicted affidavits that the appeals were taken for delay.

Appeal may be Dismissed for failure to file transcript, and damages allowed upon dismissal, p. 150.

Referred to as authority in *McFadden v. Dietz*, 115 Cal. 699.

2 Cal. 156-157. GORDON v. ROSS.

Appeal.—Defendant is entitled to an appeal, though the plaintiff recover less than \$200, if costs added to the judgment exceed \$200, p. 157.

Expressly overruled as to this point, in *Dumphy v. Guindon*, 13 Cal. 30; and distinguished, as having been decided under the constitution of 1849, in *Dashiell v. Slingerland*, 60 Cal. 656.

2 Cal. 159-160. BELT v. MEHEN. 56 Am. Dec. 329.

Mistake.—A mistake in the settlement of a partnership will not be corrected in equity, if both parties had equal opportunities of knowledge, and there was no fraud or concealment, p. 160.

Approved as authority in *Currey v. Lawler*, 29 W. Va. 115; *Lewis*

v. Loper, 54 Fed. Rep. 240; Price v. Olcovich, 142 Cal. 50, declining to set aside settlement of partnership affairs under facts stated; Robertson v. Smith, 60 Am. Dec. 238, note; Belknap v. Sealey, 67 Am. Dec. 130, note; McDaniels v. Bank of Rutland, 70 Am. Dec. 414, note; Ames v. Franklinite Co., 72 Am. Dec. 387, note; Adams v. Guerard, 76 Am. Dec. 630, note; Borden v. Railroad Co., 37 Am. St. Rep. 635, note; note to Williams v. Hamilton, 65 Am. St. Rep. 500; Coates v. Buck, 93 Wis. 132, mistake insufficient to justify reformation of order for goods. Referred to in Clouch v. Moyer, 23 Kan. 406, a case of mutual mistake in the settlement of a partnership, in which relief was granted to the complainant.

2 Cal. 161-162. **INGRAHAM v. GILDERMESTER.**

Practice.—Under act of 1851, evidence taken by the clerk in the court below is a substitute for a bill of exceptions or statement, in the absence of such bill or statement, sufficient to enable the court to look into the evidence, p. 161.

Approved in Castro v. Armesti, 14 Cal. 38, but holding that the ruling of the court upon questions of law during the trial, cannot be sought from the testimony as taken down by the clerk, neither under the act of 1850, nor 1851.

2 Cal. 163-165. **FOLSOM v. BARTLETT.**

Negotiable paper.—One who takes a note after maturity takes it subject to equities, p. 164.

Approved as authority in McPherson v. Weston, 85 Cal. 96.

Condition precedent.—Where the purchase price of land is payable in installments, the vendor agreeing to convey on payment of last installment, the tender of a conveyance is a condition precedent to the right to sue, p. 164.

Approved in Hill v. Grigsby, 35 Cal. 662; Rourke v. McLaughlin, 38 Cal. 199, 200. And see Osborne v. Elliott, 1 Cal. 337, 396, and notes thereto, ante.

2 Cal. 165-173. **FOWLER v. PIERCE.**

Mandamus may issue to Compel the Controller of the state to perform a ministerial act imposed upon him by law, p. 173.

Approved in McCauley v. Brooks, 16 Cal. 46, 63; Proll v. Dunn, 80 Cal. 224; Dane v. Derby, 89 Am. Dec. 734, note; Carr v. State, 22 Am. St. Rep. 641, note. Cited in Nougues v. Douglass, 7 Cal. 80, as authority for the proposition, that the act of drawing a warrant, or paying money out of the treasury is, in most cases, merely ministerial, and in such case the officer is amenable to the courts and bound by their orders. Shattuck v. Kincaid, 31 Or. 401, sustaining mandamus for drawing of

warrant for official services where salary fixed by law. And to same effect, in dissenting opinion of Crockett, J., in *Tilden v. Sacramento County*, 41 Cal. 77, in which case it is held that a board of supervisors, in allowing or rejecting a claim, act judicially, and mandamus will not issue to review its judgment.

Statutes.—Court may go Behind the Record Evidence of a statute, and inquire whether it was passed or approved in accordance with the constitution, p. 171.

Commented on in *Sherman v. Story*, 30 Cal. 276, 279; S. C. 89 Am. Dec. 111, where the court say, "possibly the case may be distinguished, but if not, it must be overruled." Denied in *State v. Swift*, 10 Nev. 198; S. C. 21 Am. Rep. 736, and referred to as being overruled by the opinion in *Sherman v. Story*, supra. So, in *People v. Clayton*, 5 Utah, 600, 601, 602; *State v. Jones*, 6 Wash. St. 473; and is also denied in *Pangborn v. Young*, 32 N. J. L. 46. But the case is cited and the ruling approved as settled doctrine in the following decisions: *Jones v. Hutchinson*, 43 Ala. 723; *Black v. Auditor of State*, 26 Ark. 239; *People v. Stearne*, 35 Ill. 139; S. C. 85 Am. Dec. 353; *Coleman v. Dobbins*, 8 Ind. 160; *Brady v. West*, 50 Miss. 79; *State v. McLelland*, 18 Neb. 242; 53 Am. Rep. 819; *Osburn v. Staley*, 5 W. Va. 91; S. C. 18 Am. Rep. 644; *Gardner v. The Collector*, 6 Wall. 510. Cited in *Jones v. Jones*, 51 Am. Dec. 618, 621, note, where the authorities are collected and the matter discussed at length.

Denied in *County of Yolo v. Colgan*, 132 Cal. 267, and referred to as overruled by *Sherman v. Story*, 30 Cal. 276.

Motives or Inducements of Legislators cannot be inquired into by a court of law, p. 168.

Approved in *Harpending v. Haight*, 39 Cal. 202; 2 Am. Rep. 439.

Legislation.—State executive, in approving a statute, acts as a component part of the lawmaking power, p. 172.

Approved in *State v. Deal*, 24 Fla. 308; S. C. 12 Am. St. Rep. 216; and is cited as authority to this point, in *People v. Stearne*, 85 Am. Dec. 361, note.

Same.—Parol evidence is admissible to show when an act was approved by the governor, p. 172.

Denied in *Sherman v. Story*, 30 Cal. 276, 279; S. C. 89 Am. Dec. 111; and *People v. Clayton*, 5 Utah, 600, 601. So, to same effect, in *City of Detroit v. Chapin*, 108 Mich. 138, Grant, J., dissenting, p. 145.

2 Cal. 173-176. CONRAD v. LINDLEY.

Instructions.—Should be given or refused by the court as asked for, p. 176.

Approved in *Jamson v. Quivey*, 5 Cal. 491. Overruled as to restric-

tion of the power of the court in this respect, in *Boyce v. Stage Co.*, 25 Cal. 470.

Specific Performance.—Party seeking to enforce specific performance must show that he has acted in good faith, p. 175.

Approved in *Hicks v. Lovell*, 64 Cal. 20; S. C. 49 Am. Rep. 682; *Alexander v. Jackson*, 92 Cal. 526; *Pickering v. Pickering*, 38 N. H. 407; *Alexander v. Jackson*, 27 Am. St. Rep. 166, note.

Same.—Party who settles upon land under contract to purchase, and who afterward abandons the purchase, disclaiming the vendor's title, cannot claim a specific performance, p. 175.

Cited to the point that when the testimony as to abandonment in such case is conflicting, the findings of the court on the question are conclusive, in *Owen v. Frink*, 24 Cal. 176.

2 Cal. 177-182. **DRAKE v. PALMER.**

Power to Grant New Trials is one of legal discretion, the abuse of which only will justify interference of the appellate court, p. 182.

Followed as authority in *Palmer v. Stewart*, 2 Cal. 353; and cited to this point in *Hastings v. Steamer Uncle Sam*, 10 Cal. 341.

2 Cal. 183-192. **ROSS v. AUSTILL.**

Court will Take Notice of the history of a county as to the times and places of holding courts, p. 192.

Approved as authority to the point that the court will take judicial notice of all such acts and resolutions of the legislature as appear to have been relied on in the court below, in *Groves v. County Court*, 42 W. Va. 592; and is also cited as authority on the subject of judicial notice, in *Lanfear v. Mestier*, 89 Am. Dec. 681, 682, 688, 694, note. Referred to as an instance in which proceedings were held not absolutely void, although court was held at a place not authorized by law, in *Bouldin v. Ewart*, 63 Mo. 335.

Verdict must Conform to the issues, and it is error for the court to go beyond the verdict, and attempt to correct it by the judgment, p. 192.

Approved as authority to this point, in *Shaw v. The State*, 2 Tex. App. 493.

A Continuance is Properly Granted on the ground of surprise, p. 192.

Cited as authority that the party applying for a continuance must show that he used due diligence to procure the attendance of the witness, in *Stevenson v. Sherwood*, 74 Am. Dec. 145, note.

2 Cal. 193-195. POLACK v. HUNT.

Amendments.—The court may allow a summons to be amended so as to make it conform to the law, p. 195.

Distinguished in *Lyman v. Milton*, 44 Cal. 635, in which case there was no counter motion to amend the summons. Explained in *Keybers v. McComber*, 67 Cal. 398. Cited as authority directly in point, in *Pierse v. Miles*, 5 Mont. 552. Approved as correct procedure on motion for amendment of summons, in *Sweeney v. Schultes*, 19 Nev. 56.

2 Cal. 198-236. PEOPLE v. WELLS.

Office.—Vacancy exists only when office has no legal incumbent to discharge its duties, p. 204.

Cited in *Monash v. Rhodes*, 11 Colo. App. 408, discussing power of governor to fill vacancies under local statutes.

Office and Officer.—A constitutional officer cannot be divested of his office, except as prescribed by the state constitution, p. 235.

Approved as to definition of term "vacancy in office," in *People v. Mizner*, 7 Cal. 523. Referred to in dissenting opinion of Field, J., as to when a vacancy can only be said to exist, in *People v. Whitman*, 10 Cal. 48. Ruling approved in *Weeks v. Gamble*, 13 Fla. 21. Cited in *People v. Clayton*, 4 Utah, 433, in support of the rule that if the incumbent has never been legally invested with the office, there is, in legal contemplation, a vacancy in the office.

2 Cal. 241-242. STATE v. WOODLIEF.

Default.—A summons radically defective will not support a judgment by default, p. 242.

Approved as authority to this point, in *Porter v. Hermann*, 8 Cal. 625; *Atchison, etc. R. R. Co. v. Nicholls*, 8 Colo. 191. Cited as authority that in taking judgment by default, the statute should be strictly followed, in *Palmer v. McMaster*, 8 Mont. 195. It is said in *Keybers v. McComber*, 67 Cal. 398, that the principal case came up by a direct appeal from the judgment, and cannot be considered as concluding a case in which the question arises collaterally.

2 Cal. 242-244. STATE v. CRAYCROFT. 56 Am. Dec. 331.

Remedies.—Where a right exists at common law, a new remedy provided by statute is merely cumulative, p. 244.

Approved in *Ward v. Severance*, 7 Cal. 129; *County of Monterey v. Abbott*, 77 Cal. 543; and cited as to this point in *Stiles v. Laird*, 63 Am. Dec. 113, note; *Dawson v. Miller*, 70 Am. Dec. 381, note.

Same.—Action will not lie against keeper of gaming table without license, to recover amount of license, p. 244.

Followed in *People v. Raynes*, 3 Cal. 367. Explained and distinguished in *State v. Poulter*, 16 Cal. 526, which was an action of debt by the state against an auctioneer to recover the duty imposed by statute for selling goods at public auction. Cited in *City of Dubuque v. Railroad Co.*, 39 Iowa, 62, in a discussion of the question as to whether a tax is a debt, and asserting the affirmative.

2 Cal. 245-248. **RUSSELL v. ELLIOTT.**

Mandamus lies to Compel a Judge to enter judgment on the report of a referee, p. 247.

Cited as authority for the issue of a writ of mandamus to compel a judge to issue an attachment, in *Merced Min. Co. v. Fremont*, 7 Cal. 133. Also cited in dissenting opinion of Harrison, J., as authorizing a mandamus to issue compelling the court to enter judgment by default, in *People v. Superior Court*, 114 Cal. 479; and generally, as to the test for the issuance of the writ, in *Wood v. Strother*, 76 Cal. 549; 9 Am. St. Rep. 253; *Grim v. Norris*, 79 Am. Dec. 210, note.

Waiver.—Party filing undertaking to obtain an injunction is deemed to waive his right to a jury trial, p. 247.

Explained in *Benham v. Rowe*, 2 Cal. 261, holding that a reference cannot be ordered without the consent of the adverse party. Cited to the point that where parties contract in respect to a law, the law itself becomes a part of the contract, in *Mattoon v. Eder*, 6 Cal. 59; *Nickerson v. Chatterton*, 7 Cal. 570.

2 Cal. 248-251. **BIDLEMAN v. KEWEN.**

Default Judgment will be set aside on ground of surprise, p. 250.

Approved in *People v. Lafarge*, 3 Cal. 134. Explained and distinguished in *Robb v. Robb*, 6 Cal. 22; *Casement v. Ringgold*, 28 Cal. 337; and as to what constitutes surprise, is cited in *Burnham v. Hays*, 58 Am. Dec. 397, note.

2 Cal. 251-256. **BENEDICT v. BRAY.** 56 Am. Dec. 332.

Bond.—An attachment bond taken by a justice of the peace in an action in which the amount exceeds his jurisdiction is void, p. 255.

Approved in the similar case of *Caffrey v. Dudgeon*, 38 Ind. 516; 8 C. 10 Am. Rep. 130; also in *County of Douglass v. Clark*, 15 Oreg. 6, in the case of an indemnity bond exacted by the county court without authority to do so; and so in *State v. Johnson*, 28 W. Va. 71, which was the case of an authorized injunction bond. Cited as authority to the point stated, in *Harris v. Simpson*, 14 Am. Dec. 106, note; *State v. Thomas*, 61 Am. Dec. 583, note; and to the point that there can be no recovery on a bond which is void in itself, in *Burton v. Knapp*, 81 Am. Dec. 475, note. Distinguished in *People v. Slocum*, 1 Idaho, 70, in

which case the bond was authorized, but did not fill the statutory requisites. Distinguished also in *Bellinger v. Thompson*, 26 Oreg. 338, in the case of a bond voluntarily given, though the court had no authority to require such a bond. Denied in *State v. Stark*, 75 Mo. 569, holding that the obligors in an attachment bond given in a suit brought under the Texas Cattle Act, could not plead the invalidity of the act in avoidance of their liability.

Pleading.—Plaintiff can only recover for such causes of action as are stated in his complaint, p. 256.

Cited as sustaining the rule that the allegation and proof must correspond, in *Bender v. Bender*, 14 Oreg. 356, to the point stated; in *Belknap v. Sealey*, 67 Am. Dec. 131, note; and as to the matter of variance, in *Catlin v. Gunter*, 62 Am. Dec. 119, note; *Smith v. Causey*, 65 Am. Dec. 374, note.

2 Cal. 257-261. STATE v. TANNER.

Jurors.—On the trial of an indictment charging a felony, punishable with imprisonment or death, at discretion of jury, a person called as a juror, who answers that he would not affix the death penalty, may be challenged for cause, p. 260.

Approved in *Garrett v. State*, 76 Ala. 21; *Hill v. State*, 42 Neb. 513; and *State v. Greer*, 22 W. Va. 810.

2 Cal. 262-264. IN RE HANSON.

Certiorari.—Cases in which the writ lies to review the decision of an inferior court, considered, p. 263.

Referred to in this connection, in *Spring Valley Water Works v. Bryant*, 52 Cal. 135, holding that the writ does not lie to review the action of the board of supervisors when their action is legislative in its character.

2 Cal. 269-289. TRUEBODY v. JACOBSON. S. C. before, 2 Cal. 82.

Pleading.—Although the prayer of a complaint may be inartificially framed, the court may disregard the mistakes, and grant such relief as will conform to the complaint, p. 285.

Approved in *Booker v. Aitken*, 140 Cal. 473, sustaining complaint to enforce trust in land; *Bank of Napa v. Godfrey*, 77 Cal. 616; and cited as authority for the rule that courts grant both legal and equitable relief in the same action, in *Houghtaling v. Ellis*, 1 Ariz. Ter. 387.

Verdict.—Court may instruct jury to amend verdict as to form so as to make it good in law, p. 288.

Approved in *Johnson v. Visser*, 96 Cal. 314, construing a verdict in an action of ejectment.

Vendor's Lien.—The lien which springs out of a title bond, predicated upon the covenants for the purchase money, attaches upon the land unless expressly reserved, p. 287.

Cited in *Selna v. Selna*, 125 Cal. 362, 73 Am. St. Rep. 50, holding burden of proof on vendee to show waiver of lien; as sustaining the right of the vendor to a lien on the land sold for the purchase money, in *Cahoon v. Robinson*, 6 Cal. 226; *Hill v. Grigaby*, 32 Cal. 59; *Hutzle v. Phillips*, 4 Am. St. Rep. 705, note, p. 287.

Vendor and Purchaser.—Purchaser of land cannot retain possession thereof, and at the same time recover back the purchase price from the vendor, p. 287.

Approved in *Haynes v. White*, 55 Cal. 41; *Walker v. Sedgwick*, 8 Cal. 403.

Vendor and Purchaser.—Assignee of vendee is not in privity with vendor, p. 287.

Cited in *Odd Fellows' Sav. Bank v. Brander*, 124 Cal. 257, holding such assignee not entitled to express permission to redeem in an action to foreclose vendor's lien.

Vendor's Lien is not Affected by the taking of the vendee's note for the purchase money, p. 287.

Approved in *Walker v. Sedgwick*, 8 Cal. 403.

Contract may be Vitiating by fraudulent concealment, p. 286.

Cited to this point in *Emerson v. Brigham*, 6 Am. Dec. 118, note.

2 Cal. 289-304. *DE WITT v. SAN FRANCISCO.*

Power under Statute.—Statute authority to erect county buildings necessarily embraces the power to purchase the land on which to erect them, p. 296.

Approved in *Sheidley v. Lynch*, 95 Mo. 497, in disposing of a similar question. The principle here involved recognized and applied to a different state of facts, in *Commonwealth v. Commissioners*, 40 Pa. St. 351. The principle approved in *Machebeuf v. Clements*, 2 Colo. 44.

Cotenancy.—Corporations may hold as tenants in common, either with themselves or with natural persons, p. 298.

Cited in *Hackett v. Multnomah R. R. Co.*, 12 Oreg. 131; S. C. 53 Am. Rep. 330, holding that a corporation may be the joint owner of a ferry where not inconsistent with its constitution. Cited to the rule stated, in *Page v. Heineberg*, 94 Am. Dec. 387, note.

Statutes.—A law is not unconstitutional, as embracing more than one subject, where the subjects embraced in the statute, and not expressed by the title, have congruity or proper connection, p. 299.

Cited as authority in construing a statute authorizing street improvements, in *Davies v. Los Angeles*, 86 Cal. 43.

2 Cal. 305-306. RUSSELL v. ARMADOR.

Findings.—The findings of the court upon an issue of fact must be made out and filed, otherwise the judgment cannot stand, p. 305.

Followed in *Bowers v. Johns*, 2 Cal. 419; *Hoagland v. Clary*, 2 Cal. 475; *Brown v. Brown*, 3 Cal. 111. Approved in *Semple v. Burkey*, 2 Cal. 321; *Briggs v. Eggan*, 17 Kan. 591. Also approved, but held to have no application in the case of *People v. Lafarge*, 3 Cal. 135, 136, where no issue was found, no trial had, and no verdict rendered. Construed in *Vermule v. Shaw*, 4 Cal. 216, holding it no error, where the judge did not file his findings of facts until after judgment entered. Referred to as correctly stating the procedure in this respect prior to the act of 1861 regulating appeals, which act has worked a material change in the practice relative to findings, in *Lucas v. San Francisco*, 28 Cal. 596.

2 Cal. 306-307. HILL v. WHITE.

New Trial.—Order for new trial set aside, where defendant failed to file a statement for the purpose of review on appeal, p. 307.

Denied as authority for the proposition that errors in law, occurring in the court below, will not be reviewed on appeal, unless there has been a motion for a new trial, in *Brown v. Tolles*, 7 Cal. 399. Followed in *Hart v. Burnett*, 10 Cal. 66, holding that an order denying a motion for a new trial, when there is no statement settled on file, is erroneous.

2 Cal. 308-310. AVERILL v. STEAMER HARTFORD.

Jurisdiction in Rem.—In action against boats and vessels, service of process as prescribed by statute is equivalent to actual seizure, and confers jurisdiction on the court from which the process issues, p. 300.

Adopted as correct, in *Meiggs v. Scannell*, 7 Cal. 408; and approved in *Fisher v. White*, 8 Cal. 422.

Same.—A state may confer admiralty jurisdiction upon its own courts, p. 309.

Explained and approved, in *Taylor v. Steamer Columbia*, 5 Cal. 272; but overruled in *The Moses Taylor*, 4 Wall. 427, holding that the cognizance by the federal courts "of civil causes of admiralty and maritime jurisdiction," is exclusive.

2 Cal. 310-312. HUTCHINSON v. WETMORE. 56 Am. Dec. 337.

Entire Contract.—A contract to work for a certain time, at a fixed price, is entire, and performance is a condition precedent to payment, p. 312.

Cited as authority in the similar cases of *Isaacs v. McAndrew*, 1 Mont. 451; *Stein v. Steamboat Prairie Rose*, 17 Ohio St. 476; 93 Am. Dec. 635. Also referred to on subject of entire contracts to labor, in

Oakley v. Morton, 62 Am. Dec. 54, note; *Ryan v. Dayton*, 65 Am. Dec. 564, note; *Swanzy v. Moore*, 74 Am. Dec. 136, note; *Patnote v. Sanders*, 98 Am. Dec. 567, note; and 59 Am. St. Rep. 290, note; and on apportionment of entire contracts, in *Hillyard v. Crabtree*, 62 Am. Dec. 478, note.

2 Cal. 321. SEMPLE v. BURKEY.

Findings.—On a trial by the court, if there is no finding of facts by the court, nor a statement of facts agreed upon by the parties, the judgment cannot stand, p. 321.

Cited as authority, in *Lucas v. San Francisco*, 28 Cal. 596. See *Russell v. Armador*, 2 Cal. 305, and notes thereto, ante.

Overruled in *Waller v. Weston*, 125 Cal. 204, holding findings necessary only on issues joined where decision following findings is a judgment.

2 Cal. 322-328. HEADLEY v. REED.

Reference.—Decision of referee can only be set aside for fraud or gross error in law, p. 325.

Cited to this point in *Muldrow v. Norris*, 56 Am. Dec. 317, note.

Legal Presumption is, that check is drawn for money due from drawer, p. 325.

Referred to as authority to this point, in *Ashley v. Vischer*, 24 Cal. 327; S. C. 85 Am. Dec. 67.

Reference.—If report of referee under the statute contains sufficient on which to base a judgment, it is the duty of the court below to enter judgment in accordance with the report, p. 325.

Approved in *Grayson v. Guild*, 4 Cal. 125.

Same—New Trial.—After rendition of judgment, court may award a new trial and set aside the report, for any reason which would impel the court to set aside the award of an arbitrator, and for no other, p. 326.

Approved in *Grayson v. Guild*, 4 Cal. 125; referred to as authority on review of findings of referee, in *Hihn v. Peck*, 30 Cal. 287. Limited in *Peabody v. Phelps*, 9 Cal. 225, to cases where a judgment is ordered to be reported.

2 Cal. 326-340. McDANIEL v. BACA. 56 Am. Dec. 339.

Fraud may be inferred from strong presumptive circumstances, p. 339.

Approved in *Tognini v. Kyle*, 15 Nev. 468, case of alleged fraud in the sale of personal property; *Hopkins v. Drowne*, 21 R. I. 24, applying rule to proof of malice in action for slander of title. See *Billings v.*

Billings, 56 Am. Dec. 322, note; Burch v. Smith, 65 Am. Dec. 157, 158, note.

Malice is not presumed in actions for slander of title, p. 339.

Cited in Gent v. Lynch, 87 Am. Dec. 562, note.

Court will Set Aside Verdict where the damages are unjustifiable, p. 340.

Cited to this point in Kimball v. City of Bath, 61 Am. Dec. 245, note; St. Martin v. Desnoyer, 61 Am. Dec. 499, note; Peoria Bridge Association v. Loomis, 71 Am. Dec. 267, note; Beggarly v. Craft, 76 Am. Dec. 691, note.

Witness may be Impeached by proof of contradictory statements made out of court, p. 338.

Cited in Wright v. Hicks, 60 Am. Dec. 698, note.

2 Cal. 355-358. BATES v. VISCHER.

Attorney and Client.—An attorney or counsel employed to prosecute or defend a suit may submit it to a reference or arbitration, p. 357.

Cited in Hutchins v. Johnson, 30 Am. Dec. 628, note.

2 Cal. 361-369. BREED v. CUNNINGHAM.

Dedication.—A sale of lots designated in the conveyance as bounding on a certain street, of itself amounts to a dedication of the street to public use, p. 368.

Approved as authority in Kittle v. Pfeiffer, 22 Cal. 490; cited and explained in Chapin v. Brown, 15 R. I. 583; distinguished in City of Eureka v. Croghan, 81 Cal. 526, in which case the grantor did not survey his land into lots, blocks and streets, nor did he plat the same. Referred to in People v. Reed, 15 Am. St. Rep. 31, note, where the authorities on the subject are collected.

2 Cal. 370-375. BAILEY v. STEAMER NEW WORLD.

Ownership.—Possession of personal property is prima facie evidence of ownership, p. 373.

Cited as authority in Goodwin v. Garr, 8 Cal. 617.

2 Cal. 374-378. DEWEY v. GRAY.

Law of Case.—Previous decision of appellate court in the same case, becomes the law of the case, is conclusive of the rights of the parties, and is not the subject of revision, p. 377.

Affirmed in Gunter v. Laffan, 7 Cal. 592; Davidson v. Dallas, 15 Cal. 82; Leese v. Clark, 20 Cal. 417; Jaffe v. Skae, 48 Cal. 543; Sharon v. Sharon, 79 Cal. 686; Wallace v. Sisson, 114 Cal. 43; approved in Dodge

v. Gaylord, 53 Ind. 372; *Adams County v. Railroad Co.*, 55 Iowa, 97; *Star Wagon Co. v. Swezy*, 63 Iowa, 521; *Davenport v. Kleinschmidt*, 8 Mont. 480; *State v. Thompson*, 10 Mont. 562; *Jameson v. McCoy*, 52 Tenn. 116; but criticised and the doctrine denied, in *City of Hastings v. Foxworthy*, 45 Neb. 686, 687, 688; *Silva v. Pickard*, 14 Utah, 249, and *Haley v. Kilpatrick*, 104 Fed. 648, quoted *Leese v. Clark*, 20 Cal. 417. Cited in *Gee v. Williamson*, 27 Am. Dec. 634, note, where the authorities on "the law of the case" are collected.

2 Cal. 378-380. NORRIS v. DENTON.

Discovery.—Party seeking to compel a discovery must resort to that remedy before judgment rendered, p. 380.

Cited in *Little Rock etc. R. R. Co. v. Wells*, 54 Am. St. Rep. 227, note, fully discussing the subject.

2 Cal. 381-382. CLAYTON v. WEST.

Appeal.—Error in court below, not materially affecting the merits of the case, is not ground for disturbing the judgment on appeal, p. 382.

Cited as authority in support of the rule, that error which is relied on must be shown clearly and affirmatively, in *Morgan v. Hugg*, 5 Cal. 410.

2 Cal. 383-385. DYE v. BAILEY.

Evidence.—Mode of taking depositions is in derogation of the common law, and the officers must follow the statute strictly, p. 384.

Cited in *Wise v. Collins*, 121 Cal. 151, but holding notice and certificate presumed to be in due form when not set out in record.

Referred to in *Darby v. Heagerty*, 2 Idaho, 261, 262, as an authority under the early practice act of California, but not under the present practice, nor is it the rule under the code of Idaho.

2 Cal. 387-408. BENHAM v. ROWE. 56 Am. Dec. 342.

Mortgage.—A mortgagee, by virtue of a power of sale in the mortgage, cannot become the purchaser of the premises so as to bar the equity of redemption, p. 407.

Cited as sustaining the doctrine that a mortgage is a mere security for the debt, and that the legal title remains in the mortgagor until foreclosure and sale, in *Payne v. Bensley*, 8 Cal. 267; S. C. 68 Am. Dec. 320, and cited to the rule above stated, in *Moore v. Titman*, 44 Ill. 370; *Horn v. National Bank*, 21 Am. St. Rep. 246, note; *Thornton v. Irwin*, 43 Mo. 167; *Very v. Russell*, 65 N. H. 649.

Same.—Where possession of the mortgagee is by tenant, he is accountable for such rents and profits as he could with reasonable diligence have received, p. 407.

Approved in *Scruggs v. Railroad Co.*, 108 U. S. 375; *Murdock v. Clarke*, 90 Cal. 438; and cited as to liability of mortgage in possession for rents and profits, in *Harrison v. Wyse*, 63 Am. Dec. 154, note.

Same.—It is duty of mortgagee in possession to exercise the same care over the property, as a prudent man would over his own, p. 407.

Cited in *Caldwell v. Hall*, 4 Am. St. Rep. 69, note.

Mortgagee.—Rights on sale under power discussed, p. 408.

Cited in *Copsey v. Bank*, 133 Cal. 660, as conceding that mortgagee may be trustee to sell under mortgage.

Same.—Where a sale is irregularly made under a power contained in a mortgage, and the mortgagor does not object, the sale must stand, p. 408.

Cited as authority in *Frink v. Roe*, 70 Cal. 312; *Markey v. Langley*, 92 U. S. 153; *Blockley v. Fowler*, 82 Am. Dec. 749, note; and *Williams v. Hatch*, 38 Ala. 342, where neither the mortgagor, nor the purchaser at execution sale, applied to set aside the mortgage sale.

Same.—Mortgagee in possession is not entitled to compensation for managing the property, and for collecting and receiving the rents, p. 408.

Cited in *Caldwell v. Hall*, 4 Am. St. Rep. 71, note.

Instructions.—Request to give abstract instruction to jury is properly refused, p. 408.

Cited in *Crommelin v. Thiess*, 70 Am. Dec. 505, note.

2 Cal. 409-412. **COOKE v. SPEARS.** 56 Am. Dec. 348.

Amendments.—Statutes authorizing amendments to pleadings, place the whole matter in the sound discretion of the court, p. 412.

So cited in *Crafts v. Sikes*, 64 Am. Dec. 64, note; and, generally, on subject of exercise of discretion in allowing amendments, in *Prater v. Miller*, 60 Am. Dec. 527, note; *Lee v. Lee*, 64 Am. Dec. 250, note; *Teas v. McDonald*, 65 Am. Dec. 73, note; *Whitehead v. Herron*, 65 Am. Dec. 145, note; *Haverhill Ins. Co. v. Prescott*, 80 Am. Dec. 126, note.

Amendment of Answer by pleading statute of limitations is not allowable unless in furtherance of justice, p. 412.

Cited in *Bank v. Heron*, 122 Cal. 109, on point that furtherance of justice is controlling consideration.

Same.—Appellate court will interpose if such discretion be abused, p. 412.

So cited in *Stevenson v. Mudgett*, 34 Am. Dec. 158, note.

Same.—If defendant fail to plead statute of limitations at proper time, he will not be allowed to amend his answer, so as to introduce the plea, unless it be in furtherance of justice, p. 412.

Approved and applied in *Heegaard v. Dakota, etc. Trust Co.*, 3 S. Dak. 576; *Kraft v. Greathouse*, 1 Idaho, 258. Principal case is cited on question of exercise of powers under statute, in *Napa Valley R. R. Co. v. Napa Co.*, 30 Cal. 437; *Bledsoe v. Railroad Co.*, 40 Tex. 597.

2 Cal. 413-418. **ADAMS v. BLANKENSTEIN.** 56 Am. Dec. 350.

Carrier.—If carrier deliver goods to wrong person, he does so at his peril, p. 418.

Approved as authority in *Cavallaro v. Texas etc. R. R. Co.*, 110 Cal. 356; S. C. 52 Am. St. Rep. 99; *Angle v. Miss. etc. R. R. Co.*, 18 Iowa, 561; *Shenk v. Propeller Co.*, 60 Pa. St. 116; S. C. 100 Am. Dec. 544; *Bloyd v. Pollocks*, 27 W. Va. 102; and cited on the question as to what constitutes delivery, in *Norway Plains Co. v. Railroad Co.*, 61 Am. Dec. 432, note; *Hayes v. Wells, Fargo, & Co.*, 83 Am. Dec. 95, note; *Shenk v. Steam Propeller Co.*, 100 Am. Dec. 546, note; and to whom delivery may be made, in *Weyand v. Atchison etc. R. R. Co.*, 9 Am. St. Rep. 511, note; *Pacific Express Co. v. Shearer*, 52 Am. St. Rep. 337, note.

2 Cal. 420. **BUCKLEY v. CARLISLE.**

One Partner cannot Sue his Copartner for the recovery of personal property belonging to the firm, p. 420.

Distinguished in *Balch v. Jones*, 61 Cal. 236, which was an action by a tenant in common in a chattel against his cotenant for a recovery of the specific chattel, and holding that the action could not be maintained. Approved in *Harris v. Harris*, 39 N. H. 53, holding that the administrator of a deceased partner, who had paid the partnership debt, could not maintain assumpsit against the surviving partners, to recover of them their proportion of that debt.

2 Cal. 424-459. **IN RE PERKINS.**

Habeas Corpus.—The determination of a judge in proceedings on habeas corpus is not appealable or subject to review, and the doctrine of *res adjudicata* does not apply thereto, p. 430.

Approved in *Matter of Ring*, 28 Cal. 251; also in *Hammond v. The People*, 32 Ill. 454, 464; S. C. 83 Am. Dec. 289; holding that the decision in habeas corpus proceedings is not of that final character, that it can be reviewed upon writ of error. So, in *People v. Fairman*, 59 Mich. 570; *Coston v. Coston*, 25 Md. 509; and *Bradley v. Beetle*, 153 Mass. 157, which holds that a judgment on habeas corpus remanding the prisoner is not, as matter of law, a bar to subsequent proceedings of the same kind. Cited as stating the common-law doctrine, in *Ex parte Pattison*, 56 Miss. 163; changed by statute, however, in *Mississippi*. Cited also as the common-law rule, in *McFarland v. Johnson*, 27 Tex. 106, holding that under Texas law, an appeal in such cases is

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restricted to the applicant for the writ. Construed in *United States v. Chung Shee*, 71 Fed. Rep. 279, as implying that where, on a writ of habeas corpus, the prisoner is discharged, the decision is a final determination in his or her favor. Cited in *State v. Kennie*, 24 Mont. 51, and *Miskimins v. Shaver*, 8 Wyo. 404, construing local statutes.

Constitutional Law.—Powers of the state under the federal constitution, considered, p. 432.

The principal case referred to in this connection, in *Ex parte Archy*, 9 Cal. 169.

Same.—Power of Congress to pass fugitive slave act, considered, pp. 434-437.

Cited as recognizing such power in Congress, in *Ex parte Bushnell*, 9 Ohio St. 187.

2 Cal. 460-463. HAPPE v. STOUT.

Consideration of Contract Expressed in Writing, though fictitious, satisfies the statute of frauds, p. 462.

Cited in *Osborne v. Baker*, 34 Minn. 310; S. C. 57 Am. Rep. 55, and holding that the words "for value received" sufficiently express the consideration, within the statute. Cited to ruling stated, in 60 Am. St. Rep. 438, extended note on subject.

Contract—Condition.—Failure to allege performance of condition precedent must be attached by demurrer and is cured by verdict, p. 462.

Cited in *Sayre v. Mohnney*, 35 Or. 146, applying rule to action on note.

2 Cal. 463-470. DE WITT v. HAYS.

Franchise.—Mere right to collect wharfage is neither real estate nor personal property, but a franchise, p. 468.

Cited in *Lott v. Ross*, 38 Ala. 159, holding that a tax upon "the gross amount of sales of merchandise is not a tax upon the goods themselves, but upon the business or act of selling." Also cited to the point stated in *Yellow River Imp. Co. v. Wood County*, 81 Wis. 560; and *O'Neill v. Annett*, 72 Am. Dec. 368, note.

Taxation.—*Quo modo* of taxation is matter of legislative control; and the statute must be steadily followed, p. 468.

Cited as to this point in *People v. Coleman*, 60 Am. Dec. 594, note; *Williams v. Cammack*, 61 Am. Dec. 519, note; *Smith v. Smith*, 88 Am. Dec. 710, note; *Brodhead v. Milwaukee*, 88 Am. Dec. 724, note; *Stodert v. Ward*, 100 Am. Dec. 86, note.

Pleading.—The provision that "there shall be but one form of civil action," extends only to the form of the action and the pleadings, p. 468.

Cited in *Rankin v. Charless*, 61 Am. Dec. 576, note.

Equity.—To entitle a party to equitable relief, he must show a proper case, and one in which he has no adequate remedy at law, p. 469.

Approved in *Meyers v. Association*, 122 Cal. 674, discussing right to enforce subrogation in equity; *Trinity County v. McCammon*, 25 Cal. 120, and injunction to enjoin supervisors denied. Examined and held not to apply in *Hager v. Shindler*, 29 Cal. 55, which case involved the right of a purchaser at sheriff's sale to go into equity, to have a fraudulent deed of the judgment debtor set aside. Approved in *St. James' Church v. Arrington*, 36 Ala. 551; S. C. 76 Am. Dec. 335, denying injunction to enjoin probable nuisance. Cited on subject of granting equitable relief, in *Minturn v. Hays*, 56 Am. Dec. 368, note; *Lyerly v. Wheeler*, 59 Am. Dec. 600, note; *Treadwell v. Salisbury Manuf. Co.*, 66 Am. Dec. 501, note; *Dudley v. Hurst*, 1 Am. St. Rep. 377, note.

Same.—Allegation of "irreparable injury" is not enough, but it should appear to the court from the fact set forth, p. 469.

Cited in *Dudley v. Hurst*, 1 Am. St. Rep. 378, note.

Taxation.—Where a tax has been illegally imposed, the remedy at law is perfect, and a court of equity has no power to interpose, p. 469.

Approved in *Robinson v. Gaar*, 6 Cal. 275; *Coulson v. Harris*, 43 Miss. 759; *Bucknall v. Story*, 36 Cal. 71. Cited to the point stated, in *Holland v. Mayor, etc.*, 69 Am. Dec. 199, note; *Eyre v. Jacob*, 73 Am. Dec. 380, note; *Horse etc. R. R. Co. v. Donoghue*, 11 Am. St. Rep. 92, note. Examined in *Palmer v. Boling*, 8 Cal. 388, and claiming that the rule has been changed, so that a party may invoke the aid of a court of equity, when his property is about to be illegally sold for taxes. Cited to the point that a title to be made under a tax deed is one *stricti juris*, and a strict compliance with the law must be shown, in *Van Matre v. Sankey*, 39 Am. St. Rep. 210, note.

2 Cal. 470-473. HAWLEY v. STIRLING.

Continuance to Take Deposition of Absent Witness will not be granted unless the evidence sought be material, p. 473.

So cited in *Stevenson v. Sherwood*, 74 Am. Dec. 147, note.

2 Cal. 474-475. HOAGLAND v. CLARY.

Findings.—Findings of court must appear in record, otherwise there is no basis to support the judgment, p. 475.

Approved as authority in *Briggs v. Egan*, 17 Kan. 590; *Chrisman v. Rogers*, 30 Ark. 358.

2 Cal. 483-484. INGRAHAM v. GILDERMESTER.

Appellate Court will not Review Facts of Case, except on appeal from order denying motion for new trial, p. 484.

Ruling approved in *Brown v. Willoughby*, 5 Colo. 8; *Pierce v. Manning*, 2 S. Dak. 522.

2 Cal. 484. PEOPLE v. MARTIN.

Appeal.—New trial ordered on ground that verdict was contrary to the law and evidence, p. 484.

Cited on subject of circumstantial evidence, holding the question to be one of law for the court, in *People v. Eagan*, 116 Cal. 291.

2 Cal. 485-488. RIGGS v. WALDO. S. C. 56 Am. Dec. 356.

Guarantor.—One who puts his name upon a promissory note out of the usual course of regular negotiability, is a guarantor, p. 488.

Doctrine approved in *Ford v. Hendricks*, 34 Cal. 675; *Melton v. Brown*, 25 Fla. 463; *Firman v. Blood*, 2 Kan. 526; *First Nat. Bank v. Lockstitch Fence Co.*, 24 Fed. Rep. 225. Referred to, and provisions of the Civil Code in *Fessenden v. Summers*, 62 Cal. 486; *Loustalot v. Calkins*, 120 Cal. 690, as to joinder of maker and indorser; *First Nat. Bank v. Babcock*, 94 Cal. 102; S. C. 28 Am. St. Rep. 95, 96. Cited on the subject, in *Robertson v. Rowell*, 35 Am. St. Rep. 469, note; *Bank of Jamaica v. Jefferson*, 36 Am. St. Rep. 103, note.

Same.—Such contract is not within statute of frauds in California, p. 486.

Cited as authority in *Ford v. Hendricks*, 34 Cal. 675; *Howland v. Aitch*, 38 Cal. 135.

Same.—Liability of guarantor on promissory note is strictly that of indorser, p. 488.

Approved in *Lightstone v. Laurencel*, 4 Cal. 277; *Pierce v. Kennedy*, 5 Cal. 139; *Bryan v. Berry*, 6 Cal. 396; *Reeves v. Howe*, 16 Cal. 153; *Jones v. Goodwin*, 39 Cal. 494; S. C. 2 Am. Rep. 474, holding that such guarantor is entitled to notice of nonpayment. To same effect, in *Brady v. Reynolds*, 13 Cal. 32. Cited in *Geiger v. Clark*, 13 Cal. 580, where sustained on principle of stare decisis. Distinguished in *Kritzer v. Mills*, 9 Cal. 23, in which case there was nothing upon the face of the note to show that the party was a surety. Examined in *Chafoin v. Rich*, 77 Cal. 477, holding that under the provisions of the Civil Code, guarantors are liable immediately upon default of the principal, without demand or notice, unless they are in effect indorsers. And so, in *First Nat. Bank v. Babcock*, 94 Cal. 102; S. C. 28 Am. St. Rep. 95. Cited as to liability of guarantor, in *Perkins v. Catlin*, 29 Am. Dec. 297, note; *Beebe v. Dudley*, 59 Am. Dec. 345, note; *Walker v. Forbes*,

60 Am. Dec. 505, note; *Wright v. Morse*, 69 Am. Dec. 294, note; *Crosby v. Roub*, 84 Cal. 726, note; *Killian v. Ashley*, 91 Am. Dec. 523, note; *Good v. Martin*, 91 Am. Dec. 710, note.

2 Cal. 489-493. **GODEFFROY v. CALDWELL.** 56 Am. Dec. 360.

Mechanic's Lien Law does not Protect a loan of money made for the payment of material used and labor employed in the erection of a building, p. 492.

Cited in *Cadenasso v. Antonelle*, 127 Cal. 386, holding "money advanced" not equivalent to "labor and material furnished" under guaranty; as authority to this point, in *Gaylord v. Loughbridge*, 50 Tex. 577; *Chapin v. Paper Works*, 79 Am. Dec. 277, note. Also, in *Mills v. La Verne Land Co.*, 97 Cal. 255; S. C. 33 Am. St. Rep. 169, holding that the mere right to assert a mechanic's lien is personal, and cannot be assigned. So, in *Steamboat James Battle v. Waring*, 39 Ala. 183, holding that the statutory lien on steamboats does not extend to a claim for money loaned to the master to discharge debts which were a statutory lien on the vessel.

Estoppel by Silence.—Landowner who stands by and sees another sell the land without disclosing his claim, is forever estopped from setting up his title against an innocent purchaser, p. 492.

Cited as to this ruling, in *Stevens v. McNamara*, 58 Am. Dec. 742, note; *Bradley v. Snyder*, 58 Am. Dec. 569, note; *Saunderson v. Balance*, 67 Am. Dec. 221, note; *Penn v. Heisey*, 68 Am. Dec. 603, note; *Fahie v. Pressey*, 80 Am. Dec. 406, note; *Partridge v. Stocker*, 84 Am. Dec. 675, note; *Maple v. Kussart*, 91 Am. Dec. 217, note; *Lindsay v. Cooper*, 33 Am. St. Rep. 118, note. Also cited in *Telford v. Frost*, 76 Wis. 175; *Owens v. Myers*, 57 Am. Dec. 695, as authority for the doctrine that estoppel in pais extends to real estate.

Same.—Owner of land who induces another to improve it as his own is estopped from setting up his right thereto, p. 493.

Approved as authority in *Guest v. Guest*, 74 Tex. 667; and cited in *Miller v. Miller*, 100 Am. Dec. 540, note.

Assignment of Mortgage and rights of mortgagee, discussed.

Cited in *Nichols v. Lee*, 82 Am. Dec. 59, note.

Statute of Frauds.—Parol promise to pay for improvements upon land is not within the statute, p. 493.

Cited as authority in *Thouvenin v. Lea*, 26 Tex. 615; *Treat v. Hiles*, 68 Wis. 353; S. C. 60 Am. Rep. 863; *Lesley v. Rosson*, 77 Am. Dec. 683, note; *Pitt v. Moore*, 6 Am. St. Rep. 497, note.

Mortgage is a Mere Security for the payment of money, p. 493.

Doctrine approved in *Payne v. Bensley*, 8 Cal. 267; S. C. 68 Am. Dec. 320; *McMillan v. Richards*, 9 Cal. 409; S. C. 70 Am. Dec. 662; and cited

to the point here stated in *Duty v. Graham*, 62 Am. Dec. 539, note; *Peters v. Bridge Co.*, 63 Am. Dec. 135, note; *Carroll v. Ballance*, 79 Am. Dec. 360, note.

2 Cal. 494-497. **GAVIN v. ANNAN.**

Pleading.—Accord and satisfaction may be given in evidence under general denial, p. 497.

Overruled in *Piercy v. Sabin*, 10 Cal. 30; S. C. 70 Am. Dec. 697; and in *Coles v. Soulsby*, 21 Cal. 50, holding that all new matter must be specially pleaded. Cited in *Crews v. Bleakley*, 61 Am. Dec. 60, note.

Accord and Satisfaction.—Acceptance of personality in gross is sufficient as, irrespective of value, p. 497.

Cited in *Shelton v. Jackson*, 20 Tex. Civ. App. 447, discussing effect of acceptance of money of less amount than debt.

2 Cal. 498-502. **LORD v. SHERMAN.**

Power of Attorney "to attend to all business affairs appertaining to real or personal estate," does not authorize a transfer of real estate, p. 501.

Cited as authority in *Gee v. Bolton*, 17 Wis. 612, where a power of attorney from husband to wife was held too indefinite to authorize her to convey land in his name. So, in *Quay v. Presidio etc. R. R. Co.*, 82 Cal. 6, holding that a power of attorney authorizing the exchange of old certificates of stock for new ones did not authorize a transfer of the property.

2 Cal. 503-507. **GRAHAM v. BENNET.**

Marriage is a Civil Contract, and where parties are able to contract, an open avowal of the intention and an assumption of the relative duties, which it imposes, are sufficient to render it valid, p. 506.

Construed and approved in *Sharon v. Sharon*, 75 Cal. 25, 26, and referred to in dissenting opinion of McFarland, J., in same case, who concluded that the facts found did not constitute marriage. Ruling also approved in the following cases: *Askew v. Dupree*, 30 Ga. 189; *Hutchins v. Kimmell*, 31 Mich. 131; S. C. 18 Am. Rep. 166; *Dyer v. Brannock*, 66 Mo. 416; S. C. 27 Am. Rep. 376; *Carmichael v. The State*, 12 Ohio St. 558; *United States v. Simpson*, 4 Utah, 229; *Mathewson v. Phoenix Iron Foundry*, 20 Fed. Rep. 284; *Lorimer v. Lorimer*, 124 Mich. 634, and *Willey v. Willey*, 22 Wash. 117, 79 Am. St. Rep. 924, holding such marriage shown under facts stated; *Londonderry v. Chester*, 9 Am. Dec. 73, note.

Legitimacy.—By act regulating descents, the issue of marriages deemed null in law shall be legitimate, p. 506.

Cited as to legitimacy of issue of void marriage, in *Watts v. Owens*, 62 Wis. 518; *Adams v. Adams*, 154 Mass. 293; *Smith v. Smith*, 46 Am. Dec. 132, 133, note; *Simmons v. Bull*, 56 Am. Dec. 265.

2 Cal. 507-509. **MANSFIELD v. DORLAND.**

Attorney has no Lien upon a Judgment recovered in favor of his client, as a compensation for his services, p. 509.

Followed in *Russell v. Conway*, 11 Cal. 103; and approved as authority in *Hogan v. Black*, 66 Cal. 42. Cited in *Gage v. Atwater*, 136 Cal. 173, noted under *Ex parte Kyle*, 1 Cal. 332. Cited as denying the existence of any lien, where there is no taxation of costs on account of the attorney, in *Warfield v. Campbell*, 38 Ala. 532; S. C. 82 Am. Dec. 727. So, in *Renick v. Ludington*, 16 W. Va. 390; and is cited in *Jackson v. Clopton*, 66 Ala. 33, to the proposition that an attorney's lien on a judgment is limited to services rendered in the particular action in which the judgment was obtained. Cited as limiting the lien to the costs and disbursements allowed by statute, in *Andrews v. Morse*, 31 Am. Dec. 757, note; *Hanna v. Island Coal Co.*, 51 Am. St. Rep. 258, 259, note, collecting and collating the authorities on the subject.

2 Cal. 510-514. **McLAREN v. SPALDING.**

Pleading.—Where general denial is equivalent of plea of *nul debet*, eviction, payment, release, etc., may be given in evidence, p. 513.

Overruled in *Piercy v. Sabin*, 10 Cal. 30; S. C. 70 Am. Dec. 697; *Coles v. Soulsby*, 21 Cal. 50. Cited in *Crews v. Bleakley*, 61 Am. Dec. 60, note.

Tenancy.—Interference by public authorities with privilege or license of tenant does not amount to an eviction on part of landlord, p. 514.

Cited as authority in *International Trust Co. v. Schumann*, 158 Mass. 292.

2 Cal. 515-516. **MORSE v. ROBERTS.**

Tenancy.—Lessee admits the authority of his lessor by taking a lease, and no averment of the lessor's right to lease is necessary as against him, p. 516.

Approved as authority in *Kieth v. Paulk*, 55 Iowa, 261.

2 Cal. 520-523. **TURNER v. BILLAGRAM.**

Pleading.—Party having benefit of action improperly commenced, cannot avoid the responsibility incurred, by pleading his own misfeasance, p. 522.

Cited as to propriety of allowing a party who has had the benefit of a contract to raise objections as to its binding force, in *State v.*

Hays, 2 Oreg. 319. Also cited to the proposition, that after a court has acted judicially on the admission or declaration of a party, such party should be debarred from denying it for the purpose of attacking any judgment depended thereon, in Thornton v. Baker, 15 R. I. 555; S. C. 2 Am. St. Rep. 927.

2 Cal. 524-557. SMITH v. MORSE.

Corporations can exercise no power unless granted, or is necessary to carry out the power granted, p. 538.

Approved in Union Water Co. v. Fluming Co., 22 Cal. 627. Cited in Alabama etc. Co. v. Jones, 1 Fed. Cas. 298, holding railroad company not amenable to bankruptcy proceedings as a manufacturer.

Legislature has Power to Alter or change the remedy, but may not enact statutes impairing the obligation of contracts, p. 548.

Approved in Teralta Land etc. Co. v. Shaffer, 116 Cal. 523; Lawson v. Jeffries, 47 Miss. 706; S. C. 12 Am. Rep. 354. Cited as to extent of legislative power, in Hasbrouck v. Milwaukee, 80 Am. Dec. 733, note.

Common Council of City Cannot Delegate the exercise of their power to others, p. 539.

Cited as authority to this point in dissenting opinion of Elliott, J., in Logansport v. Justice, 74 Ind. 389; S. C. 39 Am. Rep. 85.

Statutes.—Act of legislature divesting lien of creditor declared to be unconstitutional, p. 557.

Explained in Wheeler v. Miller, 16 Cal. 125, 126, which case was decided without reference to any rights which the commissioners of the funded debt might possess. Cited in In re Hope Mining Company v. Sawyer, 712; S. C. 5 Bank. Reg. 106, construing the lien law of Nevada, and holding that the repeal of the law after the lien attached, by performance of work, did not defeat the lien.

Estoppel.—City cannot, in order to defeat a claim against it, set up a right in the state, p. 557.

Examined and affirmed on principle of stare decisis, in Hart v. Burnett, 15 Cal. 586, 587, 617; and so, in Holladay v. Frisbie, 15 Cal. 636, 637.

Execution.—Power of clerk of court to issue a venditioni exponas, considered, p. 556.

Cited as to the nature and purpose of this writ, in Young v. Smith, 76 Am. Dec. 83, note. Also cited in Welch v. Sullivan, 8 Cal. 186, holding that a levy upon the property would not vitiate a sale under the writ.

Void Transfer.—Act of City of San Francisco creating the Board of Sinking Fund Commissioners, and the transfer to them of the real estate of the city, held to be void, p. 557.

Affirmed in Thorne v. San Francisco, 4 Cal. 148; Heydenfeldt v. Hitch-

cock, 15 Cal. 514; Board of Education v. Fowler, 19 Cal. 21; People v. Broadway Wharf Co., 31 Cal. 39; Ellis v. Eastman, 32 Cal. 449. Approved in Dunham v. Angus, 145 Cal. 166, 167, where execution on judgment in action for prior debt of city begun prior to act of 1851, was made after passage of act, it prevails over subsequent deed of same property by commissioners of funded debt; United States v. Mission Rock Co., 189 U. S. 405, reservation of Mission Rock for naval purposes in President's proclamation of 1899 was not appropriation of adjacent tide lands.

Valid Sale.—Levy and sale of municipal land of city of San Francisco, for a debt of the city, sustained, p. 557.

Cited as authority in Frink v. Roe, 70 Cal. 305, which was the case of a sale depending on like facts; and cited in Pacific Gas Imp. Co. v. Ellert, 64 Fed. Rep. 432, as defining the character of the title conveyed at such sale. Cited as upholding the right of a party to have his title to land protected from a sale which might create a cloud upon it, in Guy v. Hermance, 5 Cal. 75; S. C. 63 Am. Dec. 86.

Question of Fraudulent Intent, whether one of fact for the determination of a jury, discussed, pp. 541, 542.

Referred to in Billings v. Billings, 56 Am. Dec. 322, note.

General citation: Bailey v. Raleigh, 130 N. C. 212.

2 Cal. 558-561. **RAMIRES v. KENT.**

Alien may Purchase and hold real estate, even against the government, until "office found," p. 560.

Cited as authority to the proposition stated, in People v. Folsom, 5 Cal. 378; Racouillat v. Sansevain, 32 Cal. 386; Hammekin v. Clayton, 2 Woods, 339; also in De Merle v. Mathews, 26 Cal. 477; and in McNeil v. Polk, 57 Cal. 324, holding that under the laws of Mexico, which were in force in California, aliens could inherit real estate. Cited in Norris v. Hoyt, 18 Cal. 219, holding that a nonresident alien cannot acquire title to real property in California by descent or other operation of law.

Tenant cannot Deny Title of nonresident foreign lessor, p. 562.

Approved in Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 383, telegraph company using railroad's right of way under lease cannot deny railroad's title on ground that when lease made it was in possession under right of third party paramount to that of railroad.

2 Cal. 562-564. **MORGAN v. THRIFT.**

Pleading.—If a bond is executed to a party by a wrong name, the latter has his remedy, and may describe it as given to him, and may show that he was the person intended as obligee, p. 563.

Cited in *Braidfoot v. Taylor*, 1 Tex. Civ. App. 70, holding that a bond signed at the foot thereof is sufficiently executed, although the name of the person signing it is not inserted in the body of the instrument.

2 Cal. 564-567. **PEOPLE v. PERLEY.**

Bribery.—Statute against bribery must be construed strictly, p. 567.

Distinguished in *People v. Markham*, 64 Cal. 159, 160; S. C. 49 Am. Rep. 702, as turning upon the phraseology of a different statute, and holding that a police officer who receives money on his promise not to arrest any one of a class of offenders, is guilty of receiving a bribe. Cited as to case of bribery of judicial officer, in *State v. Ellis*, 97 Am. Dec. 715, note.

2 Cal. 568-571. **FOWLER v. SMITH.**

Possession, under Spanish law, is looked upon as the great object of purchase and the great symbol of right, p. 570.

Cited in *Bixby v. Bent*, 59 Cal. 528, a case of exchange of lands, and holding that delivery of possession was essential under the Spanish law to the validity of an exchange.

Spanish Law Allows Legal Interest, and conventional interest, which may be greater or less than legal interest, p. 570.

Cited as to legal rate of interest in California, under Mexican law, in *Macoleta v. Packard*, 14 Cal. 179, and holding that rate to have been six per cent per annum.

2 Cal. 571-574. **ROGERS v. HUIE.** 56 Am. Dec. 363; S. C. before, 1 Cal. 429.

Conversion.—Auctioneer selling stolen property in the regular course of his business, without notice that it was stolen, is not liable, p. 572.

Overruled in *Swim v. Wilson*, 90 Cal. 130; S. C. 25 Am. St. Rep. 113, affirming the doctrine declared in *Rogers v. Huie*, 1 Cal. 429; S. C. 54 Am. Dec. 300. Denied in *Brown v. Campbell*, 44 Kan. 241; S. C. 21 Am. St. Rep. 277, the court saying, "the decision is against all authority, and is not good law." Also, to the same effect, in *Kearney v. Clutton*, 101 Mich. 111; S. C. 45 Am. St. Rep. 398; *La Fayette Co. Bank v. Metcalf*, 40 Mo. App. 499; *Cone v. Iverson*, 4 Wyo. 220; and *Moore v. Hill*, 38 Fed. Rep. 348. Cited in *Gilmore v. Newton*, 85 Am. Dec. 751, note.

Same.—To maintain trover, defendant must have converted the property to his own use; and if not, any act amounting to a conversion, must be done with a wrongful intent, expressed or implied, p. 573.

Approved in *Morris v. Hall*, 41 Ala. 539; *Bolling v. Kirby*, 90 Ala.

222; 8 C. 24 Am. St. Rep. 793. Cited as to what constitutes conversion, in *Webber v. Davis*, 69 Am. Dec. 90, note.

2 Cal. 575-579. **FITCH v. BROCKMON.**

Effect of Assent of Agent to levy of execution by sheriff upon property of third person in possession of the principal, considered, p. 579.

Cited in *Simson v. Eckstein*, 22 Cal. 592.

2 Cal. 580-581. **HESLEP v. SACRAMENTO.**

Contract.—A promise to pay for a past consideration, without any legal liability on the part of the promisor, does not make a binding contract, p. 581.

Principal case referred to as an illustration of this general proposition, in *Frey v. City of Fond du Lac*, 24 Wis. 206, in which case it was sought to recover bounty money alleged to be due a volunteer who had enlisted prior to the city's voting the bounty.

2 Cal. 582-583. **BALDWIN v. KRAMER.**

Jurisdiction.—After the expiration of a term of the district court, no power remains in it to set aside a judgment, or grant a new trial.

Explained in *Lurvey v. Wells Fargo Co.*, 4 Cal. 106, and holding that a motion for a new trial, filed within the time allowed by law, is not affected by the adjournment of the court for the term. Approved in *Carpentier v. Hart*, 5 Cal. 407; *De Castro v. Richardson*, 25 Cal. 51; *Bell v. Thompson*, 19 Cal. 707; *Casement v. Ringgold*, 28 Cal. 337; *Woffenden v. Woffenden*, 1 Ariz. Ter. 336. Explained in *Copper Hill Mining Co. v. Spencer*, 25 Cal. 17. Cited to the point that clerical errors could be corrected after the expiration of the term, in *Wiggin v. Superior Court*, 68 Cal. 401. Referred to as stating the established rule of procedure, until a different rule was prescribed by statute (Code Civ. Proc., sec. 473), in *Norton v. Railroad Co.*, 97 Cal. 392; S. C. 33 Am. St. Rep. 201; *Brackett v. Banegas*, 99 Cal. 626; *Kaufman v. Shain*, 111 Cal. 20; 52 Am. St. Rep. 141. Cited to ruling stated, in 60 Am. St. Rep. 639, extended note on subject.

2 Cal. 584-586. **GREEN v. WELLS.**

Rescission.—Parol agreement to rescind a contract under seal, if executed, is good, p. 585.

Approved in *Beach v. Covillard*, 4 Cal. 316; *Whiting v. Heslep*, 4 Cal. 330; *McDonald v. Water Co.*, 4 Cal. 336; and cited in *Bryant v. Isburgh*, 74 Am. Dec. 657, note. Referred to in 16 Am. St. Rep. 799, note. Distinguished on a different state of facts, in *Armijo v. Abeytia*, 5 N. Mex. 544.

2 Cal. 586-587. **SMITH v. McDOUGAL.**

Mistake.—Court cannot relieve against payment of money in mistake of law, p. 587.

Cited on subject of mistake, in *Alabama etc. Ry. Co. v. Jones*, 55 Am. St. Rep. 498, note.

2 Cal. 588-589. **SHATTUCK v. CARSON.**

Cloud on Title.—Equity has jurisdiction to order the cancellation of an outstanding deed, which improperly clouds the title of the true owner, and may interfere to prevent a sale, and the consequent execution of an improper deed, p. 589.

Cited in *Thompson v. Lynch*, 29 Cal. 190, and *Jones v. Nixon*, 102 Tenn. 99, applying rule to administrator's sale creating cloud; *Einsteiner v. Bank*, 137 Cal. 50, as to execution sale of wife's property under judgment against husband. Doctrine approved in *Guy v. Hermance*, 5 Cal. 75; S. C. 63 Am. Dec. 86; *Englund v. Lewis*, 25 Cal. 357; *Hager v. Shindler*, 29 Cal. 56; *Grisby v. Shwarz*, 82 Cal. 280; *Tucker v. Keniston*, 47 N. H. 270, 271; 93 Am. Dec. 430; *Linnell v. Battey*, 17 R. I. 243; *Wagner v. Law*, 3 Wash. St. 508; S. C. 28 Am. St. Rep. 63, cases in which the cloud removed or prevented was created by execution sale either made or threatened. Explained and approved in the similar cases of *Alverson v. Jones*, 10 Cal. 11; S. C. 70 Am. Dec. 689; *Pixley v. Huggins*, 15 Cal. 133. Distinguished in *Archbishop of S. F. v. Shipman*, 69 Cal. 591, holding that a sale under a judgment for the foreclosure of a lien would not create a cloud upon the title of one owning the fee and in actual possession, but not a party to the judgment. Cited in *Huntington v. Railroad Co.*, 2 Sawy, 514, holding that equity will enjoin a tax sale when the assessment is void, and the deed given in pursuance of the sale would cast a cloud upon the owner's title. And is cited as sustaining jurisdiction in equity to remove clouds upon title, generally, in *Bayerque v. Cohen*, 1 McAllister, 117; *Watson v. Wigginton*, 28 W. Va. 578; *Pettit v. Shepherd*, 28 Am. Dec. 441, 442, note; *Lyon v. Hunt*, 46 Am. Dec. 227, note; *Carlin v. Hudson*, 62 Am. Dec. 524, note. Also cited in argument of counsel in *Alverson v. Jones*, 10 Cal. 11.

2 Cal. 590-593. **MINTURN v. HAYS.** 56 Am. Dec. 366.

Taxation.—A steamboat, though its home port be in New York, if used in navigation within this state, is liable to taxation here, pp. 591, 592.

Cited as authority that vessels are liable to taxation at their home ports, in *New Orleans v. Eclipse Tow-Boat Co.*, 33 La. Ann. 650; S. C. 39 Am. Rep. 282. Distinguished in *Johnson v. De Barry-Baya Merchants' Line*, 37 Fla. 513, and approved in dissenting opinion of Liddon,

J., in same case. Cited to the ruling stated, in *City of New Albany v. Meekin*, 56 Am. Dec. 527, note.

Same.—It is not within power of legislature to exempt any species of property from taxation, p. 592.

Cited in *State v. Bank of Smyrna*, 73 Am. Dec. 707, note; *Hogg v. Mackay*, 37 Am. St. Rep. 688, note.

Same.—Courts of equity will not take cognizance of cases simply involving the question of taxation, p. 593.

Doctrine approved in *Gulf R. R. Co. v. Morris*, 7 Kan. 231, denying an injunction to restrain the collection of a tax. So, in *Hallenbeck v. Hahn*, 2 Neb. 438. Cited in *Loring v. Downer*, 1 McAllister, 366, holding that equitable rights must be enforced on the equity side of the court. Also cited to the ruling stated, in *Horse etc. R. R. Co. v. Donoghue*, 11 Am. St. Rep. 92, note; *Pensacola etc. R. R. Co. v. Spratt*, 91 Am. Dec. 757, note; *Holland v. Mayor etc.*, 69 Am. Dec. 199.

2 Cal. 594-595. **PERALTA v. ADAMS.**

Mandamus is Not the Proper Remedy for refusal to enter a judgment for costs. The complainant may appeal, or sue for the costs, p. 595.

Cited to the point that a remedy by appeal is fatal to an application for a writ of mandate, in *Clark v. Crane*, 57 Cal. 634; and to the same effect, is cited in *Dane v. Derby*, 89 Am. Dec. 730, note.

2 Cal. 595-596. **KENT v. LAFFAN.**

Redemption.—Statutory right of redemption equally applies to sales under decrees in mortgage cases, as to sales under ordinary judgments at law, p. 596.

Doctrine adhered to in *McMillan v. Richards*, 9 Cal. 412; S. C. 70 Am. Dec. 664; *Gross v. Fowler*, 21 Cal. 395; *Stout v. Macy*, 22 Cal. 630. Referred to in *Parker v. Dacres*, 130 U. S. 47, construing similar statutory provisions of Washington Territory, and holding that the right of redemption was lost by laches.

2 Cal. 597-598. **KOHLER v. SMITH.** 56 Am. Dec. 369.

Interest.—Moneys, after due, bear interest at the agreed rate. If no rate is agreed upon, the statute rate takes effect, p. 598.

Cited in *Casey v. Gibbons*, 136 Cal. 371, holding agreed rate to exist until superseded by verdict or new obligation. Rule approved in *Guy v. Franklin*, 5 Cal. 417; *Kendall v. Porter*, 120 Cal. 109, holding that interest-bearing coupon bonds continue to bear interest after their maturity; *Hubbard v. Callahan*, 42 Conn. 534; 19 Am. Rep. 564; *Etayre v. McDaniel*, 28 Ill. 203; *Hand v. Armstrong*, 18 Iowa, 327;

McLane v. Abrams, 2 Nev. 207; **Overton v. Bolton**, 9 Heisk. 772; 24 Am. Rep. 373; **Spencer v. Mayfield**, 16 Wis. 546; and **Cromwell v. County of Sac**, 96 U. S. 61, as the law of Iowa. Referred to in **Union Inst. Sava. v. Boston**, 129 Mass. 91; S. C. 37 Am. Rep. 310, holding that interest, after breach of contract, is measured by the contract rate to time of payment. So in **Borders v. Barber**, 81 Mo. 645. See notes in 6 Am. Dec. 190; 61 Am. Dec. 64; 72 Am. Dec. 116; and 90 Am. Dec. 484.

2 Cal. 598-599. PIERSON v. HOLBROOK.

Continuance.—To entitle party to his application for a continuance to take the testimony of a distant witness the strictest diligence must be shown, p. 598.

Cited in **Stevenson v. Sherwood**, 74 Am. Dec. 145, note, where the authorities are collected.

2 Cal. 603-604. FOLSOM v. PERRIN.

Agency.—Authority of agent to make a lease for a period in excess of one year must be in writing, otherwise the lease is void, p. 604.

Approved in **Borderre v. Den**, 106 Cal. 600; and **Hoover v. Pacific Oil Co.**, 41 Mo. App. 325.

2 Cal. 605-606. CLARKE v. SMITH.

Indorsement.—An indorsement of mercantile paper by a third person before delivery to the payee is prima facie an accommodation to the payee, p. 606.

Explained in **Kealing v. Van Sickle**, 74 Ind. 541; S. C. 39 Am. Rep. 101, and said to sustain the rule that such indorser may be liable to the payee as indorser.

General citation: **Greenboro v. Ehrenreich**, 80 Ala. 582.

2 Cal. 607-609. MCGILVERY v. MOORHEAD.

Arrest.—Affidavit to sustain, must show the facts relied upon by positive averment, p. 609.

Cited, *Ex parte Yonetaro Fkumoto*, 120 Cal. 318, in which case the affidavit was held to be fatally defective, without determining the question of value of the principal case as authority.

2 Cal. 610-611. PEOPLE v. WELLS. S. C. before, 2 Cal. 198.

Office.—Absence of judge from state is not such a vacancy as can be filled by the executive, under legislative authority, p. 611.

Approved in **Weeks v. Gamble**, 13 Fla. 21, defining term "vacancy in office."

VOLUME III.

By WILLIAM FOSTER.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

3 Cal. 17-27. **LEESE v. CLARKE.** S. C. 18 Cal. 535; 20 Cal. 387.

Mexican Grant, that did not comply with Mexican laws and regulations, gave only an inchoate title, upon which an action of ejectment cannot be based in an American court, p. 27.

Disapproved in *Vanderslice v. Hanks*, 3 Cal. 46.

Approved in same case, on rehearing, 3 Cal. 48; also in *Gunn v. Bates*, 6 Cal. 269, but holding that the doctrine of the principal case was overruled by *Ritchie v. U. S.*, 17 How. 533, and *Fremont v. U. S.*, 17 How. 542, and this court must follow them; held, also, that plaintiff, who claimed under a Mexican grant, is entitled to recover, on ground of his prior possession. In *Welch v. Sullivan*, 8 Cal. 198, the court says that the principal case did not sustain *Woodworth v. Fulton*, 1 Cal. 295, which was overruled by *Cohas v. Raisin*, 3 Cal. 443. Field, C. J., in *Ferris v. Coover*, 10 Cal. 621, disapproves the principal case, saying it was overruled by *Gunn v. Bates*, 6 Cal. 269. *Hart v. Burnett*, 15 Cal. 598, 606, discussing fully all the cases, says the principal case is overruled by *Gunn v. Bates*, 6 Cal. 269, and *Ferris v. Coover*, 10 Cal. 621. The principal case was further heard, but not cited, in 18 Cal. 535, and 20 Cal. 387. Cited in *Byrne v. Alas*, 74 Cal. 634, 639, to the point that Mexican grants must be governed by Mexican laws. Cited in *U. S. v. Vallejo*, 1 Black, 552, as to the Mexican laws discussed in the principal case. Referred to in *Fuentes v. U. S.*, 22 Howard, 451, regarding a lost book of grants. Cited in *Crespin v. U. S.*, 168 U. S. 213, as to grants of pueblo lots by alcaldes and Spanish governors, holding that in 1840, in New Mexico, a prefect could not grant public lands. Approved in *Tobin v. Walkinshaw*, *McAllister*, 163, 164.

3 Cal. 27-46. **VANDERSLICE v. HANKS.**

Mexican Grant is governed by Mexican laws and regulations; but when the governor made a grant of lands, the presumption is that he

acted in accordance with existing laws and regulations, and a party who asserts the contrary must prove it, pp. 38, 39.

Reversed on rehearing, 3 Cal. 47-50.

Approved in *Ferris v. Coover*, 10 Cal. 616, as to what papers the governor was required to issue. Cited in *Hart v. Burnett*, 15 Cal. 598, in discussion of *stare decisis* on this point; also in *U. S. v. Vallejo*, 1 Black, 552, with reference to Mexican land laws; and in *Tobin v. Walkinshaw*, *McAllister*, 164, as having been reversed on rehearing. Cited in *Crespin v. U. S.*, 168 U. S. 213, holding that in New Mexico, in 1840, a prefect could not grant public lands.

"Denouncement" by another claimant, or forfeiture by the government, were the only acts that would defeat the grant, if the grantee failed to perform the conditions named in it, p. 41.

Cited in *Touchard v. Touchard*, 5 Cal. 307, holding that the doctrine of "denouncement" does not apply to a grant from a municipal corporation. Approved, as to denouncement, in *Morris v. Moody*, 84 Cal. 145, 146.

Condition Subsequent is void if impossible of performance, p. 41.

Cited in note to *Burdie v. Burdie*, 70 Am. St. Rep. 830, on general subject.

3 Cal. 47-50. **VANDERSLICE v. HANKS.** Reversing S. C. 3 Cal. 27-46, on rehearing.

Mexican Grant.—If confirmation by the territorial legislature is a condition named in the grant, such confirmation cannot be presumed, and, unless it is proven, the grant vests only an inchoate title in the grantee, p. 49.

Overruled: See note to *Leese v. Clarke*, 3 Cal. 17-27, ante, on cases in 8 Cal. 198, 10 Cal. 621, 15 Cal. 606.

3 Cal. 55-59. **BARTLETT v. HOGDEN.**

New Trial.—Affidavit of newly discovered evidence must show that the evidence is not cumulative and that failure to produce it at the trial was not caused by lack of due diligence, p. 57.

Approved in *Brooks v. Lyon*, 3 Cal. 114. Cited in *Klockenbaum v. Pierson*, 22 Cal. 163; also in *People v. Sutton*, 73 Cal. 248, holding that applications for new trial on this ground are to be regarded with disfavor.

3 Cal. 59-63. **LICK v. O'DONNELL.** 58 Am. Dec. 383.

Deed for "one-half of my lot" is not void for uncertainty, p. 63.

Cited in *Pettigrew v. Dobbelaar*, 63 Cal. 397, holding that a deed of "all lands belonging to the party of the first part" conveyed the

lands; *Cullen v. Sprigg*, 83 Cal. 62, holding that a deed of a definite quantity of land, within a larger tract, conveys an undivided interest in the larger tract; *Boyd v. Wilson*, 86 Ga. 383, holding that a sheriff's deed, of an "undivided fourth part" of land, complied with the description in the levy and advertisement; *Knowlton v. Dolan*, 151 Ind. 85, sustaining deed of all interest in partnership realty; *Idaho Gold Mine Co. v. Min. Co.*, 5 Idaho, 120, deed conveying all property, real, personal and mixed, located in certain county, sufficient to convey mining claim owned by grantor at date of execution of deed; *McCulloch v. Price*, 14 Mont. 323, 43 Am. St. Rep. 639, holding that "all my lands" is a good description in a deed.

Parol Evidence, that the grantor had only one lot, was properly admitted, p. 63.

Cited in *Marriner v. Dennison*, 78 Cal. 207, holding that an incomplete description may be completed by parol evidence, but the complaint must make the necessary averments; also in notes to *American Decisions*, vol. 60, p. 222, vol. 69, p. 411, on varying deed by parol evidence, citing note to principal case, 58 Am. Dec. 383.

Tenancy in Common between grantee and grantor was created by the deed, and action for unlawful detainer does not lie until after partition is obtained, p. 63.

Cited, as to rights of grantee as tenant in common, in *Schenck v. Eroy*, 24 Cal. 111, and *Lawrence v. Ballou*, 37 Cal. 520; and in note to 50 Am. St. Rep. 845, on point that cotenant cannot be sued for unlawful detainer.

3 Cal. 64. **MOXLEY v. SHEPARD.**

Mechanics' Liens, for labor and for materials, stand on same footing, p. 64.

Cited in *In re Hoyt*, 3 Biss. 441, holding that as between mechanics' liens there is no priority, but all of them take precedence of a mortgage given after the work was begun; and in note to 79 Am. Dec. 277, that there is no preference in mechanics' liens.

3 Cal. 69-75. **SUROCCO v. GEARY.** 58 Am. Dec. 385.

Trespass does not lie for destruction of a building during a fire, to save adjacent buildings, if it was done in good faith under apparent necessity, pp. 72, 73.

Cited in *County v. Spencer*, 126 Cal. 674, 77 Am. St. Rep. 220, sustaining acts of Horticultural Commissioners in reference to infected orchard; *Bates v. Worcester etc. Dept.*, 177 Mass. 135, holding rule inapplicable to negligence of employees of private fire company; *Field v. Des Moines*, 39 Iowa, 578, 583, 587, 18 Am. Rep. 49, 53, 57, and *McDonald v. Red Wing*, 13 Minn. 41, 42, both cases holding that a city is

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not liable for such destruction, when done under orders of city officials, unless the liability is created by statute—and that it is not a taking of private property for public use; *Walker v. Weatherbee*, 65 N. H. 661, holding that defendant was not liable in trover for detaining in his barn horses of plaintiff who entered his field and did damage, if what defendant did was reasonably necessary, which was a question for the jury; *The Brinton*, 66 Fed. 73, where a tug was held liable for dragging a sunken sloop from her position, the safety of navigation not requiring it. Principal case, and note in 58 Am. Dec. 385, are cited in notes to 47 Am. Dec. 207, 208, 210, 66 id. 442, 98 id. 698, 4 Am. St. Rep. 403.

3 Cal. 75-82. **CONNALLEY v. PECK.**

Amendments should be allowed in equity pleadings, to make them conform to the facts, in order that the court may decree fully on the merits, p. 82.

Cited in *Farmers' Bank v. Stover*, 60 Cal. 396, holding it was error not to allow amendment of answer during the trial; in *Burns v. Scooffy*, 98 Cal. 276, where the court favors "a broad liberality" in allowing amendments; in *Perea v. Gallegos*, 5 New Mex. 109, holding that the filing of an amended bill should have been allowed; and to the same effect in *Berry v. Hull*, 6 New Mex. 656.

3 Cal. 83-88. **SNYDER v. WEBB.**

Married Woman cannot make contracts, p. 88.

Cited in *Hass v. Sedlack*, 9 Or. 465, where husband and wife mortgaged wife's land and foreclosure summons was served on wife alone; held, grantee in quitclaim deed from husband and wife, after foreclosure sale, was entitled to recover the premises from the purchaser at the sale. Cited in note to 50 Am. Dec. 371, on marriage settlements.

3 Cal. 89-90. **LINN v. TWIST.**

New Trial.—Statement must be agreed to by the parties or sealed by the judge, p. 90.

Doubted in *Dickinson v. Van Horn*, 9 Cal. 210, holding the statement on appeal to be sufficiently agreed to, and declining to extend the principal case to any other not exactly parallel, as it was rendered before the statute was amended.

3 Cal. 90-93. **RAMSEY v. CHANDLER.**

Injunction granted to prevent overflow from dam, p. 93.

Cited in *Kittle v. Pfeiffer*, 22 Cal. 491, holding that injunction was the proper remedy to prevent obstruction of a right of way.

3 Cal. 94-98. MILLS v. DUNLAP.

Notice of Taking Deposition is not invalidated by a slight error in the title of the cause, p. 97.

Cited in *Cody v. Filley*, 4 Colo. 343, holding that error in entitling notice and undertaking on appeal did not invalidate them, as they referred intelligibly to the case.

3 Cal. 98-100. SINCLAIR v. WOOD.

Partnership cannot be proved by general reputation, p. 100.

Approved in *Hudson v. Simon*, 6 Cal. 455, and *Campbell v. Hastings*, 29 Ark. 528. Cited in *Cross v. Burlington Bank*, 17 Kan. 337, where authorities on both sides are given, but no decision made; also in note to 38 Am. Dec. 482.

3 Cal. 106. PEOPLE v. NAVIS.

Confession.—When put in evidence, no part of it can be excluded, p. 106.

Cited in note to 6 Am. St. Rep. 251.

3 Cal. 108-111. CAVILLAUD v. YALE.

Negligence of Attorney.—S. C. 58 Am. Dec. 388.

3 Cal. 111. BROWN v. BROWN.

Findings of law and fact must be made separately, p. 111.

Approved in *Briggs v. Eggan*, 17 Kan. 591.

3 Cal. 113-114. BROOKS v. LYON.

New Trial cannot be granted for surprise, where exercise of the slightest prudence would have guarded against it, p. 114.

Cited in *Klockenbaum v. Pierson*, 22 Cal. 163.

Affidavit of newly discovered evidence must show affirmatively its character, and due diligence in procuring it, p. 114.

Cited in *Landers v. Miles*, 3 Or. 43, as to cumulative evidence; and in note to 54 Am. Dec. 304, on affidavits for new trial.

3 Cal. 115-120. BURNHAM v. HAYS. 58 Am. Dec. 389.

Amendment may be allowed to cost bill and affidavit, in the court's discretion, p. 118.

Cited in *Palmer v. Barclay*, 92 Cal. 201, holding that an amendment to affidavit of merits was properly allowed.

Affidavit to cost bill may be made by an attorney or anyone having knowledge of the facts, p. 119.

Approved in *Yorba v. Dobner*, 90 Cal. 338, and *Morris v. Rodgers*, 28 Oreg. 579.

Statute.—Sections must be considered together, and so construed as to give utility and effect to the law and make it compatible with common sense and justice, p. 119.

Approved in *Cullerton v. Mead*, 22 Cal. 98, and *In re Mitchell*, 120 Cal. 386. Cited in *Cormerais v. Genella*, 22 Cal. 125, holding that a statute affecting a remedy should be liberally construed to extend the remedy; and in note to 68 Am. Dec. 618.

N. B.—Note to principal case, on vacating of judgments by default, is cited in notes to 67 Am. Dec. 653, 71 id. 625, 75 id. 486, 77 id. 302, 96 id. 624, 3 Am. St. Rep. 630, 5 id. 168, 6 id. 590, 14 id. 296, 15 id. 44, 19 id. 345, 533, 31 id. 898, 36 id. 767, 40 id. 498, 928, 43 id. 28, 647, 50 id. 475.

General citation: *Hawthorn v. Oliver*, 32 Or. 63.

3 Cal. 120-121. **LUPTON v. LUPTON.**

Equity has no jurisdiction of a bill to subject assets of an absent debtor to payment of a claim, when there is a perfect remedy at law, p. 121.

Distinguished in *Hager v. Shindler*, 29 Cal. 55, holding that equity has jurisdiction, at suit of purchaser at sheriff's sale, to set aside a fraudulent deed of the judgment debtor. Cited in note to 90 Am. Dec. 297, on pleading and evidence in creditor's bills.

3 Cal. 122-129. **PAYNE v. SAN FRANCISCO.**

Statute.—The requirement in a city charter that officials shall qualify within ten days after election is mandatory, p. 125.

Cited in *Hart v. Plum*, 14 Cal. 155, holding that a statutory limit of time in tax assessment proceedings was directory. Approved in *Hull v. Superior Court*, 63 Cal. 176, holding that a sheriff who had failed to qualify within the statutory time had no right to the office; and in *People v. Perkins*, 85 Cal. 511, holding that a member of state board of agriculture has ten days from the time he receives his commission within which to qualify. Cited in *Buswell v. Supervisors*, 116 Cal. 354, holding that a statutory limit of time as to acts of county board of equalization was directory.

3 Cal. 130-136. **PEOPLE v. LAFARGE.**

Equity has jurisdiction to vacate a judgment at law for fraud, mistake, surprise, inadvertence, and excusable neglect, and the court is not limited in the exercise of it to any particular period, p. 134.

Cited in *Robb v. Robb*, 6 Cal. 22, holding that after adjournment of a district court term, a party alleging fraud in obtaining a judgment

at the term must proceed by bill in equity; also in *Casement v. Ringgold*, 28 Cal. 337, holding that after adjournment of the term the court cannot, on motion, set aside a judgment inadvertently obtained; and in *Baker v. O'Riordan*, 65 Cal. 370, holding that the superior court has jurisdiction of a bill in equity to set aside a decree of the probate court obtained by fraud. Cited in note to 58 Am. Dec. 397, on what amounts to surprise, mistake, etc.

3 Cal. 137-140. **PERKINS v. WILSON.**

Verdict may be amended by the court when the error is merely formal and has no connection with merits of the case, p. 139.

Cited in *Fox v. West*, 1 Ida. 784, holding that a party who has acquiesced in the verdict cannot object to it for the first time on appeal; also in *Morris v. Burke*, 15 Mont. 216, 217, holding that a verdict for plaintiff for \$50 after the jury had been instructed to find for plaintiff for \$100, or for defendant, must be received by the court, as it is not "informal or insufficient" under the statute.

3 Cal. 140-144. **STEVENS v. STEWART.**

Delivery of an order for goods sold is only effectual when immediately followed by actual delivery of the goods, p. 143.

Cited in *Coffield v. Clark*, 2 Colo. 105, holding that delivery of an order for cattle alleged to be in the hands of a third party was not a delivery if the third party did not have them, and delivery of part of them was no bar to a suit for nondelivery of the whole; also in *Feltenstein v. Stein*, 157 Ill. 30, where delivery of keys of a store, followed by actual possession of the store within an hour, was held good.

General citation: *In re Clifford*, 2 Sawy, 423, Fed. Cas. No. 2,893.

3 Cal. 147-148. **KELLER v. YBARRU.**

Contract of Sale of "as many grapes as plaintiff wishes," for ten cents a pound, is complete when defendant states that he wishes 1900 pounds and tenders \$190, p. 148.

Cited in *Cooper v. Lansing Co.*, 94 Mich. 275, 34 Am. St. Rep. 343, holding that where an order was given for "wheels for the season" at a certain price, and some were delivered, it was a contract for the season at that price. Distinguished in *Moulton v. Kershaw*, 59 Wis. 321, 48 Am. Rep. 518, holding that where an offer to sell salt was made by letter, and an order by telegraph was sent in reply, there was no contract.

3 Cal. 148-151. **RABE v. WELLS.**

Partnership.—Notice of dissolution is a fact for the jury, p. 151.

Cited in *Gage v. Rogers*, 51 Mo. Ap. 432, holding that if notice of

dissolution was published in Bradstreet's slips that were delivered daily to defendant, it was a fact for the jury to consider.

Error must be shown clearly and affirmatively, in order to reverse a judgment on appeal, p. 151.

Cited in *Morgan v. Hugg*, 5 Cal. 410, holding that not every impropriety is error, and nothing can be relied on that was not taken advantage of in the lower court; also in *Nosler v. Haynes*, 2 Nev. 55; and in *Henderson v. Morris*, 5 Oreg. 27, 28, holding that surprise must be claimed in the lower court, if at all, and the transcript on appeal must show proceedings in the court below.

3 Cal. 151-167. *HYATT v. ARGENTI*.

Pledge may be sold by pledgee without notice to pledgor, if the parties so agree, p. 157.

Approved in *Dewey v. Bowman*, 8 Cal. 150, 151, 152, as to a pledged note. Cited in notes to 49 Am. Dec. 737, and 51 id. 314, as to pledgee's right to sell; also in note to 75 Am. Dec. 322, on point that a stock-broker may limit his liability to a client.

3 Cal. 167-178. *PEOPLE v. OLDS*. 58 Am. Dec. 398.

Mandamus is not the proper remedy to try title to a public office, pp. 170-178.

Cited in *Merced Co. v. Fremont*, 7 Cal. 133, where *mandamus* was directed to a lower court to compel the issuance of an attachment for contempt; also in *Satterlee v. San Francisco*, 23 Cal. 320, holding that validity of an election and right to hold an office cannot be attacked collaterally; and in *Hull v. Superior Court*, 63 Cal. 177, holding that *certiorari* does not lie; and in dissenting opinion in *Kennedy v. Board of Education*, 82 Cal. 493, where a majority of the court held that *mandamus* was the proper remedy to compel the board of education to reinstate a teacher. Distinguished in *Morton v. Broderick*, 118 Cal. 481, holding that the writ may issue to compel an auditor to compute a tax levy, though title to office of rival boards of supervisors is incidentally involved in the question. In *Ewing v. Turner*, 2 Okla. 104, 35 Pac. Rep. 954, the court holds that the writ may issue to enable one who has *prima facie* title to a public office to obtain the records and belongings of the office, but the court will not try his title. Cited, on point that *quo warranto* is the proper remedy, in *Denver v. Hobart*, 10 Nev. 30, *Brown v. Turner*, 70 N. C. 104, notes to 76 Am. Dec. 709, 94 id. 83, 3 Am. St. Rep. 184, 39 id. 917; and, on point that *mandamus* is not the proper remedy, in *Biggs v. McBride*, 17 Oreg. 652, notes to 12 Am. Dec. 29, 60 id. 773, 77 id. 59, 89 id. 732, 13 Am. St. Rep. 273; and on point that *mandamus* does not lie where there is other adequate redress, in notes to 67 Am. Dec. 553, 81 id. 647, 89 id. 729.

3 Cal. 179-184. CALL v. HASTINGS.

Recording of Conveyances.—Statutes creating the doctrine of constructive notice have always been most rigidly construed, p. 183.

Cited in *Chamberlain v. Bell*, 7 Cal. 294, 68 Am. Dec. 261, holding that where a deed is incorrectly recorded it is not constructive notice; and in *Bird v. Dennison*, 7 Cal. 304, 309, holding that the statute applies only to conveyances specifically named in it. In *Stafford v. Lick*, 7 Cal. 487, the principal case is approved on stare decisis as to an unrecorded conveyance being void, and on page 498, in dissenting opinion, is cited as not raising the question of retrospective laws, the majority of the court holding that the Registry Act is not unconstitutional, as impairing obligation of contracts or destroying vested rights. Approved in *Clark v. Troy*, 20 Cal. 223, on stare decisis, as to recording of conveyances made before passage of the law; and to same effect in *Anderson v. Fisk*, 38 Cal. 634, holding that the statute must be construed liberally to carry out its intent, and deeds made before passage of the Act must be recorded even though they were not acknowledged.

3 Cal. 185-187. PERALTA v. MARIEA.

Dismissal.—Want of Prosecution by absence at trial is sufficient ground for, p. 186.

Cited in *Colorado etc. Co. v. Railway Co.*, 94 Fed. 313, sustaining dismissal for want of prosecution under facts stated.

3 Cal. 191-192. COTES v. CAMPBELL.

Evidence.—Allegations and proofs must correspond, p. 191.

Cited in *McCord v. Seale*, 56 Cal. 264, holding that allegation of individual interest is not sustained by proof of partnership interest; and in *Harrison v. McCormick*, 69 Cal. 621, holding that in suit to enforce partnership liability all the partners must be joined, unless sued by firm name; and in *Weinreich v. Johnston*, 78 Cal. 257, holding that proof of an individual note is not allowed in suit on a partnership note.

3 Cal. 192-195. CRANE v. BRANNAN.

Presumption is that a judicial officer has acted regularly, p. 195.

Cited in *Alderson v. Bell*, 9 Cal. 321, as to a decree that "defendants had waived service;" and in *Montgomery v. Tutt*, 11 Cal. 317, as to a decree that a case was heard "on pleadings and evidence;" in *Stoddard v. Mattice*, 10 S. Dak. 255, sustaining decree based on acknowledgment of service where place of service not stated.

3 Cal. 196-206. SAMPSON v. SHAEFFER.

Assumpsit for use and occupation of land will not lie to try plaintiff's title, pp. 201-205.

Cited in *Appleton v. Ames*, 150 Mass. 44, holding that a tenancy at will may be terminated by suing the tenant as a trespasser or repossessing the premises without violence; and in *Columbia Co. v. Histogenetic Co.*, 14 Wash. 479, holding that a complaint is not for use and occupation where it fails to aver that the premises were occupied permissively or as a tenancy. Cited in notes to 46 Am. Dec. 289, on use and occupation, and 89 id. 429, on trial of title by assumption.

3 Cal. 206-208. **DULTON v. SHELTON.**

Attachment is allowed only where contract is made in, or payable in, this state, p. 207.

Approved in *Eck v. Hoffman*, 55 Cal. 502, *Tuller v. Arnold*, 93 Cal. 168, *Trabant v. Rummell*, 14 Oreg. 18, 19; *Bank v. Sperry etc. Co.*, 141 Cal. 316, discussing venue in action against corporation.

3 Cal. 212-215. **MARYSVILLE v. BUCHANAN.**

Clerk of District Court, after filing remittitur from supreme court, may issue execution for costs, without an order from the district court, and in vacation, p. 214.

Approved, in regard to entry of judgment, in *McMillan v. Richards*, 12 Cal. 468; *People v. Jones*, 20 Cal. 55; *McMann v. Superior Court*, 74 Cal. 108. Cited in *Jacksonville Co. v. Adams*, 28 Fla. 659, holding that writ of possession in ejectment cannot be granted pending appeal; also in *Rockwell v. District Court*, 17 Colo. 128, 31 Am. St. Rep. 272, holding that the party prevailing on appeal is entitled to execution in the lower court, even if he has already obtained judgment on the appeal bond; also in note to 49 Am. Dec. 515, on execution after judgment.

3 Cal. 216-219. **AH THAIE v. QUAN WAN.**

Injunction Bond.—Reasonable counsel fees for getting the injunction dissolved are recoverable in suit on the bond, p. 218.

Approved in *Prader v. Grim*, 13 Cal. 588; *Wittich v. O'Neal*, 22 Fla. 596; *Behrens v. McKenzie*, 23 Ia. 342, 92 Am. Dec. 430; *Miles v. Edwards*, 6 Mont. 182; and to same effect, as to dissolution of attachment, in *Territory v. Rindscoff*, 5 New Mex. 97. Cited in *Bucki etc. Co. v. Fidelity etc. Co.*, 109 Fed. 397, quoting *Wittich v. O'Neal*, 22 Fla. 596; *Crowley v. United States Fidelity etc. Co.*, 29 Wash. 276, in action on builder's surety bond owner may recover attorney's fees incurred in defending against liens; *Noble v. Arnold*, 23 Ohio St. 270, holding that if the fee was for defending the suit, and the dissolving of the injunction was only incidental, the fee cannot be recovered as damages; also in *Elder v. Kutner*, 97 Cal. 494, holding that in suit on an attachment bond counsel fees in the attachment suit cannot be recovered, in the absence of any allegation that they have been paid; and in note to 77 Am. Dec. 157, 159, on attorneys' fees.

3 Cal. 219-227. HICKS v. BELL.

District Court Jurisdiction is constitutional and cannot be affected by statute, p. 224.

Cited in *Burns v. Superior Court*, 140 Cal. 7, discussing power of court to punish for disobedience to notary's subpoena.

Mines—Ownership.—According to common law gold and silver mines belong to crown, p. 225.

Cited in *United States v. San Pedro etc. Co.*, 4 N. Mex. 294, discussing effect of act confirming title to Mexican grant containing mineral land.

Mines on public lands belong to the state by virtue of her sovereignty, and she has by legislation permitted all who desire to work the mines, with or without conditions, pp. 226-227.

Distinguished in *Stoakes v. Barrett*, 5 Cal. 39, holding that the principal case did not decide that gold diggers could trespass on private lands. Approved in *Irwin v. Phillips*, 5 Cal. 145, 63 Am. Dec. 114, holding that the right of mining stands on equal footing with the right to divert streams from their natural courses; also in *Conger v. Weaver*, 6 Cal. 557, 65 Am. Dec. 531, holding that the right of all persons to mine applies also to canals for mining, and prior possession determines the right in both cases; and in *Merced M. Co. v. Fremont*, 7 Cal. 324, 68 Am. Dec. 269, holding that the owner of a mining claim has a vested title, and may protect his rights by injunction against trespassers. In *Boggs v. Merced M. Co.*, 14 Cal. 305, the principal case is held to apply only to public lands, and the court say that when lands containing minerals have been patented, the patentee can maintain ejectment against miners; and on pp. 373, 376, the court decline to decide whether the doctrine that mines belong to the state is correct. In *Moore v. Smaw*, 17 Cal. 217, 219, 79 Am. Dec. 131, 132, the doctrine that mines belong to the state is overruled, and it is held that a U. S. patent covers all minerals in the land. *Doran v. C. P. R. Co.*, 24 Cal. 257, disapproves the principal case, and holds that the owner of mineral land cannot enjoin a railway company from exercising a right of way over the land. Cited, as to rights of miners and settlers on public lands, in notes to 63 Am. Dec. 94, 102, 105, 91 id. 694.

3 Cal. 228-230. THAYER v. WHITE.

Vendee of land can rescind the contract only by alleging and proving paramount title in another than the vendor, p. 230.

Approved in *Riddell v. Blake*, 4 Cal. 267. Cited in *Arguello v. Edinger*, 10 Cal. 160, and *Weber v. Marshall*, 19 Cal. 457, on point that an equitable defense is allowed in ejectment.

3 Cal. 231-235. BACKUS v. MINOR.

Interest.—An account stated, in which interest on partial payments is reckoned according to a custom of merchants instead of the common-law rule, has the effect of validating that method of computation, p. 235.

Approved in *Auzerais v. Naglee*, 74 Cal. 71. Cited in *Anderson v. Perkins*, 10 Mont. 159, holding that interest must first be canceled by a partial payment, and the balance, if any, applied to the principal; also in *Marye v. Strouse*, 6 Sawy. 212, 5 Fed. Rep. 491, holding that it is no cause for opening an account stated, that an item of interest therein could not have been recovered by suit; *Porter v. Price*, 80 Fed. 660, 49 U. S. App. 304, quoting *Marye v. Strouse*, 5 Fed. 483; *Patillo v. Allen-West etc. Co.*, 131 Fed. 688, an account stated, conceded to disclose some just indebtedness, retained by debtor for unreasonable time, estops him, in absence of fraud or mistake, from denying liability on all items; *Sayward v. Dexter*, 72 Fed. Rep. 768, holding that where a rate of interest is in a series of monthly statements, it is considered as agreed to. Cited in notes to 50 Am. Dec. 288, 290, on rules for computing interest.

3 Cal. 235-236. McNALLY v. MOTT.

Name.—Substitution of "Gordon" for "George" as the Christian name of a defendant, on ex parte motion by plaintiff after judgment, held error, as prima facie the names signify different persons, p. 236.

Cited in *Houghton v. Tibbets*, 126 Cal. 58, vacating default of W. T. C., on service of W. F. C.; *Smith v. Curtis*, 7 Cal. 587, holding that where a defendant who had been substituted without notice appeared and answered, it cured the fault; also in *Ford v. Doyle*, 37 Cal. 348, holding that in a suit against—Doyle, John Doe and Richard Roe, a writ of possession cannot issue against James Doyle, Jr., James Doyle, Sr., and Catherine Doyle; and in *Peckham v. Stewart*, 97 Cal. 153, holding that Redman and Redmond were presumably different names; and in *Kennedy v. Merriam*, 70 Ill. 230, holding that May and Mary signify different persons, in absence of proof to the contrary.

3 Cal. 236-237. HANSON v. WEBB.

Franchise.—Holder of is protected by statute against infringement of his rights, p. 237.

Cited in *Cal. Telegraph Co. v. Alta Telegraph Co.*, 22 Cal. 423, holding that the granting of exclusive privileges to a telegraph company does not render an act unconstitutional.

3 Cal. 238-241. MIDDLETON v. FRANKLIN.

Injunction to restrain a nuisance is granted only where the injury cannot be compensated by damages or is irremediable, p. 241.

Cited in *People v. Davidson*, 30 Cal. 384, holding that nuisance is a question of fact, and that a wharf was not a nuisance; also in *Bigelow v. Los Angeles*, 85 Cal. 618, holding that in granting a preliminary injunction the final judgment of the court ought not to be anticipated; and in *Eastman v. Amoskeag Co.*, 47 N. H. 78, holding that equity will not interfere if an action at law would give adequate remedy.

3 Cal. 241-243. **WILSON v. CUNNINGHAM.** 58 Am. Dec. 407.

Streets.—Where a private person is allowed to divert a street from its legitimate use by running cars thereon for his own benefit, he is required to exercise extraordinary care in running the cars, p. 243.

Cited in *State v. Trenton*, 36 N. J. Law, 84, holding that the common council of a city have no right to allow a private railway to be built across a public street; also in note to 90 Am. Dec. 64, on speed of trains.

3 Cal. 246. **BURT v. WASHINGTON.**

Mechanics' Lien law does not cover a bridge, p. 246.

Cited in notes to 78 Am. Dec. 694, 695, on liens upon buildings.

3 Cal. 247-249. **ADAMS v. TOWN.**

Writ of Error may be issued by supreme court to review the judgment of a county court, p. 248.

Cited in *Ex parte Thistleton*, 52 Cal. 224, holding that where there is no machinery provided for an appeal, a writ of error will lie; also in note to 91 Am. Dec. 196, on writs of error; *State v. Reed*, 3 Idaho, 558, order overruling application for change of venue is reviewable only on appeal from final judgment.

3 Cal. 249-253. **EDDY v. SIMPSON.** 58 Am. Dec. 408.

Water.—The right is not to the water itself, but to the use of it; it is gained by prior possession, lost by abandonment, and if lost, cannot be reclaimed, p. 252.

Approved in *Barneich v. Mercy*, 136 Cal. 206, as to water of springs which has passed into a watercourse; *Katz v. Walkinshaw*, 141 Cal. 135, discussing deviation from common-law rule under local necessities. *Kelly v. Natoma Water Co.*, 6 Cal. 108, holding that appropriation of water must be actual, not constructive, and that a dam was an appropriation only at the point where it was erected, not below. Distinguished in *Hoffman v. Stone*, 7 Cal. 49, holding that appropriation of water by the first locator did not prevent the use of the bed of the stream by a neighbor, if he did not divert the water; and to same effect in *Butte Co. v. Vaughn*, 11 Cal. 151, 70 Am. Dec. 772. Cited in *McDonald v. Askew*, 29 Cal. 206, holding that a prior locator, who sold his right,

still retained the right to a certain amount of the flow; also in *Nevada Co. v. Kidd*, 37 Cal. 310, holding that diverting of water would not be restrained until the party complaining was in condition to use it. Cited in *Druley v. Adams*, 102 Ill. 197, holding that a lower proprietor is entitled to the benefit of all improvements whereby the flow of water is increased; also in *Gassert v. Noyes*, 18 Mont. 222, holding that a prior appropriator cannot change the place of his ditch to the injury of a subsequent proprietor; and in *Schulz v. Sweeny*, 19 Nev. 361, 3 Am. St. Rep. 890, 891, holding that failure to use water was evidence of abandonment; also in *Last Chance Co. v. Bunker Hill Co.*, 49 Fed. Rep. 434, holding that a prior appropriator cannot change the place of his use; and in *Hewitt v. Story*, 64 Fed. Rep. 515, holding that waste water in a ditch was abandoned by nonuser. Cited, as to prior appropriation of water, in notes to 61 Am. Dec. 470; 63 id. 141; 68 id. 331; and, as to rights of use, in notes to 64 Am. Dec. 661; 65 id. 401; 68 id. 313; 79 id. 639.

3 Cal. 255-257. **MORRISON v. DAPMAN.**

Judgment may be amended nunc pro tunc at any time when it appears of record that the entry on the minutes is incorrect; but can not be opened and a new judgment rendered, after the lapse of a term, p. 257.

Approved, as to statement on motion for new trial, in *Branger v. Chevalier*, 9 Cal. 173, 352, and *De Castro v. Richardson*, 25 Cal. 52, 53. Cited in *Casement v. Ringgold*, 28 Cal. 338, holding that a judgment cannot be vacated after the term, unless a motion for new trial has been made within the statutory time; also in *Brackett v. Banegas*, 99 Cal. 626, holding that an application to vacate a judgment under sec. 473, C. C. P., must be made within six months; and in *Kaufman v. Shain*, 111 Cal. 20, 52 Am. St. Rep. 141, holding that the court may correct errors in a minute order at any time; and to same effect in *Wallace v. Cason*, 42 Ga. 441. Cited in *Scamman v. Bonslett*, 118 Cal. 97, holding that where a court amended a decree seventeen months after its entry, thus granting different relief, without notice to defendant, the amendment was without jurisdiction, and void; in *Fox v. West*, 1 Ida. 784, holding that a motion to correct an irregular judgment should be made in the lower court; also in *Vestal v. State*, 3 Tex. Ap. 654, holding that the record in a criminal case cannot be contradicted by parol evidence; and in *Hays v. Miller*, 1 Wash. T. 149, holding that a decree of foreclosure cannot be amended nunc pro tunc to the prejudice of a prior encumbrancer, and in *Fairchild v. Dean*, 15 Wis. 210, holding that a judgment entered in 1855 cannot be amended in 1861. Cited in notes to 12 Am. Dec. 353 and 14 id. 518, on amendments.

Judgment.—Amendment cannot be made by changing award of cost de bonis intestati to one against administrator personally, p. 257.

Cited in *Leonis v. Leffingwell*, 126 Cal. 372, as to converse amend-

ment where record showed no clerical error; *Estate of Potter*, 141 Cal. 426, denying right to amend judicial errors nunc pro tunc.

3 Cal. 260-262. **WILCOMBE v. DODGE.** 58 Am. Dec. 411.

Note cannot be sued on until the day after it is due, p. 262.

Affirmed in *Farmers' Bank v. Salina Co.*, 58 Kan. 209.

Distinguished in *McFarland v. Pico*, 8 Cal. 634, holding that demand must be made on the last day to fix liability of indorser. Cited in *Davis v. Eppinger*, 18 Cal. 381, 79 Am. Dec. 185, holding that suit on a note payable one day after date cannot be begun on the day after it is made; and in *Holland v. Clark*, 32 Ark. 701, holding that the statute of limitations begins to run from the last day of grace, if demand was made on that day, otherwise from the following day; *Sabin v. Burke*, 4 Idaho, 119, note without grace payable at bank, where it remains until due, may be sued on after banking hours of day it falls due..

Payment of Note may be made at any time during day of maturity, p. 262.

Cited in *Farmers' etc. Bank v. Salina etc. Co.*, 58 Kan. 209, holding rule not altered by custom of banking hours where note payable at bank.

3 Cal. 263-266. **TARTAR v. HALL.**

Mortgagor is estopped from denying his title to the mortgaged premises, p. 266.

Affirmed, on similar facts, in *Redman v. Bellamy*, 4 Cal. 250. Cited in *Clark v. Baker*, 14 Cal. 634, 76 Am. Dec. 458, holding that a title subsequently acquired by mortgagor inures to benefit of mortgagee; *Kirkaldie v. Larrabee*, 31 Cal. 457, 89 Am. Dec. 206, holding that where a mortgagor of public lands, acquires later a homestead title, it inures to benefit of the mortgagee; and to same effect in *Stewart v. Powers*, 98 Cal. 519, where a pre-emptioner acquired a patent after the mortgage; *Stidham v. Matthews*, 29 Ark. 660, holding that a vendee must take notice of recitals in the deed under which vendor holds; and in note to 52 Am. St. Rep. 251, on encumbrances by a pre-emptioner of public lands.

Distinguished in *Freiermuth v. Steigleman*, 130 Cal. 395, holding wife not estopped from asserting invalidity of void mortgage to her husband of homestead.

General citation: *Grady v. Newman*, 1 Ind. Ter. 625.

3 Cal. 266. **LEWES v. THOMPSON.**

Sheriff.—Deputy may make an execution deed, but it must be in the sheriff's name, p. 266.

Approved in *Rowley v. Howard*, 23 Cal. 403, and *Robinson v. Hall*, 33 Kan. 143.

3 Cal. 271-272. PEOPLE v. SMITH.

Bail Bond.—In suit on bond given to appear and answer an indictment, the complaint must aver that an indictment was found or is pending, p. 272.

Cited in *People v. Sloper*, 1 Ida. 163, holding that sureties on the bond are liable only when defendant is convicted of the offense for which he was held to appear.

3 Cal. 273-283. CHIPMAN v. EMERIC.

Landlord and Tenant.—Nonpayment of rent is a forfeiture of the tenant's estate, provided the rent is demanded at a late hour on the last day it is due, p. 283.

Approved, on *stare decisis*, in *McGlynn v. Moore*, 25 Cal. 397. Cited in *Gage v. Bates*, 40 Cal. 385, holding that an amendment to the statute of unlawful detainer had only changed the time of demand, the rest of the law remaining as before; and in *Bettys v. Milwaukee Co.*, 37 Wis. 326, on point that statute must be construed strictly.

3 Cal. 284-287. WHEELER v. HAYS.

Findings in a jury waived case have the legal effect of a verdict, p. 287.

Cited in *Lyons v. Lyons*, 18 Cal. 449, holding that findings cannot be disregarded.

3 Cal. 287-290. ORD v. LITTLE.

Administrator.—There is no fixed rule for compensation where an administrator resigns or is removed before his duties are completed, p. 289.

Approved in *Estate of Barton*, 55 Cal. 89, disallowing attorney's fees where administration was not complete. Cited in *In re Dewar's Estate*, 10 Mont. 439, holding that compensation of administrator is regulated by the law in force when his final account is rendered, not by statutes existing at date of his appointment.

3 Cal. 292-294. STONE v. FOUSE.

Partnership.—Damages on dissolution must be settled in equity, p. 294.

Cited in *Bremner v. Leavitt*, 109 Cal. 132, holding that all the matters involved in dissolution may be embraced in a single count in the complaint; and in note to 83 Am. Dec. 110, on mining partnerships.

3 Cal. 295-298. VANDYKE v. HERMAN.

Redemption of land sold on execution must settle any unpaid bal-

ance of the judgment on which the execution was issued, and the lien of the judgment continues till the whole amount is paid, p. 298.

Approved in *Knight v. Fair*, 9 Cal. 118, and *McMillan v. Richards*, 9 Cal. 413, 70 Am. Dec. 666, 667. Disapproved in *Simpson v. Castle*, 52 Cal. 646, holding that the statute of 1859 (p. 139) amending sec. 231, Pr. Act, was enacted purposely to modify the rule of the former cases, and the law now in force is in secs. 702, 703, C. C. P. Cited in *Lloyd v. Hoo Sue*, 5 Sawy. 76, holding that an assignee in bankruptcy may redeem the bankrupt's property without discharging the unpaid balance of the judgment; also in dissenting opinion in *Parke v. Hush*, 29 Minn. 439, holding that a redemptioner must follow the statute.

3 Cal. 299-302. **SPARKS v. KOHLER.**

Witness.—A codefendant is not competent where his testimony would benefit himself, p. 301.

Cited in *Fairchild v. Amsbaugh*, 22 Cal. 574. Distinguished in *Geller v. Huffaker*, 1 Nev. 27.

3 Cal. 302-308. **HOSTLER v. HAYS.**

Estoppel.—Only a technical estoppel is required to be specially pleaded, p. 307.

Distinguished in *Flandreau v. Downey*, 23 Cal. 357, holding that where there is no opportunity to plead a technical estoppel, it may be conclusive as evidence. Cited in *Carpy v. Dowdell*, 115 Cal. 687, holding that if the rule applies to equitable estoppels, in regard to which the authorities are conflicting, it is enough if the facts on which the estoppel rests are pleaded; also in *Davis v. Wakelee*, 156 U. S. 688, holding that plaintiff was estopped from claiming that a judgment, improperly entered against him, was void.

3 Cal. 309-311. **GELSTON v. WHITESIDES.**

Injunction Bond.—To maintain suit on the bond, where the injunction was dissolved by act of the party procuring it, it must be shown that there was no proper cause for the injunction, p. 311.

Overruled in *Dowling v. Polack*, 18 Cal. 627, 629, holding that suit does not lie on the bond till after the court has determined in the injunction suit that the writ was improperly issued.

3 Cal. 312-323. **KASHAW v. KASHAW.**

Domicile of the husband is domicile of the wife, p. 322.

Approved in *Beard v. Knox*, 5 Cal. 257, 63 Am. Dec. 127, holding that the statute gives no greater rights to married women within the state than to those elsewhere. Distinguished in *Moffatt v. Moffatt*, 5 Cal. 281, holding that the desertion of the husband entitles the wife to her own domicile. Cited in note to 26 Am. Rep. 31, on residence.

Divorce.—The court granting the decree of divorce may partition the common property, p. 322.

Cited in *Sharon v. Sharon*, 67 Cal. 188, holding that divorce is a proceeding in equity, from which an appeal lies; and in dissenting opinion on p. 213, as being an appeal on questions of property only. Cited in *Donovan v. Donovan*, 20 Wis. 590, holding that the court may give the husband's land to the wife; also in *Gibson v. Gibson*, 46 Wis. 458, holding that the wife is entitled to her rights in a pending suit for slander brought by her; and in note to 65 Am. Dec. 359, on property rights after divorce.

3 Cal. 323-326. SELKIRK v. SACRAMENTO CO.

Demurrer admits the truth of the facts alleged, p. 326.

Cited in *Tuolumne Co. v. Chapman*, 8 Cal. 397.

3 Cal. 327. BARNETT v. KILBOURNE.

Equity gives no relief for ignorance in making necessary averments or insufficient conduct in prosecuting a suit, p. 327.

Cited in *Daly v. Pennie*, 86 Cal. 554, 21 Am. St. Rep. 62, holding that neglect by attorney's clerk to file an undertaking on appeal was no ground for relief in equity.

3 Cal. 328-329. CARRIER v. BRANNAN.

Gaming Debt.—Money lost at play cannot be recovered by suit, p. 329.

Cited in *Cothran v. Ellis*, 125 Ill. 500, holding that dealing in "futures" is void at common law; also in *State v. Judge*, 32 La. An. 724, holding that sale of lottery tickets is prohibited, except by associations chartered by the state; *Scott v. Courtney*, 7 Nev. 422, holding that money lost at a public gaming table is not recoverable; *Kinney v. Hynds*, 7 Wyo. 33 construing local statute.

3 Cal. 332-334. GREGORY v. HAY.

Injunction.—Bill must aver that defendant has no property subject to levy, p. 334.

Approved, on similar facts, in *Schmitt v. Cassilius*, 31 Minn. 9.

3 Cal. 334-340. GASKILL v. TRAINER.

Lease.—Forfeiture is not caused by mere failure to pay rent, p. 339.

Cited in *Ellis v. Brisher*, 8 Utah, 113, holding lease not forfeited under facts stated.

Rent must be demanded on day when due in order to make a forfeiture of lease, p. 339.

Approved in *Chipman v. Emeric*, 3 Cal. 283, and, on stare decisis, in *McGlynn v. Moore*, 25 Cal. 397; also in *Gage v. Bates*, 40 Cal. 385, holding that the only change made by the statute of 1863 was in regard to time of making demand.

Mechanics' Lien on leasehold estate is not defeated by subsequent merger of leasehold and fee, p. 340.

Approved in *Dobschuetz v. Holliday*, 82 Ill. 375, and *Williams v. Vanderbilt*, 145 Ill. 246, 36 Am. St. Rep. 490. Cited in notes to 45 Am. Dec. 678 and 61 id. 697, on liens against leasehold estate.

3 Cal. 341-342. **HENLY v. HASTINGS.**

Appeal does not lie from an order refusing to vacate a former order, p. 342.

Distinguished in *Gilman v. Contra Costa*, 8 Cal. 57, 68 Am. Dec. 291, holding that an appeal lies from an order refusing to quash an execution. Approved in *California Co. v. Southern Co.*, 65 Cal. 295, as to an order denying motion to vacate order of condemnation; in *Reay v. Butler*, 69 Cal. 586, as to order refusing to vacate judgment; *Tripp v. Santa Rosa Co.*, 69 Cal. 632, as to order refusing to vacate former order; in *Eureka Co. v. McGrath*, 74 Cal. 51, as to order refusing to vacate judgment; in *Davis v. Donner*, 82 Cal. 36, as to order refusing to vacate writ of assistance; *Blythe v. Swenson*, 15 Utah, 365, on point that appeal not taken within statutory time should be dismissed, and page 368, as to appeal from order refusing to vacate judgment. Distinguished in *Pignaz v. Burnett*, 119 Cal. 161, 162, 163, holding that an order denying a motion to restrain a sheriff from executing a writ of assistance was appealable, because the party aggrieved had no previous opportunity to take an appeal, the order granting the writ having been made ex parte. Affirmed in *Traveler's Co. v. Weber*, 2 N. Dak. 246, as to an order refusing to vacate an order dismissing an appeal. Cited in *Baker v. Baker*, 83 Fed. Rep. 5, holding that where defendants failed to appeal from an interlocutory order, granting a perpetual injunction, within the time prescribed by statute, they cannot thereafter appeal from an order refusing to dissolve the injunction, but must wait till after final decree.

3 Cal. 343-347. **JOHNSON v. TOTTON.** 58 Am. Dec. 412.

Partnership.—Actual notice of dissolution must be brought home to one dealing with the firm, in order to affect his rights, p. 347.

Cited in *Williams v. Bowers*, 15 Cal. 321, 76 Am. Dec. 489, holding that a retiring partner must give notice of his withdrawal; in *Delapiazza v. Foley*, 112 Cal. 384, holding that sec. 2453, C. C., regarding notice, applies to a retiring member of a mining partnership, and requires him to give personal notice of his retirement to a laborer for the firm, having a claim for wages; in *Gage v. Rogers*, 51 Mo. App.

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432, holding that notice may be inferred from daily receipt of commercial agency slips in which the dissolution was referred to; in *Stoddard Co. v. Krause*, 27 Neb. 89, holding that actual notice is necessary; to same effect in *Gilchrist v. Brande*, 58 Wis. 199. Cited in notes to 84 Am. Dec. 356, and 40 Am. St. Rep. 573, on notice of dissolution.

Partnership has a limited existence after dissolution, for the purpose of fulfilling engagements, p. 347.

See note to 79 Am. St. Rep. 710, and 65 Am. Dec. 798.

General citation: *Hodgin v. People's Nat. Bank*, 125 N. C., 509.

3 Cal. 363-365. **CLYMER v. WILLIS**. 58 Am. Dec. 414.

Sheriff.—Money collected on execution is in custodia legis, and is not subject to attachment or execution, p. 365.

Cited in *Lightner v. Steinagel*, 33 Ill. 517, 85 Am. Dec. 294, as to redemption money in sheriff's hands; also in *Hardy v. Tilton*, 68 Me. 196, 28 Am. Rep. 35, as to proceeds of execution; and to same effect in *State v. Boothe*, 68 Mo. 550; *Hill v. La Crosse Co.*, 14 Wis. 293, 80 Am. Dec. 784; *Dahms v. Sears*, 13 Or. 56, as to money taken from an arrested prisoner; Cited in *Eaton v. McElhone*, 6 Kan. App. 226, construing local statute. Cited in notes, on funds in custodia legis, to 65 Am. Dec. 493, 69 id. 768, 85 id. 296.

3 Cal. 366-367. **PEOPLE v. RAYNES**.

License.—Amount of license for keeping gaming house cannot be recovered by a suit against the proprietor, p. 367.

Cited in note to 56 Am. Dec. 332 (*People v. Craycroft*), on cumulative remedies.

3 Cal. 370-373. **O'CONNOR v. CORBITT**.

Public Lands.—Settler in possession has no right to an injunction against the sale of a house, built by a stranger on plaintiff's land, or to damages for rents and profits, p. 371.

Cited in *Ramirez v. Murray*, 5 Cal. 223, holding that in order to recover rent, it must be shown that defendant's possession was by agreement; also in *Sumner v. Coleman*, 23 Ind. 94, as to prior equities of earlier pre-emptioner; and in note to 46 Am. Dec. 289, on use and occupation.

Use and Occupation.—Right to recover for is based on contract, p. 373.

Cited in *Murphy v. Hopcroft*, 142 Cal. 46, holding action for rent not maintainable in case of adverse or tortious possession.

3 Cal. 373-376. **TOBIN v. POST**.

Damages for failure to deliver goods do not include speculative profits, p. 375.

Cited in *Anderson v. Sloane*, 72 Wis. 583, 7 Am. St. Rep. 897, holding that profits cannot be recovered in suit for wrongful attachment and closing up of a store.

3 Cal. 376. **STEARNS v. MARVIN.**

Appeal will not lie from an order refusing to vacate a judgment, p. 376.

Approved in *Goyhinech v. Goyhinech*, 80 Cal. 409.

3 Cal. 383-386. **WILLIAMSON v. MONROE.**

Receiver will not be appointed when the answer to a bill for dissolution of partnership denies waste or other wrongful acts, p. 386.

Distinguished in *Emeric v. Alvarado*, 64 Cal. 623, holding that an order appointing a receiver is not appealable, though it might have been at the date when the principal case was decided. Cited in *Irwin v. Everson*, 95 Ala. 66, holding that where defendant is solvent and denies that any partnership existed, a receiver will not be appointed. See note to *Cameron v. Improvement Co.*, 72 Am. St. Rep. 85, on receivers.

3 Cal. 386-388. **WILSON v. SACRAMENTO CO.**

Certiorari lies only to review a final determination, p. 388.

Approved in *People v. County Judge*, 40 Cal. 480; *Sayers v. Superior Court*, 84 Cal. 645, holding that the writ is to annul proceedings, not to restrain them; *Gauld v. Supervisors*, 122 Cal. 19, denying writ to review proceedings for franchise while in fieri; *Territory v. District Court*, 4 Dak. 315.

3 Cal. 389-391. **CAULFIELD v. HUDSON.**

District Courts have no appellate jurisdiction, p. 390.

Approved in *People v. Peralta*, 3 Cal. 379; *Reed v. McCormick*, 4 Cal. 342. Cited in *Parsons v. Tuolumme Co.*, 5 Cal. 43, 63 Am. Dec. 77, holding that the statute giving jurisdiction to the county court in "special cases" does not include cases where there has always been a remedy; also in *Townsend v. Brooks*, 5 Cal. 52, holding that district courts have no jurisdiction over cases of forcible entry and detainer; and in *Zander v. Coe*, 5 Cal. 230, holding that an Act giving a justice of the peace jurisdiction in cases over \$200 is unconstitutional; also in *People v. Applegate*, 5 Cal. 295, holding that the superior court has no jurisdiction of criminal appeals in cases of a less degree than felony; and in *People v. Hester*, 6 Cal. 681, holding that district courts cannot issue certiorari; and in *People v. Fowler*, 9 Cal. 86, holding that the court of sessions has no appellate jurisdiction. Distinguished in *State v. District Court*, 13 Mont. 374, holding that an Act allowing an appeal

to the district court from board of medical examiners is not unconstitutional.

3 Cal. 396. PALMER v. REYNOLDS.

Verdict for \$1500, when damages are laid at \$1000, is erroneous, p. 396.

Cited in *Pacific Co. v. Fleischner*, 66 Fed. Rep. 910, holding that interest on damages should not be included in a verdict.

3 Cal. 396-399. BURRITT v. GIBSON.

Special Verdict may be directed by the court, p. 399.

Cited in *Knight v. Fisher*, 15 Colo. 180.

New Trial.—Application, on ground of newly discovered evidence, must state facts sufficient to warrant it, p. 399.

Cited in *Klockenbaum v. Pierson*, 22 Cal. 163, and *Lander v. Miles*, 3 Oreg. 43.

3 Cal. 400-403. RUSSEL v. AMADOR.

Instructions to the jury must be given or refused by the court without modification, p. 403.

Approved in *Jamson v. Quivey*, 5 Cal. 492. Overruled in *Boyce v. Cal. Stage Co.*, 25 Cal. 470, holding that the court may modify instructions, the only test being whether the instruction as modified is right or wrong.

Waiver of fraud in a contract of sale cannot result from receipt of payment under protest, p. 403.

Cited in *Wilder v. Beede*, 119 Cal. 651, holding that delay of buyer of a piano in repudiating the sale was not conclusive evidence of waiver of seller's fraud; saying, "Waiver is commonly a question of fact; certainly it cannot be said here as matter of law that plaintiff waived the fraud."

3 Cal. 406-407. SLOAN v. SMITH.

Referee need not be sworn, p. 407.

Approved in *Willingham v. Harrell*, 36 Ala. 587, and *Older v. Quinn*, 89 Iowa, 448.

Judgment is entered as a matter of course upon filing of referee's report, p. 407.

Cited in *Peabody v. Phelps*, 9 Cal. 225, holding that the time for moving to set aside the report dates from entry of judgment, not from date of filing the report; and in *Terpening v. Holton*, 9 Colo. 312.

3 Cal. 408-410. LAMBERT v. SMITH.

Referee should state the facts found and conclusions of law, p. 409.

Cited in *Reever v. White*, 8 Utah, 190, but holding question of lack of findings not reviewable on appeal from judgment.

Distinguished in *Hihn v. Peck*, 30 Cal. 285, where referee was required to file his "findings," and it was held he need not report the facts.

3 Cal. 410-413. SLOAN v. SMITH.

Change of Venue is discretionary with the lower court, subject to review only in cases of gross abuse, p. 412.

Approved in *Pierson v. McCahill*, 22 Cal. 131; *Watson v. Whitney*, 23 Cal. 378; *Avila v. Meherin*, 68 Cal. 479; *Kennon v. Gilmer*, 5 Mont. 264.

3 Cal. 413-420. SPECK v. HOYT.

New Trial.—Granting or refusing a new trial is discretionary with the lower court, and will not be disturbed except where there was gross abuse of discretion, p. 420.

Approved in *Hastings v. The Uncle Sam*, 10 Cal. 341.

3 Cal. 421-425. PARSONS v. DAVIS.

Judgment rendered without personal service on defendant is invalid, p. 425.

Distinguished in *Whitwell v. Barbier*, 7 Cal. 64, where a judgment was held valid, although the summons was not served on the defendant until after the return day named therein; also in *Schloss v. White*, 16 Cal. 68, holding that failure of the record to show service of process is ground for reversal of a judgment by default.

3 Cal. 426. WHITE v. ABERNATHY.

Error must be affirmatively shown by the record, p. 426.

Approved in *Nelson v. Lemmon*, 10 Cal. 50; *Nelson v. Mitchell*, 10 Cal. 93; *Frost v. Grizzly B. Co.*, 102 Cal. 527; *Goodman v. Minear Co.*, 1 Idaho, 134; *Fulton v. Earhart*, 4 Oreg. 64; approved in *State v. Preston*, 4 Idaho, 223, applying rule in prosecution for vagrancy where instructions attacked; *State v. Perry*, 4 Idaho, 243, applying rule in prosecution for murder.

3 Cal. 427-430. POWELL v. HENDRICKS.

Copy of a recorded document has the same effect as the original, p. 430.

Approved in *McMinn v. O'Connor*, 27 Cal. 244.

3 Cal. 431-434. MONTIFIORI v. ENGELS.

Appeal.—Defendant cannot on appeal take advantage of defects in the complaint that might have been reached by demurrer, p. 434.

Approved in *Wedel v. Herman*, 59 Cal. 516.

3 Cal. 435-437. EVANS v. BIDDLEMAN.

Partnership is not liable to the creditor of a partner who improperly loaned to the firm the creditor's money, p. 437.

Cited in *Gilruth v. Decell*, 72 Miss. 234, holding that the use of a trust fund by a partner in paying his share of the capital did not make the firm liable. See note to *Williams v. Hendricks*, 67 Am. St. Rep. 45, on torts of partners.

3 Cal. 438-440. TOOMS v. RANDALL.

Abatement.—Matters of abatement must be averred in the answer, or they will be deemed to be waived, p. 440.

Cited in *Greenfield v. Gunnell*, 6 Cal. 68, as to an objection that the complaint was not verified; also in *Pearkes v. Freer*, 9 Cal. 643, as to objection to venue of complaint; and to same effect in *Cook v. Pendergast*, 61 Cal. 75; also in *Ontario Bank v. Tibbits*, 80 Cal. 70, and *Cal. Savings & L. Society v. Harris*, 111 Cal. 136, both cases holding that the failure of a corporation to file a copy of its articles with the county clerk must be averred in the answer or deemed waived. Disapproved in *Sheckles v. Sheckles*, 3 Nev. 406, holding that the court may change the venue at its discretion, for convenience of witnesses, unless there was an unjustifiable delay in making the application.

3 Cal. 443-453. COHAS v. RAISIN.

Pueblo.—San Francisco was a Mexican pueblo, having title to the lands within her boundaries, and this right continued during the military occupation of California by the United States, p. 453.

Cited in *Touchard v. Touchard*, 5 Cal. 307, on the power of towns to dispose of their lands; also in *Seale v. Mitchell*, 5 Cal. 402, holding that in a suit for land in San Francisco, a title from the city is *prima facie* good. In *Dewey v. Lambier*, 7 Cal. 348, the court cite the principal case and "announce our determination to adhere to it." In *Welch v. Sullivan*, 8 Cal. 187-189, the court say that the principal case decided that the city was a pueblo and entitled to land within its boundaries, which the court must now affirm on *stare decisis*, "conceding that it is not law"; and, on pages 199-203, hold that the principal case properly overruled *Woodworth v. Fulton*, 1 Cal. 295. In *Treadwell v. Payne*, 15 Cal. 498, defendant obtained secret information regarding the decision in the principal case, and on the faith of it bought a title to a lot in plaintiff's possession and sued plaintiff in ejectment; held,

plaintiff had no ground for an injunction against the suit. In *Hart v. Burnett*, 15 Cal. 558, the court approves the doctrine of the principal case as to pueblo lands, and holds on page 562 that the rights were under the protection of the state government after the acquisition of California; on page 587, *Welch v. Sullivan*, 8 Cal. 187, is referred to, with its comments on the principal case; on page 589 the court says it is useless to comment on the principal case or call it in question, because if the pueblo did own its lands, it does not follow that they could be sold at forced sale; on page 598, the correctness of the overruling of *Woodworth v. Fulton* by the principal case is questioned; on page 599 it is said that little weight can be attached to the principal case and its successors, for they did not consider the question of a levy on the pueblo lands; on pages 617, 618, in the dissenting opinion the principal case is referred to; held, by a majority of the court, on pages 615, 616, that San Francisco was a pueblo and held its lands in trust for the use of the public, and they were not leviable in a suit against the city.

Cited in *Redding v. White*, 27 Cal. 285, as to sale and lease of pueblo lands, holding that a lease of a 500-acre tract for 1,000 years at \$3 per year was invalid; also in *U. S. v. Vallejo*, 1 Black, 562, in the dissenting opinion, commenting on the Mexican laws cited in the principal case; and in *Merryman v. Bourne*, 9 Wall. (76 U. S.) 602, as having overruled *Woodworth v. Fulton*, 1 Cal. 295.

Alcalde Grant raises the presumption that the alcalde had authority to make it, and that the land was within the pueblo, p. 453.

Affirmed in *White v. Moses*, 21 Cal. 40. Cited in *Scott v. Dyer*, 54 Cal. 432-434, holding that if the rule applied at the time it was announced, it must now be considered *res adjudicata*; also in *Latham v. Los Angeles*, 87 Cal. 518, holding that the presumption is not overcome by the fact that part of the land had been used by the public before the grant; and in note to 38 Am. Dec. 106, on officers *de facto*. Cited in *Crespin v. U. S.*, 168 U. S. 213, holding that in 1840, in New Mexico, a prefect could not grant public lands.

3 Cal. 454-457. **HELM v. DUMARS.**

Judgment that is right will not be reserved because a conclusion of law therein is erroneous, p. 457.

Cited in *Spencer v. Duncan*, 107 Cal. 426, holding that sec. 633, C. P., is directory as regards conclusions of law.

3 Cal. 458-464, **LUBERT v. CHAUVITEAU.** 58 Am. Dec. 415.

Evidence.—Books of account are admissible to prove sale of goods, p. 463.

Cited in *White v. Whitney*, 82 Cal. 166.

Reformed Pleading abolishes the distinction between actions *ex contractu* and *ex delicto*, p. 464.

Cited in *Houghtaling v. Ellis*, 1 Ariz. T. 387, holding that equitable defenses are allowed in actions at law; in *Buchanan v. McClain*, 110 Ga. 480, holding action at bar to be one *ex contractu*. Note to 68 Am. Dec. 480, as to actions *ex contractu*, etc.

3 Cal. 467-468. ESTELL v. CHENERY.

Findings held insufficient to sustain the judgment, p. 468.

Cited in *Squier v. Lowenberg*, 1 Ida. 785, holding that if there are no findings of fact in a jury waived case, they are presumed to be waived.

3 Cal. 469-470. RHODES v. PATTERSON.

Sheriff who has wrongfully seized property is liable to a suit by the real owner, p. 470.

Cited in note to 12 Am. Dec. 394, on levy upon property of a stranger.

3 Cal. 471-474. CHEVER v. HAYS.

Assignment voluntarily made for benefit of creditors is void unless made in conformity with the statute, p. 473.

Approved in *Cohen v. Barrett*, 5 Cal. 210; *Groschen v. Page*, 6 Cal. 139. Distinguished in *Dana v. Stanford*, 10 Cal. 278, holding that a mortgage by an insolvent debtor, to protect and prefer a creditor, was valid; also in *Naglee v. Lyman*, 14 Cal. 456, holding that the transfer of an insolvent's effects to a receiver was void only as against creditors.

Statute must be construed strictly, p. 473.

Approved in *McAllister v. Strobe*, 7 Cal. 430, and *Judson v. Atwill*, 9 Cal. 478, both cases holding that a discharge in bankruptcy is no bar to recovery of a claim inaccurately described in the bankrupt's petition.

Statute.—Force and meaning must be given to every part, p. 473.

Cited in *Taylor v. Umatilla Co.*, 6 Oreg. 404, regarding county assessors.

3 Cal. 475-476. LEWIS v. MYERS.

Evidence.—Proofs must correspond with allegations, p. 476.

Cited in *Gyle v. Shoenbar*, 23 Cal. 539, holding that a release, put in issue by the pleadings, must be proved.

3 Cal. 477-501. PEOPLE v. BRENHAM.

Election.—Failure of common council to comply with provisions of city charter as to notice of time and place of an election, held immaterial, pp. 486-492.

Cited in *People v. Prewett*, 124 Cal. 10, holding notice sufficient; *Sanchez v. Fordyce*, 141 Cal. 431, holding ballots properly rejected under facts stated; *Lafayette v. State*, 69 Ind. 228, holding that if an election is otherwise regular, want of notice of holding it will not invalidate it; *Morgan v. Gloucester*, 44 N. J. Law, 143, holding that want of notice invalidates a special election to fill a vacancy; *State v. Carroll*, 17 R. I. 595, holding that the statutory provision for notice is merely directory, if it appears that the electors had knowledge of the election.

Distinguished in *Dickey v. Hurlburt*, 5 Cal. 344, holding that the legislature cannot confer upon a county judge the power to designate the place and manner of holding an election; also in *People v. Porter*, 6 Cal. 28, 29, holding that where there is a special election to fill a vacancy the provisions as to notice must be complied with. Doubted in *McKune v. Weller*, 11 Cal. 63, 64, 70 Am. Dec. 764, 765, holding that where there is an election to fill a vacancy, it is invalid unless made in pursuance of the governor's proclamation.

Election Laws, construction of pp. 486-492.

The principal case is cited in *Farrel v. Pingree*, 5 Utah, 450, holding that election statutes must be construed prospectively, and that where a law shortened the term of a city treasurer from four years to two, it did not affect the incumbent of the office at the time the law was passed.

Statute providing that a person elected to an office must qualify within ten days is merely directory, p. 492.

Distinguished in *Payne v. San Francisco*, 3 Cal. 126, holding such a provision to be mandatory.

3 Cal. 502-506. **PEOPLE v. MOTT.**

Election Laws.—The filling of a vacancy by the governor held to be not for the full term of the office, but only until the legislature should appoint or the people elect someone for the position, pp. 504-506.

Cited in *People v. Mizner*, 7 Cal. 523, holding that an appointment by the governor was for the full term; also in *People v. Whitman*, 10 Cal. 49, in dissenting opinion of Field, J., where the majority of the court held that there being no vacancy in the office of controller, the governor had no right to make an appointment; and in *People v. Tilton*, 37 Cal. 620, holding that the principal case was not in point and that the governor had no right to fill a vacancy in the board of harbor commissioners, because there was no vacancy; *Weeks v. Gamble*, 13 Fla. 18, holding that an election was necessary to fill a vacancy; *State v. Murphy*, 32 Fla. 150, holding that the governor could fill a vacancy; also in page 196 of same case, on the point that a statute cannot contravene the constitution; *Moreland v. Millen*, 126 Mich. 388, construing local statutes.

VOLUME IV.

By WILLIAM FOSTER.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

4 Cal. 1-5. HESLEP v. SAN FRANCISCO.

Arbitration.—Order of court is necessary to constitute a reference under our statute, p. 4.

Overruled by *Carsley v. Lindsay*, 14 Cal. 395, as being “a dictum and clearly erroneous.”

Arbitration.—Reference is a voluntary withdrawal of the case from jurisdiction of the court, p. 4.

Approved in *Draghicevich v. Vulicevich*, 76 Cal. 380, holding that submission to arbitration operates as a discontinuance. Cited in *McGinnis v. Curry*, 13 W. Va. 50, with the comment “if this be law,” where it was held an attorney cannot bind his client by agreement to arbitrate, made out of court.

4 Cal. 5-6; 60 Am. Dec. 577. INNIS v. THE SENATOR.

Opinion Evidence is admissible as to whether vessel could be seen under certain circumstances, p. 5.

Cited in *Bank v. Fire Assn.*, 33 Or. 183, as to opinion of professional fireman on causes of fire. See note 72 Am. Dec. 251.

4 Cal. 6-8. SMITH v. ROWE.

Equity Practice.—In a chancery case, the court may direct that special issues of fact be settled by counsel and put in writing, before submitted case to the jury, p. 8.

Cited in *Still v. Saunders*, 8 Cal. 286, as deciding that the court may direct a jury to find special issues of fact, in spite of objections by counsel for one side.

4 Cal. 9-10. PEOPLE v. HARRIS.

Municipal Government.—Right to fit up a building for city or public purposes is a necessary incident to the administration of every municipal government, p. 10.

Cited on this point in *Mayor v. McWilliams*, 67 Ga. 113, and *Smith v. Newbern*, 70 N. C. 19; 16 Am. Rep. 768; dissenting opinion in *Reynolds v. Waterville*, 92 Me. 317, main opinion denying right of city to acquire city hall under local statutes.

4 Cal. 12-14. **ESTATE OF SANFORD.**

Statute, as to paternity of illegitimate child, must be construed strictly, p. 14.

Approved in *Pina v. Peck*, 31 Cal. 361-363, holding that bequest "to my daughter" in a will was not sufficient to legitimize the child. Distinguished in *In re Jessup*, 81 Cal. 443, holding that strict construction should apply only to proof of paternity, but as regards legitimacy, the construction should be liberal. Overruled in *Blythe v. Ayres*, 96 Cal. 590, holding that sec. 1387, C. C., as to heirship of illegitimate child, must be construed liberally, which doctrine was affirmed in *Blythe v. Ayres*, 102 Cal. 262, and *In re Blythe*, 112 Cal. 693, citing the principal case as quoted in *Pina v. Peck*, 31 Cal. 361.

4 Cal. 14-15. **JONES v. POST.**

Witness is disqualified when he would be directly benefited by his testimony, p. 15.

Affirmed, solely on doctrine of *stare decisis*, in *Jones v. Post*, 4 Cal. 14, 15.

4 Cal. 17-21. **FLINT v. LYON.**

Sale.—In sale note of "Haxall flour," use of the word "Haxall" amounts to a warranty that the flour is Haxall, p. 21.

Approved on this point in *Moore v. McKinley*, 5 Cal. 474. Distinguished in *Bertram v. Lyon*, McAll. 55, 57, where in suit on same contract it was held that delivery of "Gallego" flour instead of "Haxall" was at most a breach of warranty and did not annul the contract, and also that the principal case must have recognized an existing contract before it could hold there was a warranty. Cited in *Weed v. Dyer*, 53 Ark. 160, holding that failure of buyer to notify seller that goods were inferior, as evidence of breach of warranty, was a question for the jury; also, in *Morse v. Union S. Co.*, 21 Or. 297, where the words "good beef cattle" were held to raise an implied warranty as to quality of animals sold.

4 Cal. 22-23. **RICH v. DAVIS.** S. C. 6 Cal. 142.

Note made by one partner binds the firm, even when there was intentional fraud in the making, if transferred to a bona fide holder, p. 23.

Cited in *Bedell v. Herring*, 77 Cal. 574, 11 Am. St. Rep. 309, on the

point that payment to innocent indorsee cannot be avoided for fraud in original making of note; *First Nat. Bank v. Grignon*, 7 Idaho, 656, managing partner may execute notes and renew them as business of firm may require; *Salt Lake Brewing Co. v. Hawke*, 24 Utah, 207, partnership liable for money borrowed for firm by managing partner, though partner objected but did not notify lender.

4 Cal. 23-27. **COOK v. McCHRISTIAN.**

Homestead Act of 1851 applies to property acquired before its passage, and is "beneficial," p. 26.

Cited on this point in *Moss v. Warner*, 10 Cal. 297; and in note to 87 Am. Dec. 464, on point that retroactive homestead laws are unconstitutional; also in *Campbell v. Adair*, 45 Miss. 181, on point that being "beneficial," the statute must be construed liberally; and in *State v. Diving*, 66 Mo. 381, on point that the law being "beneficial," conveyance of the homestead in fraud of creditors does not work a forfeiture of the benefits conferred by the statute.

Recording notice of selection of homestead has "no legal verity," as the statute does not require that it be recorded, p. 26.

Cited on this point in *Stafford v. Lick*, 7 Cal. 490, holding that where the statute prescribes recording, the doctrine of constructive notice is superseded; and in *McQuade v. Whaley*, 31 Cal. 530, holding that failure to record selection took away homestead right; and in *Beecher v. Baldy*, 7 Mich. 504, 510, on point that recording is of no effect where statute does not require it; also in *Wells v. Smith*, 2 Utah, 60, on the point that where a statute does not require a mortgage to be recorded, the recording of it creates no priority.

The Homestead is where the family permanently resides, and such residence raises presumption that the premises are a homestead, p. 27.

Approved in *Taylor v. Hargous*, 4 Cal. 273; 60 Am. Dec. 606; *Reynolds v. Pixley*, 6 Cal. 167; *Holden v. Pinney*, 6 Cal. 235; *Dorsey v. McFarland*, 7 Cal. 345. Also in *Harper v. Forbes*, 15 Cal. 204, where removal was held presumptive evidence of abandonment, and on same point in *Brennan v. Wallace*, 25 Cal. 111; and in *Tipton v. Martin*, 71 Cal. 328, it was held that under the Act of 1862 and secs. 1243, 1244, C. C., a homestead could be abandoned only by recorded declaration of abandonment; *McCanna v. Anderson*, 6 N. Dak. 484, denying right of unmarried childless man to declare homestead. Cited in note to *Taylor v. Hargous*, 60 Am. Dec. 614, on point that removal is prima facie evidence of abandonment. In *McDonald v. Badger*, 23 Cal. 400, 83 Am. Dec. 127, held that several lots may be included in the homestead, but total value must not exceed statutory limit. Cited, on point that residence was sufficient without filing selection of homestead, in three Arkansas cases, commenting on each other, and

finally approving the principal case, viz: *Tumlinson v. Swinney*, 22 Ark. 406; 76 Am. Dec. 436; *Norris v. Kidd*, 28 Ark. 487; *Lindsay v. Norrill*, 36 Ark. 549. Cited in *Tucker v. Kenniston*, 47 N. H. 270; 93 Am. Dec. 429; where it was held that right to redeem homestead cannot be sold on execution, the tenement being what is exempted by statute, not the title or estate in it; and in note to *Greeley v. Scott*, 2 Woods, 662, the case holding that the homestead of a lumberman running a saw mill includes the mill.

Deed by Husband alone conveys no title to the homestead, p. 27.

Approved in *Poole v. Gerrard*, 6 Cal. 73, 65 Am. Dec. 482, holding that separate deeds of husband and wife were invalid. Cited in *Gimmy v. Doane*, 22 Cal. 638, on point that the homestead is a sort of joint tenancy; but this doctrine had been denied in *Gee v. Moore*, 14 Cal. 477, in comment on *Taylor v. Hargous*, 4 Cal. 273. Cited in *Levins v. Rovegno*, 71 Cal. 290, as to rights of survivor in the homestead, holding that the estate descends, one-half to survivor, one-half to surviving children.

Buyer of Homestead cannot recover in ejectment the excess in value over the amount exempted, p. 27.

Cited in note to 84 Am. Dec. 572.

4 Cal. 27-28. MAYO v. MADDEN.

Joinder of claim for damages with an equitable cause of action is improper, p. 28.

Distinguished in *Gates v. Kieff*, 7 Cal. 126, holding that equitable relief may be asked in action of trespass. Cited in *Wilcox v. Saunders*, 4 Neb. 581, on point that legal and equitable causes should not be blended in one action.

4 Cal. 28-30. TOOTHAKER v. CORNWALL.

Notice to indorser of nonpayment of note, given before close of business hours, is premature, p. 30.

Overruled, as "in direct conflict with the law," by *McFarland v. Pico*, 8 Cal. 630.

4 Cal. 31-33. ENGELS v. LUBECK.

Injunction issued from one court should be respected by other courts, on the ground of judicial comity, p. 32.

Approved, *Uhlfelder v. Levy*, 9 Cal. 615; *Sharon v. Sharon*, 84 Cal. 431.

4 Cal. 33-34; 60 Am. Dec. 578. HUTCHINSON v. PERLEY.

Ejectment.—Possession is prima facie evidence of title, and proof of

prior possession is enough to maintain ejectment against a mere naked trespasser, p. 34.

Approved in *Winans v. Christy*, 4 Cal. 78, 79; 60 Am. Dec. 597; *Sacramento R. Co. v. Moffatt*, 7 Cal. 579; *Nagle v. Macy*, 9 Cal. 427; *Turner v. Aldridge*, *McAll* 232; *Burt v. Panjaud*, 99 U. S. 182; *Oregon R. Co. v. Hertzberg*, 28 Or. 222; *Bagley v. Kennedy*, 85 Ga. 706. Cited in *Mickey v. Stratton*, 5 Saw. 479, discussing rights as to persons claiming under same owner. Cited on this point in notes to *American Decisions*, vol. 60, pp. 601, 602, vol. 62, p. 334, vol. 70, p. 620, vol. 98, p. 363.

4 Cal. 35-37. **MINTURN v. FISHER.**

Draft payable at a future day is a bill of exchange, not a check, p. 37.

Approved *Ga. Bank v. Henderson*, 46 Ga. 497; *Harrison v. Nicolle* Bank, 41 Minn. 489; 16 Am. St. Rep. 719; and cited in note to 64 Am. Dec. 634. Denied in *Way v. Towle*, 155 Mass. 375, 31 Am. St. Rep. 553, where such a draft was held to be a check.

4 Cal. 37-41; 60 Am. Dec. 579. **WELTON v. ADAMS.**

Negotiable Instrument.—A certificate of deposit is negotiable like a promissory note, and if it is lost or destroyed, the maker may require indemnity against future claims before cashing it, pp. 40, 41.

Cited, as to indemnity, in *Price v. Dunlap*, 5 Cal. 484; and, as to negotiability, in *McMillan v. Richards*, 9 Cal. 418, 70 Am. Dec. 671, holding that after issuance the bank has nothing on which attachment can be levied against the depositor; also, as to negotiability, in *Mills v. Barney*, 22 Cal. 248; and, as to indemnity, in *Randolph v. Harris*, 28 Cal. 564, 87 Am. Dec. 140, holding there is no distinction between lost and destroyed notes, and that the indemnity need not be tendered before suit. Approved in *Brummagin v. Tallant*, 29 Cal. 505, 89 Am. Dec. 62, holding that as a certificate has essentials of a note, statute of limitations begins to run from its date, when payable on demand. Cited in *Poorman v. Mills*, 35 Cal. 120, 95 Am. Dec. 91, holding that indorsee is presumed to be holder for value and can sue in his own name; also in *McCully v. Cooper*, 114 Cal. 262, 55 Am. St. Rep. 69, as to negotiability; *Bank v. Wilder*, 104 Fed. 191, requiring indemnity from payee in action against maker on lost certificate. *Eans v. Exchange Bank*, 79 Mo. 185, holding that indemnity must be given before judgment; also (in dissenting opinion), in *Citizens' Bank v. Brown*, 45 O. St. 60, where a majority of the court held that in case of total destruction of certificate no indemnity was necessary, because maker could not have to pay it twice. Cited in *State v. Hill*, 47 Neb. 51, where the state treasurer was not allowed to reckon a certificate as "money." Cited, as to indemnity, in note to 13 Am. Dec. 481, 482,

and, as to negotiability, in note to 42 Am. Dec. 577. Note to principal case, 60 Am. Dec. 579, is cited in subsequent notes in same series, vol. 63, p. 466, vol. 66, p. 298, vol. 69, p. 691, vol. 74, p. 321, vol. 78, p. 399, vol. 87, p. 142, and 33 Am. St. Rep. 625.

4 Cal. 46-62; 60 Am. Dec. 581. **PEOPLE v. COLEMAN.**

Constitution of this state is a restriction on powers of the legislature but the legislature may exercise all powers not forbidden by the state and United States constitutions, p. 49.

Cited on this point in *Thorne v. San Francisco*, 4 Cal. 158; *Thompson v. Williams*, 6 Cal. 89; also in *People v. Rogers*, 13 Cal. 165, holding that the restriction may be express or by necessary inference. Approved in *Sheehan v. Scott*, 145 Cal. 687, upholding San Francisco charter provision that tax collector must be elector of city and county at time of election and for five years prior thereto; *Crosby v. Patch*, 18 Cal. 443, where tax on consigned goods was held valid. Cited in *Cohen v. Wright*, 22 Cal. 308, and *Ex parte Yale*, 24 Cal. 244, 85 Am. Dec. 64, both cases holding that statute compelling attorneys to take oath of allegiance was valid; also in *Stockton R. Co. v. Stockton*, 41 Cal. 162, holding that a tax to aid in constructing a railway was valid, the court saying, "Construction is liberal in favor of the government." Cited in *Seat of Government Case*, 1 Wash. T. 127, and note to 62 Am. Dec. 638.

Tax on occupations is completely within the control of the legislature, p. 49.

Cited in *Santa Barbara v. Stearns*, 51 Cal. 501, holding that a license to take tolls on wharf was a tax within the meaning of sec. 838, C. C. P., and sec. 6, art. 6, Const. Affirmed in *San Jose v. San Jose R. Co.*, 53 Cal. 481, saying that the proposition had "never been denied or questioned in any subsequent case." Cited in *Little Rock v. Prather*, 46 Ark. 477; *McGrath v. Newton*, 29 Kan. 369; *Ex parte Gregory*, 20 Tex. Ap. 221; 54 Am. Rep. 524. Note to principal case, 60 Am. Dec. 581, is cited in subsequent notes to said series, vol. 67, p. 296, vol. 73, p. 380, vol. 77, p. 67, vol. 80, pp. 422, 423, and 8 Am. St. Rep. 508.

Constitution.—In construing a state constitution, weight should be given to interpretation of similar provisions by courts of other states, p. 50.

Cited in *People v. Webb*, 38 Cal. 477, as to being "twice in jeopardy." Approved in *Sharon v. Sharon*, 67 Cal. 189. Cited in *Lux v. Haggin*, 69 Cal. 384, holding that to find out the common law, courts may refer to American and English decisions; also in *W. U. Tel. Co. v. State Board*, 80 Ala. 275; 60 Am. Rep. 101. Approved in *Fritts v. Kuhl*, 51 N. J. L. 200.

Constitution.—Force must be given to every part of a section, to avoid an absurd construction, p. 54.

Cited in *Wilson v. Broder*, 10 Cal. 489; also in *State v. French*, 17 Mont. 58, 59; *Board of Education v. Commissioners*, 111 N. C. 591.

Taxation must be "equal and uniform"; these words in the constitution apply only to a direct tax on property, not to a tax on occupation; and the legislature may select or exempt such property as it thinks proper, p. 55.

Approved in *High v. Shoemaker*, 22 Cal. 369, holding that the exemption of church and school lands from taxation did not invalidate the Revenue Act of 1857. Overruled by *People v. McCreery*, 34 Cal. 443-463, holding that the exemptions are void, as the constitution requires "all property" to be taxed, but this does not avoid the whole act. Cited in *Dundee Co. v. School District*, 10 Sawy. 77, 21 Fed. Rep. 156, on point that exemption may be void, yet the statute be valid in other respects; and, on point that construction as to direct tax does not apply to license tax, in *Leavenworth v. Booth*, 15 Kan. 635; *Commissioners v. Nelson*, 19 Kan. 241; 27 Am. Rep. 107; also, as to "equality," in dissenting opinion in *State v. Cumberland Co.*, 40 Md. 71. Approved, as to exemptions, and called "a well-reasoned opinion," in *Mississippi Mills v. Cook*, 56 Miss. 58, holding that the principal case and *High v. Shoemaker*, 22 Cal. 369, contain sounder views than *People v. McCreery*, 34 Cal. 448. Cited in *Stewart v. Griffith*, 33 Mo. 23, 82 Am. Dec. 153, on point that a law may apply to certain classes of people or property; and, as to uniformity, in dissenting opinion in *Knowlton v. Supervisors*, 9 Wis. 430; also, as to equality and uniformity not applying to license taxes, in notes to 34 Am. Dec. 638 and 52 Am. Dec. 332, 335. Note to principal case, 60 Am. Dec. 581, is cited on this point in notes to 41 Am. St. Rep. 422, and 52 Am. St. Rep. 246.

Taxation of everything within the state is an incident of sovereignty, p. 57.

Note to principal case, 60 Am. Dec. 581, is cited in subsequent notes in said series, vol. 63, p. 132, vol. 73, p. 706, vol. 79, p. 139, vol. 97, p. 263; 29 Am. St. Rep. 757, and 38 Am. St. Rep. 261.

Regulation of Commerce by state must yield to federal legislation, when inconsistent therewith, p. 58.

Note to principal case, 60 Am. Dec. 581, is cited in notes to 86 Am. Dec. 240, and 16 Am. St. Rep. 933.

Tax on consigned goods does not violate rights of nonresidents, p. 61.

Cited on point that property of nonresident can be taxed, in note to 56 Am. Dec. 534.

4 Cal. 62-64; 60 Am. Dec. 595. **MATTHEY v. GALLY.**

Negotiable Instrument.—Waiver of notice by indorsee is equivalent to waiver of demand, p. 63.

Notes Cal. Rep.—9

Denied in *Sprague v. Fletcher*, 8 Or. 369, 34 Am. Rep. 589, saying that principal case cites no authorities; held, waiver of notice of protest is not waiver of demand. Note to principal case, 60 Am. Dec. 595, on this point, is cited in note to 75 Am. Dec. 118.

Covenant not to sue, made to only a portion of joint debtors, will not be held as a release to either, p. 64.

Distinguished in *Seligman v. Pinet*, 78 Mich. 55, holding that a covenant not to sue, made by payee of note with one of three makers, released the other two makers, who had already paid their two-thirds of the note.

4 Cal. 67-70. **HICKS v. DAVIS.**

Ejectment.—Possession is prima facie evidence of title, p. 69.

Cited in *Bagley v. Kennedy*, 85 Ga. 706; *Turner v. Aldridge*, McAll. 232; *Mickey v. Stratton*, 5 Sawy. 479; note to 60 Am. Dec. 601.

Public Lands.—Claimant is not compelled to limit his possession to 160 acres, p. 68.

This point is not referred to in the opinion, though raised in the lower court; but is cited in *Dyson v. Bradshaw*, 23 Cal. 537, and approved on the doctrine of stare decisis.

4 Cal. 70-80; 60 Am. Dec. 597. **WINANS v. CHRISTY.**

Ejectment.—Possession is prima facie evidence of title, and proof of prior possession is sufficient to maintain ejectment against a mere trespasser, p. 78.

Approved in *Merced M. Co. v. Fremont*, 7 Cal. 319; 68 Am. Dec. 263; also in *Nagle v. Macy*, 9 Cal. 427, holding that a mortgage has only a chattel interest in the land, which possession cannot enlarge. Cited in *Kellogg v. King*, 114 Cal. 383; 55 Am. St. Rep. 77; *Mickey v. Stratton*, 5 Sawy. 479; *Sears v. Taylor*, 4 Colo. 43; *Hacker v. Horlemus*, 74 Wis. 23, and notes to 68 Am. Dec. 382, and 86 Am. Dec. 707.

Ejectment.—Possession, coupled with color of title, must prevail, unless defendant shows a better title; plaintiff need not prove a fee-simple title, even though alleging it in his declaration, p. 89.

Cited on this point in *Turner v. Aldridge*, McAll. 232; and in *Anderson v. Parker*, 6 Cal. 200, on point that defendants, having acquired possession from plaintiff's tenant, cannot deny his title.

Defendants may answer separately or demand separate verdicts, but unless they do so are concluded by a general verdict, p. 80.

Cited in *Anderson v. Parker*, 6 Cal. 201; *Ritchie v. Dorland*, 6 Cal. 40; *Ellis v. Jeans*, 7 Cal. 417; *Curtis v. Sutter*, 15 Cal. 264; *Ellis v. Jeans*, 26 Cal. 276; *Leese v. Clark*, 28 Cal. 35; *Andrews v. Carlile*, 20 Colo. 372. Distinguished in *Townesley v. Hornbuckle*, 2 Mont. 584, where a separate trial was allowed to one of four defendants.

4 Cal. 80-88. ELDRIDGE v. COWELL.

Navigable Waters.—Owner of water lot in San Francisco has the right to fill it up, p. 87.

Cited in *Griffing v. Gibbs*, McAll. 223, holding a wharf not to be a nuisance; and in *Pacific G. I. Co. v. Ellert*, 64 Fed. 432, holding that the city may extend a street to the harbor line and deprive a wharf owner of his rights therein; also in *Miller v. Mendenhall*, 43 Minn. 101, 19 Am. St. Rep. 224, holding that by establishing a dock line, the state invites owners to fill out their flats to the line.

Navigable Waters.—The state has complete sovereignty over her navigable bays and rivers, and in certain cases may destroy the easement of navigation for the public good, p. 87.

Cited in *People v. Williams*, 64 Cal. 499, holding that the state controls navigable waters within a harbor line. Affirmed in *Oakland v. Oakland Water Front Co.*, 118 Cal. 185, holding that a grant of Oakland mudflats "cannot be held to have been in excess of the legislative power, in the absence of any proof that such grant has seriously impaired the power of succeeding legislatures to regulate, protect, improve, or develop the public rights of navigation or fishery, and in this case it does not appear that the grant to Oakland, as here construed, would have that effect if transferred to a natural person or private corporation"; and referred to in dissenting opinion in same case, on page 215. Approved in *United States v. Mission Rock Co.*, 189 U. S. 405, President's order reserving Mission Rock in San Francisco bay for naval purposes did not appropriate surrounding tide lands. Cited in *Bass v. State*, 34 La. Ann. 499, 503, holding that a riparian owner cannot claim damages for erection of a levee authorized by the state.

N. B.—Application for writ of error in the principal case was considered with the case of *Johnson v. Gordon*, 4 Cal. 368.

4 Cal. 88-89. LINDSAY v. FLINT.

Parties.—In action on a bond there can be no constructive obligors, p. 89.

Cited in *Asevado v. Orr*, 100 Cal. 299, holding that as appellant is not alleged to be a party to an undertaking filed by him, he is not liable thereon.

4 Cal. 90-94. ABELL v. CALDERWOOD.

Equity.—In their abhorrence of fraud, courts, in certain cases, abrogate the letter and spirit of a statute, p. 91.

Cited as illustration in *Lee v. Evans*, 8 Cal. 433, as to varying deed by parol evidence.

Specific Performance cannot be decreed of an unwritten contract for sale of land, void under the statute of frauds, p. 94.

Distinguished in *Halleck v. Guy*, 9 Cal. 196, 70 Am. Dec. 645, as not opposed to the view that probate sales of real estate are judicial and not within the statute of frauds. In *Arguello v. Edinger*, 10 Cal. 158, Field, J., disapproved the principal case, saying that the point, as to specific performance of a verbal contract not being allowed, was a dictum; but Burnett, J., claimed that the principal case was an authority on the point that part performance takes a parol contract out of the statute of frauds.

4 Cal. 94-97; 60 Am. Dec. 599. **PLUME v. SEWARD.**

Ejectment.—Possession is evidence of title, p. 96.

Cited on this point in *Merced M. Co. v. Fremont*, 7 Cal. 319; 68 Am. Dec. 263; *Nagle v. Macy*, 9 Cal. 427; *Bagley v. Kennedy*, 85 Ga. 706; *House v. Reaves*, 89 Tex. 630; *Baier v. Ziegelbauer*, 66 Wis. 526; also in *Staininger v. Andrews*, 4 Nev. 67, holding that if locator is ousted, he can only recover by showing his notorious prior possession. Note to principal case, 60 Am. Dec. 599, is cited on this point in subsequent notes in said series, to vol. 62, p. 334, vol. 65, p. 534, vol. 67, p. 437, vol. 70, pp. 394, 620, vol. 85, p. 124, vol. 88, p. 566; also in vol. 89, p. 171, and 52 Am. St. Rep. 895, on point that possession is constructive notice.

Ejectment.—Possession must be an actual occupation or *possessio pedis*, not a mere assertion of title, p. 96.

Approved in *Murphy v. Wallingford*, 6 Cal. 649; and in *Bird v. Dennison*, 7 Cal. 302, 310, on point that mere survey and marking of boundary, without any inclosure, is not possession, unless made so by compliance with the law as to possessory actions on public lands; and holding that a grantee gets no more rights by a deed than the grantor had. Cited by Field, C. J., in *Wolf v. Baldwin*, 19 Cal. 314, on point that inclosing of land unaccompanied by other acts does not constitute possession; and by Baldwin, J., on p. 317 of same case, on the point that an inclosure must be such as to exclude intrusion by persons and cattle. Approved in *Lawrence v. Fulton*, 19 Cal. 690, holding that "occupation" may sometimes signify an actual residence, but ordinarily is synonymous with "*possessio pedis*"; also in *Brumagim v. Bradshaw*, 39 Cal. 44, holding that where an inclosure is partly natural and partly artificial, it is for the jury to say, considering the quantity and character of the land, whether the boundaries were sufficient to notify the public of a *possessio pedis*. Cited in *Crosby v. Pridgen*, 76 Ala. 387, *Sankey v. Noyes*, 1 Nev. 72; *U. S. v. Rogers*, 23 Fed. 666. Note to principal case, 60 Am. Dec. 599, is cited in subsequent notes, in said series, to vol. 60, p. 616, vol. 62, p. 176, vol. 77, p. 651.

Public Lands.—Occupation of a portion of the land claimed will, in certain cases, draw after it the possession of the whole, p. 96.

Approved in *Castro v. Gill*, 5 Cal. 42, and *Gunn v. Bates*, 6 Cal. 272, on point that possession is not confined to the land actually inclosed. Cited in *Dyson v. Bradshaw*, 23 Cal. 537, on point that a trespasser on public lands, who claims title by possession, is not restricted to 160 acres. Overruled in *Polack v. McGrath*, 32 Cal. 20, as "not in accordance with the general rule, and opposed by many subsequent cases in this court." Doctrine of principal case is approved in *Feirbaugh v. Masterson*, 1 Ida. 138, 139, holding that a settler may claim more land than he actually occupies.

4 Cal. 102-103. **AMSBY v. DICKHOUSE.**

Juror cannot impeach his verdict, p. 103.

Approved in *Boyce v. Cal. Stage Co.*, 25 Cal. 475, holding that a "chance verdict" is the only exception to the rule; also in *Taylor v. Garnet*, 110 Ind. 292. In *People v. Azoff*, 105 Cal. 633, decided in January, 1895, the court, after considering the cases in California, affirmed the principal case, and held that evidence of jurors as to reading of a newspaper report of the trial in the jury-room, could not be received. No reference was made in argument or opinion to *Mattox v. U. S.*, 146 U. S. 140, decided in November, 1892, which held that the evidence of a juror, as to reading in the jury-room a newspaper comment on the case, ought to be received, the rule being that such evidence as to overt acts, or acts and declarations outside the jury-room, was admissible. *Griffiths v. Montandon*, 4 Idaho, 379, under Revised Statutes, section 4439, subdivision 2, affidavits of jurors to impeach verdict not admissible unless verdict obtained by resort to chance. In *People v. Ritchie*, 12 Utah, 194, decided in November, 1895, the court adopted the rule of the California cases, in preference to that of *Mattox v. U. S.* Cited in *Territory v. Taylor*, 1 Dak. 467.

4 Cal. 105-106. **PARKER v. SMITH.**

Evidence that is inadmissible may be stricken out by the court on its own motion, p. 106.

Approved in *People v. Wallace*, 89 Cal. 166, holding that the rule applies still more forcibly to a criminal case; also in *Davey v. S. P. Co.*, 116 Cal. 330, holding that the excluding of the evidence will be sustained if it was for any reason incompetent.

4 Cal. 106-107. **LURVEY v. WELLS.**

Motion for New Trial, made after close of the term, but within the statutory period, stays operation of the judgment and preserves all rights until the motion is determined, p. 107.

Distinguished in *Copper Hill Co. v. Spencer*, 25 Cal. 16, and *Carpenter v. Louchs*, 28 Cal. 71, holding that the principal case decided only that the court retains jurisdiction over motion for new trial after close

of the term, but not that all proceedings were stayed till the motion was determined. Approved in *Brckett v. Banegas*, 99 Cal. 626, holding that under sec. 473 C. C. P., a judgment cannot be vacated after six months from date of rendition. Approved in *Gomer v. Chaffe*, 5 Colo. 385, holding that a statute requiring that a motion for new trial be determined at the same term in which the trial was had is directory, not mandatory.

4 Cal. 107-112. **GOULDIN v. BUCKELEW.**

Vendor has an equitable lien on the land for the purchase money, p. 111.

Approved in *Hill v. Grigsby*, 32 Cal. 59, where the court regrets that the principal case and later decisions did not adhere to "the easy and plain rule of the statute of frauds," but holds that the doctrine of vendor's lien is now "firmly settled in this state."

Presumption of abandonment does not arise from failure of vendee to pay the price, p. 112.

Approved in *Ellis v. Jeans*, 7 Cal. 415. Cited in *Knott v. Stephens*, 5 Oreg. 239, holding that interest on deferred payments is sufficient compensation for delay.

4 Cal. 113-114. **McDERMOTT v. ISBELL.**

Replevin.—Party who obtains writ cannot plead want of jurisdiction of the court issuing it, as a defense in suit on the replevin bond, p. 114.

Cited, on point that irregularities in bond will not exonerate makers or sureties, *Nichols v. Standish*, 48 Conn. 323; *State v. Stark*, 75 Mo. 569; *State v. Hays*, 2 Oreg. 319; *Curlon v. Dixon*, 12 Oreg. 149. Cited in *Portland v. Bituminous etc. Co.*, 33 Or. 318, 72 Am. St. Rep. 719, but holding rule inapplicable to bond given for performance of ultra vires contract with city.

Bond requires the obligor to prosecute the suit with success or return the property, p. 114.

Approved, *Pierce v. King*, 14 R. I. 612.

4 Cal. 114-117. **SAN FRANCISCO v. SCOTT.**

Eminent Domain.—Compensation must be made before the citizen can be divested of his rights, p. 116.

Cited in *Steinhart v. Superior Court*, 137 Cal. 577, holding section 1254, Code of Civil Procedure, unconstitutional. *McCauley v. Weller*, 12 Cal. 528, 530, holding that the owner must be paid before the land is taken; and to the same effect in *San Francisco R. Co. v. Mahoney*, 29 Cal. 117.

Distinguished in *Fox v. W. P. Co.*, 31 Cal. 545, 546, which held that an act allowing a railway company to enter on condemned land before paying damages was not unconstitutional, and that the principal case did not consider this question.

Dedication may be by deed, overt act, or presumed from lapse of time or acquiescence. There is no precise limit of time from which it will be presumed, p. 116.

Approved in *Kittle v. Pfeiffer*, 22 Cal. 499. Cited in *People v. Blake*, 60 Cal. 510, in dissenting opinion, on point that there is no presumption from user by the public before the land was inclosed by the owner. *Schwerdtle v. Placer Co.*, 108 Cal. 592, holding that in the absence of a statute, the common-law rule of presumption by adverse user applies.

4 Cal. 117-120. *DE RO v. CORDES*.

Nonsuit is improper when facts and reasonable presumptions require that the case go to the jury, p. 119.

Cited in *Goldstone v. Merchants' etc Co.*, 123 Cal. 627, *Ferris v. Baker*, 127 Cal. 522, and dissenting opinion, *Mulcahey v. Dow*, 131 Cal. 80, holding nonsuit erroneous; *Herbert v. King*, 1 Mont. 490, on point that in considering question of nonsuit, the court will deem proven every fact that the evidence tended to prove.

4 Cal. 120-122. *CRONISE v. GARGHILL*.

Pleadings before justice of peace are not construed strictly. If defendant goes to trial instead of demurring, informalities in the complaint are cured by the verdict, p. 122.

Approved, *Lataillade v. Santa B. Co.*, 58 Cal. 5.

4 Cal. 127-173. *THORNE v. SAN FRANCISCO*. (*People v. Hays*.)

Redemption Laws cannot be retrospective, but must be applied only to subsequent suits, p. 132.

Approved in *Seale v. Mitchell*, 5 Cal. 402; *Welch v. Cross*, 146 Cal. 629, 630, subsequent change of time for redemption of realty from execution sale, extending time for redemption before levy and sale does not apply to redemption from such sale. Doubted in *Hart v. Burnett*, 15 Cal. 587, on account of "the able dissenting opinion." Denied in *Moore v. Martin*, 38 Cal. 439, which approves the dissenting opinion of the principal case, and regards the case as overruled by *Tuolumne R. Co. v. Sedgwick*, 15 Cal. 515, which did not cite the principal case, but held that a redemption act applies to sales made, after its passage, upon judgments rendered before. Cited in *Stockton R. Co. v. Stockton*, 41 Cal. 162, as to powers of the state, holding that where a statute is claimed to be unconstitutional, the construction should be "liberal in favor of the government." Dissenting opinion in the principal case.

as approved in 38 Cal. 439, is cited in the dissenting opinion in *Allen v. Allen*, 95 Cal. 205, where a majority of the court held that the right to redeem mortgaged premises was fixed by the law existing in this state at the date of the contract, and could not be affected by subsequent legislation here or by the laws of New York where the land was situated. The principal case is cited in *Oliver v. McClure*, 28 Ark. 561, holding that redemption laws must not be retrospective; and on same point in *Scobey v. Gibson*, 17 Ind. 574; 79 Am. Dec. 492; *McCormick v. Rush*, 15 Withr. (Ia.) 137; 83 Am. Dec. 408; *Deering v. Boyle*, 8 Kan. 537; 12 Am. Rep. 490; *Ogden v. Walters*, 12 Kan. 291; *Lawson v. Jeffries*, 47 Miss. 706; 12 Am. Rep. 354; and note to 54 Am. St. Rep. 808, as to present status of redemption laws. Distinguished in *Gordon v. South Fork Co.*, McAll. 518, holding that where a lien law goes exclusively to the remedy, it does not impair the obligation of the contract.

Repeal of a former statute held not to affect pending cases or vested rights, p. 139.

Cited in *Vance v. Rankin*, 194 Ill. 628, discussing effect of statute on pending appeal; *San Francisco Sav. Union v. Reclamation Dist.*, 144 Cal. 647, on point that statutes should be construed to operate prospectively. See note 12 Am. Dec. 480.

Mayor's powers and duties are defined by the charter, p. 145.

Cited in *Holland v. San Francisco*, 7 Cal. 375, holding that powers under a charter are strictly construed.

Checks, though certified are not coin, p. 151.

Cited in *Judah v. Brothers*, 72 Miss. 633, in dissenting opinion, on point that an execution sale must be for cash; and in note to 77 Am. Dec. 471.

N. B.—The principal case is cited, apparently by mistake in *Davis v. Rupe*, 114 Ind. 595, on the point that a judgment creditor has no contractual interest in his debtor's land; and in note to 13 Am. Dec. 71, that acceptance of a conveyance is presumed till the contrary is shown.

Certified Check is not equivalent to coin, p. 151.

Overruled in *Hooker v. Burr*, 137 Cal. 667, holding payment in such check sufficient in redemption proceedings.

4 Cal. 173-175. ROSE v. MUNIE.

Unrecorded Mortgage has priority over subsequent mechanics' lien, p. 174.

Approved in *Dennis v. Burritt*, 6 Cal. 673, holding that record as notice is limited to subsequent vendees and mortgagees; and to same

effect in *Pixley v. Huggins*, 15 Cal. 132. Cited in *Miller v. Stoddard*, 50 Minn. 276, holding that a mortgagee was not required by statute to record his mortgage as against mechanics' liens.

4 Cal. 176. **REED v. GRANT.**

Unlawful Detainer.—Holding over must be shown, p. 176.

Cited in *Van Lomond etc. Co. v. Sladky*, 141 Cal. 623, holding action not maintainable under facts stated.

4 Cal. 177-180. **PEOPLE EX REL. McDOUGALL v. BELL.**

Mandamus may issue to compel an auditor to audit an account, but he cannot be directed how to audit it, p. 180.

Cited in *Merced County v. Fremont*, 7 Cal. 133, where a district court was ordered to issue an attachment for contempt; also in *People v. Fogg*, 11 Cal. 359, where the writ was refused against a county treasurer to compel him to pay interest on bonds. Approved in *McCauley v. Brooks*, 16 Cal. 46, 63, where state controller was directed to issue a warrant; also in *Flagley v. Hubbard*, 22 Cal. 36, where the writ was refused against a justice of the peace to compel him to vacate an order; *Metz v. Schweitzer*, 8 Utah, 188, sustaining mandamus to constable for release of property from levy; dissenting opinion in *Tilden v. Sacramento Co.*, 41 Cal. 77, where a majority of the court refused to compel a board of supervisors to allow a claim: *Jacobs v. Supervisors*, 100 Cal. 129, holding that supervisors could not be compelled to fix or alter water rates.

4 Cal. 184. **SAMPSON v. HAMMOND.**

Trover for logs may be brought as soon as the logs are cut, p. 184.

Cited in *Pittsburg R. Co. v. Swinney*, 97 Ind. 598, holding that trover lies for gravel when severed from the soil; also in *Michigan L. Co. v. Deer L. Co.*, 60 Mich. 149, 1 Am. St. Rep. 495, holding that measure of damages is the value of the timber before cutting; and in *Tyson v. McGuineas*, 25 Wis. 660, on principal point.

4 Cal. 185, 186. **GRAY v. SCHUPP.**

Appeal lies from a void judgment, p. 185.

Cited on this point in *People v. Lindsay*, 1 Ida. 400, and *Hastings v. B. M. Co.*, 2 Nev. 97.

4 Cal. 186, 187. **DOMINGUEZ v. DOMINGUEZ.**

Term of Court being illegally held, judgment rendered at it must be reversed, p. 187.

Cited in *Bates v. Gage*, 40 Cal. 185.

4 Cal. 188; 60 Am. Dec. 604. TAYLOR v. BROWN.

Constable may appoint as many deputies as he pleases, p. 188.

Approved in *Jobson v. Fennell*, 35 Cal. 713. Distinguished in *Kaysen v. Steele*, 13 Utah, 265, saying that the principal case did not discuss the question, and holding that only deputies pro tem can be appointed, in case of disability of the constable.

General citation: *Parkeburg Industrial Co. v. Schultz*, 43 W.Va. 474.

4 Cal. 190-195. WOOD v. SAN FRANCISCO.

Wharf held to be a public street and not liable to levy on execution, p. 194.

Approved on similar facts in *Minor v. San Francisco*, 9 Cal. 45. Distinguished in *Hart v. Burnett*, 15 Cal. 587, 615, as holding only that the property is not leviable; the questions of validity of sale or title of the city did not arise. Cited in *Barney v. Keokuk*, 4 Dill. 597, holding that a wharf is subject to the same public use as the street of which it is an extension.

4 Cal. 195. HAWLEY v. DELMAS.

Affidavit for Attachment, "on a contract express or implied," is insufficient, as being in the alternative, p. 195.

Distinguished in *Wilke v. Cohn*, 54 Cal. 214, holding an alternative description to be bad. Cited in *Harvey v. Foster*, 64 Cal. 297, 298, holding that irregularities in obtaining attachment are waived by failure of defendant to object, and cannot be taken advantage of by other attaching creditors; and to same effect in *Scrivener v. Dietz*, 68 Cal. 3. Distinguished in *Simpson v. McCarthy*, 78 Cal. 178, 179, 12 Am. St. Rep. 39, 40, holding that an affidavit that the debt is on "an account stated" is not defective for failure to aver whether the contract was express or implied, and partially disapproving the principal case. Hayne, C., dissenting, says the majority of the court "overlook" the principal case. Distinguished in *Flagg v. Dare*, 107 Cal. 486, holding that it need not be averred whether the contract was express or implied, if it appears there was a contract for payment of money; also in *Cope v. Upper M. Co.*, 1 Mont. 56, holding that the averment that the debt was on "an express and implied contract" was sufficient.

4 Cal. 196. DUPREY v. MORAN.

Purchaser at Sheriff's Sale gets no title until six months after sale, p. 196.

Approved in *Cantwell v. McPherson*, 3 Idaho, 725, proceeding to revive judgment under Revised Statutes, section 4498, does not accrue until period of redemption has expired.

4 Cal. 198-200. PEOPLE v. KOHLE.

Juror may be challenged peremptorily by the defense in a criminal case, after twelve jurors are accepted, but before they are sworn, p. 199.

Approved in *People v. Rodriguez*, 10 Cal. 59. Cited in *State v. Pritchard*, 15 Nev. 81, holding that after twelve jurors have been accepted, and the court has notified defendant that unless he challenges he will be deemed to accept those in the box, defendant cannot peremptorily challenge one of them.

4 Cal. 201-203. YOUNGS v. BELL.

Indorsee of note must prove the indorsement, p. 202.

Approved in *Hastings v. Dollarhide*, 18 Cal. 391.

Defendant may rely on several defenses, p. 202.

Approved in *Bell v. Brown*, 22 Cal. 680, and *People v. Lothrop*, 3 Colo. 449.

4 Cal. 203, 204. WELCH v. TENNENT.

Removal of Cause from state to federal court cannot be granted unless all the defendants are citizens of a foreign state, p. 203.

Cited on this point in *Ex parte Andrews*, 40 Ala. 656, and *Shelby v. Hoffman*, 7 Ohio St. 453.

4 Cal. 204, 205. CORWIN v. PATCH.

Answer containing nothing to defeat the action, plaintiff is entitled to judgment on the pleadings, p. 205.

Cited in *Hemme v. Hayes*, 55 Cal. 339.

4 Cal. 205-207. PEACHY v. RITCHIE.

Award of arbitrators can only be set aside for fraud, mistake, or misconduct, p. 207.

Cited on this point in *Carsley v. Lindsay*, 14 Cal. 394, *Craft v. Thompson*, 51 N. H. 544, note to 56 Am. Dec. 317.

4 Cal. 208-209. RAY v. ARMSTRONG.

Landlord and Tenant.—Suit cannot be brought till after six days from service of notice to quit, p. 209.

Distinguished in *Garbrell v. Fitch*, 6 Cal. 189, holding that if suit is for holding over, it is not premature if brought on fourth day after notice.

4 Cal. 209-211. McMINN v. MAYES.

Ejectment.—Possession of plaintiff's grantor is sufficient for recovery, p. 211.

Cited in *Bird v. Lisbros*, 9 Cal. 5, 7, 70 Am. Dec. 618, 620, holding that if possession is for the period of the statute of limitations, there is great doubt if abandonment could destroy it; also in *Bagley v. Kennedy*, 85 Ga. 706, to the point that possession is presumption of title.

Ejectment.—Plaintiff is entitled to recover improvements that are fixtures, p. 211.

Cited in note to 15 Am. St. Rep. 59, on this point.

4 Cal. 213, 214; 60 Am. Dec. 605. **STOUGHTON v. SWAN.**

Notice of Dishonor of note is sufficient, if it appears or can reasonably be inferred that the note has been presented and dishonored, p. 213.

Cited on this point in notes to 62 Am. Dec. 372; 75 Am. Dec. 118; 81 Am. Dec. 626; 84 Am. Dec. 370.

4 Cal. 214-218. **VERMULE v. SHAW.**

Findings may be filed after entry of judgment, p. 216.

Cited in *Keller v. Sutrick*, 22 Cal. 473, holding that sec. 187, Practice Act, requiring referee to file report within ten days after close of testimony, is merely directory, and report may be filed later. Approved in *Broad v. Murray*, 44 Cal. 229. Cited in *North v. Peters* 138 U. S. 283, holding that omission to file findings can be cured after judgment; also in *Gomer v. Chaffe*, 5 Colo. 386, holding that a statute requiring decision on motion for new trial to be at same term as the trial is directory, not mandatory; *Thompson v. Conn. M. Co.*, 139 Ind. 353, holding that findings may be amended at any time before final judgment; *Swanstrom v. Marvin*, 38 Minn. 361, holding that findings may be filed after judgment, nunc pro tunc; *Lynch v. Coviglio*, 17 Utah, 108, holding local statute as to time of filing findings merely directory.

4 Cal. 218-227. **PEOPLE v. STUART.**

Jurors.—No regular panel having been drawn, the court orders thirty-six jurors to be summoned, and draws a trial jury from twenty-seven, p. 225.

Approved in *People v. Vance*, 21 Cal. 403; *People v. Williams*, 43 Cal. 349.

Criminal Practice, p. 222.

As to failure of court to call defendant if he had any legal cause against judgment being pronounced, nothing is said in the opinion, though it is referred to in counsel's brief; yet the case is cited on this point in *Ex parte Gibson*, 31 Cal. 627, 91 Am. Dec. 552, and *Jones v. State*, 51 Miss. 727, 24 Am. Rep. 659.

General citation: *Greeley v. Dixon*, 21 Fla. 425.

4 Cal. 227-229. STEARNS v. MARTIN.

Evidence of a joint contract is inadmissible when the pleadings set up a several contract, p. 229.

Cited, *Hook v. White*, 36 Cal. 301.

4 Cal. 230-231. VINES v. WHITTEN.

Survey by anyone but county surveyor is inadmissible in evidence, p. 230.

Disapproved in *Doherty v. Thayer*, 31 Cal. 145, holding that the doctrine was virtually overruled in *Ellis v. Janes*, 10 Cal. 456, which held that a witness could testify as to correctness of a private survey made by him.

4 Cal. 238-243. PEOPLE v. THOMPSON.

Indictment must substantially follow the statute, p. 240.

Cited in *Whitman v. State*, 17 Neb. 226, holding that exact words of statute need not be used if equivalent words are substituted; also in *People v. Colton*, 2 Utah, 458, holding that it was not necessary to use the word "feloniously," the offense being complete without it; and in *U. S. v. Cannon*, 4 Utah, 146, where description of person and offense was held correct.

Clerk of court of sessions being also clerk of district court, his failure to indorse indictment in district court does not render it invalid, p. 241.

Approved in *People v. Stuart*, 4 Cal. 226.

Continuance.—Affidavit, alleging absence of a material witness, must show that due diligence was used to procure the witness, and that the testimony is not cumulative, p. 241.

Approved in *People v. Gaunt*, 23 Cal. 158, *People v. Williams*, 24 Cal. 38, *People v. Perkins*, 56 Cal. 6; also in *People v. Francis*, 38 Cal. 188, holding that where affidavit states on information and belief that a foreign witness can be procured, grounds of the information and belief should be stated.

Plea of defendant may be made in his absence by his counsel, except where he pleads guilty, p. 241.

Cited in *Stubbs v. State*, 49 Miss. 724.

Amendment to Sentence may be made before final judgment, p. 242.

Cited, on point that sentence may be corrected during the term, in *Collins v. State*, 13 Fla. 655, and *State v. Brannon*, 34 La. An. 945; and in *Bilansky v. State*, 3 Minn. 318, holding that the record may be amended, after appeal, before sentence; also in note to 79 Am. Dec. 779, on power to amend sentence.

General citation: *Perkins v. Territory*, 10 Okl. 514.

4 Cal. 243-244. **CAHOON v. LEVY.**

See same case, 6 Cal. 295, 10 Cal. 216.

4 Cal. 244. **GARCIA v. DE SATRUSTEGUI.**

Pleading.—Defect in complaint, that might have been demurred to, is cured by verdict, p. 244.

Approved in *Wilkins v. Stidger*, 22 Cal. 235; 83 Am. Dec. 65; and *Parrott v. Scott*, 6 Mont. 345.

4 Cal. 245-247. **RAMIREZ v. McCORMICK.**

Right of Way is not implied except in cases of way by necessity, p. 246.

Cited in *Walker v. Clifford*, 128 Ala. 75, 86 Am. St. Rep. 76, holding such right not shown.

4 Cal. 250-254. **CAVENDER v. GUILD.**

Interest on foreign judgment not allowed without proof, p. 253.

Disapproved in *Olson v. Veazie*, 9 Wash. 483, 43 Am. St. Rep. 857, holding that weight of authority is the other way. Cited in note to 89 Am. Dec. 674, on point that judicial notice is not taken of the rates of interest of other states.

General citation: *Schroeder v. Boyce*, 127 Mich. 35.

4 Cal. 254-256. **HARTMAN v. WILLIAMS.**

Judgment by Default can be rendered on an unliquidated demand, p. 256.

Cited in *Johnson v. Vance*, 86 Cal. 114.

4 Cal. 256-259. **ALLEN v. PHELPS.**

Equity.—In suit at law by vendor of land to recover balance of price, rights of a third party to be subrogated to plaintiff's equitable lien cannot be considered, but must be left to an equitable action, p. 259.

Cited in *Golden S. Works v. Davidson*, 73 Cal. 392, holding that question of priority of partnership creditors over creditors of one partner must be asserted in equity, and could not be considered in an ejectment suit.

4 Cal. 260-263. **TREADWELL v. WELLS.**

Notice.—Publication of notice of dissolution of partnership of debtors in a newspaper taken by a creditor, is a fact from which the jury may infer actual notice, p. 263.

Cited on this point in *Gilchrist v. Brande*, 58 Wis. 200, *Homburger v. Alexander*, 11 Utah, 377; *Prentiss v. Sinclair*, 26 Am. Dec. 292, 293.

4 Cal. 264-267. RIDDELL v. BLAKE.

Vendee of land must pay the price unless he can show paramount title in another than the vendor, p. 267.

Cited in *Walker v. Sedgwick*, 8 Cal. 403, on point that vendee cannot keep possession and deny the title under which he entered.

4 Cal. 268-273; 60 Am. Dec. 606. TAYLOR v. HARGOUS.

Homestead.—Occupancy is presumptive evidence of appropriation, and is notice to all the world, p. 272.

Cited on this point in *Holden v. Pinney*, 6 Cal. 235; *Beecher v. Baldy*, 7 Mich. 504; note to *Greeley v. Scott*, 2 Woods, 662; notes to 65 Am. Dec. 735, and 70 Am. Dec. 294, citing note in 60 Am. Dec. 615.

Homestead.—Removal is not proof of abandonment, p. 273.

Cited in *Revalk v. Kraemer*, 8 Cal. 71, 73; 68 Am. Dec. 306-308; *Moss v. Warner*, 10 Cal. 297; also in *Tipton v. Martin*, 71 Cal. 326, holding that under act of 1860 declaration of abandonment must be filed and recorded; *In re Pratt*, 1 Flipp. 355, holding abandonment not shown merely by husband's absence; *Smith v. Pearce*, 85 Ala. 268, 7 Am. St. Rep. 47, holding that sale by husband and renting part of the premises from vendee by husband and wife, was not abandonment. Note to principal case, 60 Am. Dec. 607, on abandonment, is cited in later notes of that series, vol. 65, p. 735, vol. 66, p. 93, vol. 67, pp. 612, 645, vol. 68, p. 702, vol. 70, p. 374, vol. 76, pp. 439, 443, vol. 81, p. 301, vol. 85, pp. 406, 582, vol. 86, p. 626, vol. 87, p. 249, vol. 92, p. 117, vol. 96, p. 415; also in notes to 1 Am. St. Rep. 775, and 7 Am. St. Rep. 47.

Homestead is a sort of joint tenancy, with right of survivorship, p. 273.

Cited in *Poole v. Gerrard*, 6 Cal. 73, 74, 65 Am. Dec. 482, holding that husband and wife must join in suit to recover the homestead; *Dorsey v. McFarland*, 7 Cal. 345, holding that mortgage by husband alone is void to extent of homestead value; *Revalk v. Kraemer*, 8 Cal. 71, 73, 68 Am. Dec. 306-308, holding that subsequent death of wife does not validate a mortgage made by husband alone; *Buchanan's Estate*, 8 Cal. 509, holding that homestead passes to wife on husband's death; *Estate of Tompkins*, 12 Cal. 125, holding that the homestead is not assets of husband's estate. In *Gee v. Moore*, 14 Cal. 477, Field, C. J., overrules the doctrine of joint tenancy, saying "it has never met the approval of the profession and is not warranted by any language of the constitution or statute;" held, deed by husband alone is good, subject to the right of husband and wife to use the homestead as long as it is such or until they get another. Cited in *Gimmy v. Doane*, 22 Cal. 638, holding that if the homestead is selected from common property, it is subject to division in case of divorce; also cited, as overruled by *Gee v. Moore*, 14 Cal. 477, in *Brennan v. Wallace*, 25

Cal. 114; and in *McQuade v. Whaley*, 31 Cal. 530, it was held that under Act of 1851 a conveyance by the husband alone was good, subject to the right to use the premises as a homestead, and if declaration of homestead was not recorded, as required by Act of 1860, the homestead right created; and *Levins v. Rovegno*, 71 Cal. 279, decided that under the Act of 1860 a surviving husband or wife was entitled to one-half of the estate, and surviving children to the other half. Cited in *Johnston v. Turner*, 29 Ark. 292, and *Trotter v. Trotter*, 31 Ark. 150, on point that after husband's death the homestead passes to his wife and children; also in *Sharp v. Bailey*, 14 Withr. (Ia.) 389, 81 Am. Dec. 491, holding that wife's acknowledgment to mortgage operated only as release of dower, not as transfer of homestead. In *Smith v. Shrieves*, 13 Nev. 308, citing principal cases and others from California, it was held that under Nevada statute if there is a declaration of homestead, rule of joint tenancy applies, otherwise not. Note to principal case, 60 Am. Dec. 615, on joint tenancy, is cited in subsequent notes in that series, vol. 65, p. 485, vol. 66, p. 93, vol. 81, p. 491.

General citation: *Murphy v. Farquhar*, 39 Fla. 361.

4 Cal. 274, 275. **MOWRY v. STARBUCK.**

Further Evidence may be allowed, after testimony is closed, in the court's discretion, p. 275.

Approved in *Foote v. Richmond*, 42 Cal. 442, *State v. Harrington*, 9 Nev. 94, and *Huntley v. Territory*, 7 Okl. 63.

4 Cal. 276. **MASON v. TIPTON.**

Partnership.—One partner cannot sue another and purchasers from the latter, to recover value of partnership property sold, p. 276.

Approved in *White v. Campbell*, 18 R. I. 152.

4 Cal. 277. **LIGHTSTONE v. LAURENCEL.**

Guarantor of a note should not be sued as a joint maker, for his liability is that of an indorser, p. 277.

Cited in *Bryan v. Berry*, 6 Cal. 397, holding that a surety has the liability of an indorser, no matter on what part of the note he puts his name; also in *Sayre v. Nichols*, 7 Cal. 538, 68 Am. Dec. 282, where one who signed a bill of exchange as "agent" was held not liable personally. Distinguished in *Kritzer v. Mills*, 9 Cal. 23, where nothing appeared on face of note to show that a defendant was only a surety, and he was held as maker. Cited in *Reeves v. Howe*, 16 Cal. 153, holding that a guarantor is entitled to notice before he can be held.

4 Cal. 278, 279. **BEQUETTE v. CAULFIELD.**

Ejectment.—Possession is evidence of title and gives a right of action against a mere trespasser, p. 279.

Cited in *Bird v. Lisbros*, 9 Cal. 5, 70 Am. Dec. 618, holding that defendant may show abandonment by plaintiff's grantor; and in *Gregory v. Haynes*, 13 Cal. 595, holding that defendant, who entered under deed executed by order of court, was not a trespasser; also in *Hubbard v. Barry*, 21 Cal. 325, and *Richardson v. McNulty*, 24 Cal. 348, both cases holding that the common-law rule is modified in this state, and plaintiff recovers if his possession is prior to defendant's. Affirmed in *Bagley v. Kennedy*, 85 Ga. 706, *Turner v. Aldredge*, McAll. 232, *Mickey v. Stratton*, 5 Sawy. 479, *Hacker v. Harlemus*, 74 Wis. 23, *House v. Reavis*, 89 Tex. 630, 631. Cited to the point that rights may be lost by abandonment, in note to 40 Am. Dec. 467. Note to the principal case, 60 Am. Dec. 615, is cited in notes to 70 Am. Dec. 620, and 98 Am. Dec. 363.

4 Cal. 280, 281. **SUYDAM v. PITCHER.**

Judgment cannot be disturbed after adjournment of the term, except as provided by statute, p. 280.

Cited on this point in *Carpentier v. Hart*, 5 Cal. 407, *Shaw v. McGregor*, 8 Cal. 251, *Casement v. Ringgold*, 28 Cal. 338; also in *De Castro v. Richardson*, 25 Cal. 52, holding that power to amend record after close of term extends only to correction of clerical errors; and in *Daniels v. Daniels*, 12 Nev. 121.

Attorney entering appearance, whether authorized or not, binds his client, except in case of fraud or insolvency of the attorney, p. 280.

Cited in *Holmes v. Rogers*, 13 Cal. 200; also in *Sampson v. Ohleyer*, 22 Cal. 210, holding that remedy is against the attorney; and in *Nex Perce v. Latah*, 2 Ida. 1135, where a stipulation that an appeal should be heard on its merits was held to bar the right to move for dismissal of appeal; in dissenting opinion, *Blyth v. Swenson*, 15 Utah, 363, main opinion holding judgment properly vacated for attorney's lack of authority to appear; *Keyser v. Pallock*, 20 Utah, 376, holding defects in summons waived by general appearance. As to powers of an attorney, in note to 75 Am. Dec. 148.

4 Cal. 284. **HARLEY v. YOUNG.**

Appeal.—Statement must be signed by the judge, if parties or counsel do not agree to it, p. 284.

Distinguished in *Dickinson v. Van Horn*, 9 Cal. 210, where it did not appear that the statement was referred to in the record signed by the judge. Cited in *Cody v. Filley*, 4 Colo. 437.

4 Cal. 285. **ROWE v. KOHLE.**

Married Woman is not liable on her contract, p. 285.

Cited in *Luning v. Brady*, 10 Cal. 267, holding that note of husband
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and wife is only obligatory on the husband; also in *Belloc v. Davis*, 38 Cal. 256, holding that a note and mortgage, and new promise to pay same in gold, made by husband and wife, were not binding on the wife; also in *Drais v. Hogan*, 50 Cal. 128, where wife was held not bound by her agreement to pay an attorney for procuring a divorce. Cited in *Bayerque v. Haley*, McAll. 99, holding that a statute regarding married women is not applicable to persons married out of the state, who had never been within it; also in *Vantelburg v. Black*, 3 Mont. 464, holding that a judgment against a married woman was not void but erroneous, and remained valid till set aside; and in *Spangler v. Sellers*, 5 Fed. 891, quoting from *Drais v. Hogan*, 50 Cal. 128.

4 Cal. 286. **GATES v. BUCKINGHAM.**

Appeal.—Notices and affidavits, not embodied in a bill of exceptions or statement, are no part of the record, p. 286.

Cited in *Ritter v. Mason*, 11 Cal. 214, and *Moore v. Semple*, 11 Cal. 361; also in *Everett v. Buchanan*, 2 Dak. 253, where clerk's minutes were held to be no part of the record.

4 Cal. 287. **PATTEN v. RAY.**

Foreign Judgment is not a contract within the meaning of the statute of limitations, requiring suit to be brought within two years, p. 287.

Approved in *Higgins v. Graham*, 143 Cal. 133, sustaining constitutionality of statute as to note executed out of state; *Dore v. Thornburg*, 90 Cal. 66, 25 Am. St. Rep. 101, holding that suit on a foreign judgment must be brought within four years, under sec. 343, C. C. P.

4 Cal. 288. **WATSON v. McCLAY.**

Discretion of lower court in granting new trial will not be disturbed, p. 288.

Approved, *Bates v. Howard*, 105 Cal. 178. Cited in *Anthony v. Eddy*, 5 Kan. 133, holding that order granting new trial will not be reversed, unless the verdict is sustained by great preponderance of evidence.

4 Cal. 289-290; 60 Am. Dec. 616. **FITZGERALD v. GORHAM.**

Statute of Frauds requires that a sale "be followed by an actual and continued change of possession," p. 290.

Approved in *Stewart v. Scannell*, 8 Cal. 83, where vendor acted as warehouseman of vendee after sale. Cited in *Vance v. Boynton*, 8 Cal. 561, where the piling of bags of barley in same field as they were before sale, was held not a change of possession; also in *Bacon v. Scannell*, 9 Cal. 273, where vendor was clerk of vendee after sale. *Stevens v. Irwin*, 15 Cal. 507, overruled *Bacon v. Scannell*, but did not refer to the principal case, and held that possession of goods by

vendor a year after sale was not a badge of fraud. *Godchaux v. Mulford*, 26 Cal. 323, 85 Am. Dec. 182, claims that the principal case was overruled by *Stevens v. Irwin*, and holds that subsequent employing of vendor by vendee is colorable only, and question of fraud must be left to the jury. Cited in notes to 97 Am. Dec. 341 and 30 Am. St. Rep. 485.

4 Cal. 291-292. SULLIVAN v. DAVIS.

Power of attorney to make "sales, leases, and contracts of every description" includes power to sell land, p. 292.

Approved in *De Rutte v. Muldrow*, 16 Cal. 512.

Quitclaim Deed enables grantee to maintain ejectment if grantor could have done so, p. 292.

Cited in *Downer v. Smith*, 24 Cal. 123, *Carpentier v. Williamson*, 25 Cal. 168, *Lawrence v. Ballou*, 37 Cal. 521, *Rego v. Van Pelt*, 65 Cal. 256; also in *Spaulding v. Bradley*, 79 Cal. 456, holding that a quitclaim deed does not imply any precedent interest in grantee; and in *Field v. Columbet*, 4 Sawy. 523, holding that grantee need not be in possession at date of deed.

Ejectment.—Recovery of land, damages for detention, and rents and profits, may all be obtained in same action, p. 292.

Cited in *Johnson v. Visser*, 96 Cal. 312, holding it is not necessary to aver that defendant has received rents and profits; and in note to 1 Am. Dec. 116, on mesne profits.

Sheriff's Deed is insufficient proof of title, without showing the judgment authorizing the sale, p. 292.

Cited in *People v. Doe*, 31 Cal. 221, holding that the rule applies to judicial sales for taxes; also in *Archbishop v. Shipman*, 69 Cal. 592, holding that such proof does not avail against one in possession of the land, who was not a party to the judgment; and in *Porter v. Wells*, 6 Kan. 455, *Bolan v. Bolan*, 4 Nev. 152, notes to 11 Am. Dec. 709 and 13 Am. Dec. 365. *Hazard v. Cole*, 1 Ida. 289, probably intends the principal case by citing "4 Cal. 47" on this point.

4 Cal. 294-296. SHAFER v. BEAR RIVER CO.

Mortgage.—Where there is no express covenant to pay the debt, action will not lie on a mere recital of its existence.

Cited in *Union Co. v. Murphys Co.*, 22 Cal. 626, on point that where there is no express covenant, the remedy is against the mortgaged property, not against the mortgagor, p. 296.

Pleading.—Allegations by way of recital are insufficient, p. 296.

Cited in *Leadville Co. v. Leadville*, 22 Colo. 303; *Jackson Township v. Farlow*, 75 Ind. 122; *Lake Shore Co. v. Cincinnati Co.*, 116 Ind. 580;

Louisville Co. v. Kendall, 138 Ind. 317; *Reitman v. Bangart*, 26 Ind. App. 471, holding complaint for negligence insufficient.

4 Cal. 297-299. **MOODY v. McDONALD.**

Damages, in case of simple negligence, cannot include "smart money," p. 299.

Cited in *Goddard v. Grand Trunk Railway*, 57 Me. 256, 2 Am. Rep. 54, holding that exemplary damages were properly awarded against a railway that retained in its employ a brakeman who had grossly assaulted a passenger; also in *Woodman v. Nottingham*, 49 N. H. 394, 6 Am. Rep. 532, holding that "smart money" cannot be awarded in suit against a town for injuries caused by defective railing on a bridge. Cited in notes to 27 Am. Dec. 687, and 62 Am. Dec. 384, on exemplary damages.

Special Verdict should be recorded as rendered, and judgment entered according to the findings, p. 299.

Cited on this point in *Insurance Co. v. Piaggio*, 83 U. S. (16 Wall.) 388; also in *Guerold v. Holtz*, 103 Mich. 123, holding that verdict and judgment as entered were not warranted by the special findings.

4 Cal. 304-306. **DOUGLASS v. PACIFIC MAIL CO.**

"Person" includes a corporation, p. 306.

Cited in *Johnson v. Mining Co.*, 127 Cal. 8, 78 Am. St. Rep. 21, discussing application of fourteenth amendment to United States constitution; *Railroad Tax Case*, 8 Sawy. 285, 13 Fed. Rep. 760; also in *Billings v. State*, 107 Ind. 55, 57 Am. Rep. 78, holding that estate of a decedent is a "person."

4 Cal. 308. **MORAGA v. EMERIC.**

Judgment.—Decision on demurrer is not a final judgment from which an appeal lies, p. 308.

Approved in *Moulton v. Ellmaker*, 30 Cal. 529. Cited in dissenting opinion, in *Quivey v. Gambert*, 32 Cal. 314, where a majority of the court held that an order striking out statement on motion for new trial was not appealable. Cited in note to 60 Am. Dec. 431, on principal point.

4 Cal. 309. **VINTON v. CROWE.**

Promissory Note, transferred after maturity, is taken subject to all equities between maker and payee, but not to those between maker and an intermediate holder, p. 309.

Approved, on doctrine of *stare decisis*, in *Hayward v. Stearns*, 39 Cal. 60. Distinguished in *Bank v. Gove*, 63 Cal. 356, 49 Am. Rep. 93, holding that the principal case did not establish the rule that every

indorsee after maturity is bound by equities between maker and payee; held, where payee indorsed the note before maturity, and indorsee transferred it after maturity, the last holder was not bound by an agreement between maker and payee that each should pay half the note.

4 Cal. 310-314. **WARNER v. WILSON.**

Misjoinder of parties must be demurred to, p. 313.

Cited in *Dunn v. Tozer*, 10 Cal. 170.

Letters of Guardianship, issued by probate court, cannot be attacked collaterally, p. 313.

Declared to be obiter in *Smith v. Andrews*, 6 Cal. 654. Cited in *Irwin v. Scriber*, 18 Cal. 505, holding that letters of administration cannot be questioned, in suit by administrator against a debtor of the estate; also in *Hodgdon v. S. P. R. R.*, 75 Cal. 648, holding that letters of guardianship cannot be attacked in suit by infant to recover lands.

4 Cal. 315-317. **BEACH v. COVILLARD.**

Statute of Frauds.—Covenant to convey may be varied by subsequent parol agreement, if the agreement has been executed, p. 316.

Cited on this point in *Denham v. Walker*, 93 Ga. 501, and in note to 100 Am. Dec. 172.

4 Cal. 318-320. **NUGENT v. LOCKE.**

Partnership.—Remedy of one partner against another for breach of contract is by bill in equity for dissolution and accounting, p. 320.

Cited in *Stevens v. Baker*, 1 Wash. Ter. 317.

4 Cal. 321-323. **THORNE v. YONTZ.**

Note, given for illegal consideration, is good if transferred to an innocent holder before maturity, p. 323.

Cited in *Hatch v. Burroughs*, 1 Woods, 448, holding that stockholders of a bank were liable for bankbills illegally issued; and in note to 56 Am. Dec. 313 (*Smith v. Joyce*).

4 Cal. 327-330. **WHITING v. HESLEP.**

General Demurrer must be overruled if some counts in declaration are good, p. 330.

Distinguished in *Ferguson v. Burt*, 2 Utah, 392, holding that the rule does not apply to special demurrer for misjoinder of causes of action.

4 Cal. 331-332. **JESSUP v. KING.**

Amendment.—Presumption is that lower court properly refused an amendment, the record failing to state what it was, p. 331.

Cited in note to 34 Am. Dec. 158.

4 Cal. 333-334. **REDDING v. BELL.**

Appropriation.—Warrants on the state treasurer cannot be cashed unless there is an "unexhausted, specific appropriation" to meet them, p. 334.

Approved in *Stratton v. Green*, 45 Cal. 151. Cited in *Stevens v. Truman*, 127 Cal. 157, but holding defects in complaint in mandamus thereon obviated by allegations of answer; *People v. Reis*, 76 Cal. 275, on point that a public official cannot be compelled to pay out funds not in his official custody; also in *Ingram v. Colgan*, 106 Cal. 118, 46 Am. St. Rep. 224, holding that bounty for killing coyotes could not be paid under the act authorizing it, because there was no specific appropriation. Cited in *Booth v. Bryan*, 26 Or. 509, where mandamus, to compel apportionment of school funds, was refused; also in *State v. Mish*, 13 Wash. 305, holding that mandamus would not lie to compel a county treasurer to pay over money collected by his predecessor; in *State v. Burdick*, 4 Wyoming, 281, holding that a statute creating the office of state examiner also appropriated his salary, and a subsequent appropriation of it at later sessions of the legislature was unnecessary; and in note to 22 Am. St. Rep. 640, 641, on appropriations.

Pleading.—Plaintiff must allege that "there are moneys not otherwise appropriated by law," p. 334.

Cited in *Kemerer v. State*, 7 Neb. 134.

4 Cal. 339-340. **BEACH v. FARISH.**

Lease, exempting tenant from liability to restore a house if it should be burned, does not relieve him from paying rent for full term if it is burned, p. 340.

Cited in *Cowell v. Lumley*, 39 Cal. 153, 2 Am. Rep. 431, holding that covenant by lessee to build on premises does not imply a covenant to rebuild in case of fire.

4 Cal. 341. **PEOPLE v. NUGENT.**

Indictment need not allege an offense to have been committed "without considerable provocation," p. 341.

Approved in *People v. Vanard*, 6 Cal. 562, 563, holding that on a charge of assault with a deadly weapon, the weapon must be alleged and found. Cited in *People v. English*, 30 Cal. 218, holding that it is sufficient to find that an assault was with a deadly weapon and with

intent to do bodily harm. Cited in *Territory v. Conrad*, 1 Dak. 355, on point that jury may convict of a lesser degree than that charged; also in *Territory v. Scott*, 2 Dak. 217, and *Territory v. Burns*, 6 Mont. 75, on point that statutory exceptions need not be pleaded; and in *State v. Robey*, 8 Nev. 321, on point that negative qualifications in statute must be relied on as matter of defense.

Denied in *People v. Fairbanks*, 7 Utah, 6, holding indictment insufficient under local statutes.

4 Cal. 342-344. **REED v. McCORMICK.**

District Courts have no appellate jurisdiction over probate courts, p. 343.

Cited in *Parsons v. Tuolumne Co.*, 5 Cal. 44, 63 Am. Dec. 77, holding that county court's jurisdiction in "special cases" does not include cases where there has always been a remedy. Approved in *Keller v. DeFranklin*, 5 Cal. 433, 434, holding that probate judge has discretion to decide what issues of fact shall be sent to district court for trial. Cited in *Beckett v. Selover*, 7 Cal. 240, 68 Am. Dec. 254, holding that heirs may contest in district court the allowance of claims by probate court; also in *People v. Fowler*, 9 Cal. 86, holding that where certain powers are given to certain courts, they are exclusive, unless there are exceptions in the constitution, or power is expressly given to the legislature to prescribe cases to which the jurisdiction shall extend.

4 Cal. 352-354. **McDONALD v. GRISWOLD.**

Tax levied for "county purposes" must be restricted to current expenses, and cannot be used to pay holders of county scrip, p. 353.

Distinguished in *Taylor v. Brooks*, 5 Cal. 334, holding that one who registers warrants becomes a preferred creditor, to be paid when there are funds; also in *McCauley v. Brooks*, 16 Cal. 34, holding that the legislature cannot, by revoking an appropriation, prevent the state treasurer from making the payments designated; and in *Odd Fellows Bank v. Quillen*, 11 Nev. 116, where the legislature provided for drawing on the general fund to pay interest on bonds, if the interest fund was not sufficient. Cited in note to 22 Am. St. Rep. 647, on appropriations.

4 Cal. 355-358; 60 Am. Dec. 618. **RUIZ v. NORTON.** S. C. 4 Cal. 359-361.

Recoupment.—In action for purchase price of goods, defendants may recoup damages for breach of warranty, p. 358.

Cited in *Flint v. Lyon*, 4 Cal. 20; and *Stoddard v. Treadwell*, 26 Cal. 305; also in note to 65 Am. Dec. 606.

Parol Evidence cannot vary unambiguous written contract, p. 358.

Cited in *Frink v. Roe*, 70 Cal. 316; also in notes to *American Decisions*, vol. 63, pp. 423, 427; vol. 68, p. 382; vol. 95, p. 236.

Undisclosed Principal may sue personally on agent's contract, p. 358.

Cited in *Crosby v. Watkins*, 12 Cal. 88; *McConnell v. East Point Co.*, 100 Ga. 134; *St. Louis Co. v. Thatcher*, 13 Kan. 567; *West v. Humphrey*, 21 Nev. 85; *Chandler v. Coe*, 54 N. H. 571; *Sires v. Newton*, 1 Wash. Ter. 360; *McConnell v. Land Co.*, 100 Ga. 134, as to action on note made to agent; and in notes to *American Decisions*, vol. 65, p. 239; vol. 66, p. 389; vol. 71, p. 581; also notes to 5 Am. St. Rep. 675, and 55 Am. St. Rep. 921.

Damages.—“Where one of two innocent parties must suffer, it must be he who trusted most, or he whose misplaced confidence enabled the wrong to be committed,” p. 358.

Cited in notes to *American Decisions*, vol. 70, p. 124; vol. 96, p. 587; vol. 99, p. 739.

4 Cal. 359-361. **RUIZ v. NORTON.** S. C. 4 Cal. 355-358

Sale of rice, “warranted sound,” is a warranty of soundness, p. 361.

Cited in *Moore v. McKinlay*, 5 Cal. 474, holding that “seeds” implies no warranty.

4 Cal. 362-367. **WILSON v. ROACH.**

District Courts have chancery jurisdiction over estates of minors, and jurisdiction of probate courts over them is not exclusive, p. 366.

Cited in *Toland v. Earl*, 129 Cal. 154, 79 Am. St. Rep. 104, but held inapplicable under present system; *People v. Boring*, 8 Cal. 411, 68 Am. Dec. 337, holding that district court may appoint a master to execute a deed for a deceased sheriff; also in *Belloc v. Rogers*, 9 Cal. 129, holding that district court may carry through foreclosure proceedings after death of mortgagor, and there is no need to go into probate court; and in *Griggs v. Clark*, 23 Cal. 429, holding that suit to settle partnership in district court was not barred by proceedings in probate court to settle the estate. In *Rosenberg v. Frank*, 58 Cal. 417, Myrick, J., in dissenting opinion, cited the principal case, but majority of the court held that district courts had power, under their equitable jurisdiction, to construe a will. Cited in *Ex parte Miller*, 109 Cal. 647, holding that parents cannot by habeas corpus take away child from guardian to whose appointment by probate court they did not object. Cited in notes to 73 Am. Dec. 560, and 98 Am. Dec. 733, on California probate system.

Elisor may be appointed by court when sheriff and coroner disqualified, p. 367.

Cited in *People v. Fellows*, 122 Cal. 237, holding appointment in selection of jury not justified by sheriff's disqualification alone.

4 Cal. 368-374. **JOHNSON v. GORDON.**

Appeal.—Supreme court of the United States has no appellate jurisdiction over state courts, p. 369.

Approved in *Taylor v. Stmr. Columbia*, 5 Cal. 273, holding that state courts have admiralty jurisdiction. Distinguished in *Gunn v. Bates*, 6 Cal. 271, holding that it was not decided in the principal case that the state courts would not follow federal decisions in federal matters. Distinguished and doubted in *Warner v. The Uncle Sam*, 9 Cal. 710, 724, 729. Approved in dissenting opinion in *Ferris v. Coover*, 11 Cal. 185, but majority of the court held that there was an appeal from state courts to the United States supreme court, strictly limited to cases named in the U. S. Judiciary Act. *Greely v. Townsend*, 25 Cal. 613, held that the principal case was overruled by *Ferris v. Coover*, 11 Cal. 175, and *Hart v. Burnett*, 20 Cal. 169. Cited in dissenting opinion in *Piqua Bank v. Knoup*, 6 Ohio St. 378, where majority of court held that mandate from U. S. supreme court must be obeyed.

4 Cal. 376-380; 60 Am. Dec. 620. **PEOPLE v. GILMORE.**

Conviction of a lesser degree of an offense operates as an acquittal of higher degrees, and if new trial is granted, defendant can be tried only for the degree of which he was convicted at the first trial, p. 376.

Approved in *People v. Backus*, 5 Cal. 278; also in *People v. Apgar*, 35 Cal. 391, holding that where defendant was indicted for a felony and convicted of a misdemeanor, the supreme court had no jurisdiction of an appeal. Cited in *People v. Smith*, 134 Cal. 455, applying rule to number of challenges on such retrial; *People v. McFarlane*, 138 Cal. 484, holding rule not affected by code provisions (Pen. Code, secs. 687, 1023, 1180); *People v. McArron*, 121 Mich. 6, holding defendant subject to retrial for manslaughter under murder indictment; *People v. Webb*, 38 Cal. 478, holding that discharge of jury before verdict operated as an acquittal. Distinguished in *People v. Schmidt*, 64 Cal. 264, where conviction for murder had been set aside and new trial granted, and a second conviction of murder was held not to put defendant twice in jeopardy. Approved in *People v. Gordon*, 99 Cal. 230, 232, the court saying that if section 1180 of the Penal Code means that defendant may be tried again for a degree of which he was acquitted, it is unconstitutional; also in *People v. Defoor*, 100 Cal. 157, holding that a conviction of assault, under a charge of assault with intent to murder, was a bar to subsequent prosecution for mayhem committed during the assault; and in *People v. Muhlner*, 115 Cal. 307, holding that conviction of a lesser offense than the evidence calls for is not ground for new trial. Principal case is approved in *Bell v. State*, 48 Ala. 695; 17 Am. Rep. 49; *Johnson v. State*, 29 Ark. 46; 21

Am. Rep. 164; *Johnson v. State*, 27 Fla. 272; *State v. Tweedy*, 11 Iowa, 357; *State v. Dennison*, 31 La. An. 848; *State v. Ross*, 29 Mo. 44; *People v. Cignarale*, 110 N. Y. 30; *Cheek v. State*, 4 Tex. Ap. 448; *Livingston's case*, 14 Gratt. (Va.) 608; *Stuart's case*, 28 Gratt. 957, 960; *State v. Belden*, 33 Wis. 124; 14 Am. Rep. 750; and in *In re Bennett*, 84 Fed. Rep. 326. Denied in *Ex parte Bradley*, 48 Ind. 553; *State v. McCord*, 8 Kan. 241, 244; 12 Am. Rep. 470, 472, 473; *State v. Thompson*, 10 Mont. 562; *Bohanan v. State*, 18 Neb. 60, 62, 76; 53 Am. Rep. 793, 794, 795, 805; all these latter decisions holding that a new trial puts the case in the same position as if no trial had been had. Cited in notes to 27 Am. Dec. 480; 58 Am. Dec. 544; 4 Am. St. Rep. 117, 119.

4 Cal. 381-383. **BENEDICT v. COZZENS.**

Pleadings, lost or destroyed, may be replaced in the court's discretion, without notice to the other side, p. 382.

Denied in *People v. Cazalis*, 27 Cal. 523, holding that there must be an affidavit as to what the paper contained, and explicit notice to other side.

New Trial refused, provided plaintiff remits part of the verdict, is not an abuse of the court's discretion, p. 383.

Approved in *Davis v. S. P. R. R. Co.*, 98 Cal. 17, 18; also in *Brooks v. S. F. & N. P. Co.*, 110 Cal. 176, holding that refusal of new trial unless defendant paid \$300 to plaintiff for fees and expenses, was not an abuse of discretion.

4 Cal. 388-389. **WASHINGTON v. PAGE.**

Constitution.—Art. 4, sec. 25, of state constitution of 1849, requiring that every law have but one object, which shall be expressed in its title, is merely directory, p. 389.

Disapproved in *People v. Johnson*, 6 Cal. 504. Cited in *People v. Mullender*, 132 Cal. 219, and *Lewis v. Dunne*, 134 Cal. 296, but holding rule different under present constitution; *Law v. San Francisco*, 144 Cal. 387, holding charter provision as to title of ordinance merely directory. Approved in *Ex parte Newman*, 9 Cal. 523, re Sunday law; also in *Pierpont v. Crouch*, 10 Cal. 316, re salaries of county officers; also in *Matter of Boston M. Co.*, 51 Cal. 626, holding that when language of a statute is plain, resort cannot be had to its title to restrain it; and in *San Francisco v. Spring Valley*, 54 Cal. 574. Cited in *Ex parte Pollard*, 40 Ala. 101, holding that although part of a statute may be void, the rest of it may be good; and in *Morford v. Unger*, 8 Iowa, 86, holding that object of an act was properly expressed in the title; also in *Bowman v. Cockrell*, 6 Kan. 335, holding that the legislature may decide how general or limited the object of a statute shall be; and in *Cutlip v. Sheriff*, 3 W. Va. 594, holding that if part of a statute is void it renders the whole of no effect; also in *Swan v. Buck*,

40 Miss. 295. Disapproved in *State v. Rogers*, 10 Nev. 252, 259, 21 Am. Rep. 738, 744, where the section of the constitution was held mandatory; and to same effect in *Hunt v. State*, 22 Tex. Ap. 398; also in dissenting opinion in *Seat of Government case*, 1 Wash. Ter. 126, a point not raised in the case. Cited in note to 61 Am. Dec. 340.

4 Cal. 390-391. **SWIFT v. ARENTS.**

Creditor's Bill is a substantial ground of equity jurisdiction, p. 391.

Cited in *Rapp v. Whittier*, 113 Cal. 431, holding that secs. 717-720, C. C. P., as to supplementary proceedings do not supersede the remedy by creditor's bill; also in *Stockgrower's Bank v. Newton*, 13 Colo. 250, holding that a judgment creditor may sue to set aside a fraudulent deed of a debtor; and in notes, on creditor's bills, to 90 Am. Dec. 292, 294, 100 Am. Dec. 502, and 14 Am. St. Rep. 745.

4 Cal. 392-394. **BALDWIN v. BENNETT.**

Damages.—Where there is no other mode of ascertaining amount of injury, the price agreed to be paid is the measure of damages, p. 394.

Approved in *Coffee v. Meiggs*, 9 Cal. 364; also in *Webb v. Trescony*, 76 Cal. 622, which was a case of an attorney discharged before end of suit. Distinguished in *Glaspie v. Glassow*, 28 Minn. 161, holding that measure of damages was difference between contract price and plaintiff's expenses in performing. Approved in *Kersey v. Garton*, 77 Mo. 646, and *McElhinney v. Kline*, 6 Mo. Ap. 95, as to fees of an attorney. Distinguished in *Duke v. Harper*, 8 Mo. Ap. 302, where an attorney who had agreed for one fourth of land to be recovered in ejectment, was held bound to take one-fourth of amount received by his client in compromise, but was entitled to reasonable value of his services; and to same effect in *Quint v. Ophir Co.*, 4 Nev. 307.

4 Cal. 395-396. **PAGE v. WARNER.**

Damages cannot be recovered for protest of a duplicate bill of exchange when the original was paid and surrendered before suit was brought, p. 396.

Distinguished in *Kennerly v. Bragg*, 1 Mo. Ap. 576, where the note was retained by plaintiff, and protest fees had not been paid.

4 Cal. 397-398. **COOK v. BONNET.**

Map of San Francisco water lots, required by statute to be deposited with secretary of state, is not conclusive evidence of the extent of the property, p. 398.

Cited in *Griffing v. Gibb*, *McAllister* 223, holding that a federal court is bound by state court's construction of a state statute.

4 Cal. 399-405. PEOPLE v. HALL.

Chinese testimony is inadmissible under a statute providing that no "black, mulatto, or Indian person" shall give evidence, p. 404.

Approved in *Speer v. See Yup Co.*, 13 Cal. 73. Distinguished in *People v. Elyea*, 14 Cal. 146, holding that a Turk might testify. Cited in note to *Doe v. Avaline*, 8 Ind. 17.

4 Cal. 409-410. NORRIS v. BURGOYNE.

Garnishee is only required to answer as to his liability at the time he was served, p. 410.

Cited in note to 100 Am. Dec. 510, as to garnishment.

4 Cal. 411. HASKELL v. McHENRY.

Measure of Damages, in suit against purchaser for not receiving goods, is difference between contract price and market value at time of the breach, p. 411.

Approved in *Pittsburg Co. v. Heck*, 50 Ind. 305, 19 Am. Rep. 715. Cited in *Kane v. Jenkinson*, 10 Bank. Reg. 323, Fed. Cas. No. 7607, holding that where seller of personal property has to refund the price, he may retain enough to cover his damages caused by buyers failure to perform.

Entire Contract.—Breach by one party absolves other from further performance, p. 411.

Cited in *De Prosse v. Royal Eagle etc. Co.*, 135 Cal. 411, discussing remedies on part repudiation of contract.

4 Cal. 412-415. STARK v. BARNES.

Relation.—Where a number of acts are to be performed, in virtue of which a right accrues, the time of performance of the last act relates back to the first, p. 413.

Distinguished in *Kelley v. National Water Co.*, 6 Cal. 108, holding that the principal case applied the rule to the thing possessed, not to the intent in possessing; also in *Kennedy v. Hamer*, 19 Cal. 387, holding that in the principal case defendant was a trespasser, but here a lessee. Cited in *Porter v. Pico*, 55 Cal. 174, holding that sheriff's deed on execution sale relates back to date of attachment.

VOLUME V.

By CHARLES T. BOONE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

5 Cal. 9-23. BURGOWNE v. BOARD OF SUPERVISORS.

Constitutional Law.—Legislature is not competent to confer other than judicial functions upon courts or judges, p. 21.

Affirmed in the following cases, and applied to the matters stated: In *Exline v. Smith*, 5 Cal. 113, that the power to "prescribe by law" is legislative, and cannot be conferred upon judicial officers; in *People v. Applegate*, 5 Cal. 295, that the legislature had no power to confer appellate jurisdiction upon the supreme court in cases of misdemeanors or crimes of a less degree than felony; in *Dickey v. Hurlburt*, 5 Cal. 344, that the legislature could not confer upon a county judge the power of designating the place and manner of holding an election; in *People v. Town of Nevada*, 6 Cal. 144, that a statute was unconstitutional which conferred upon the county court the power to incorporate towns; in *Phelan v. County of San Francisco*, 6 Cal. 540; *S. C.* again, 20 Cal. 42, that any contract, not incident to their judicial functions made by a court of sessions, was void; in *Hardenburgh v. Kidd*, 10 Cal. 403, that the assessment of taxes is not a judicial act; in *People v. Sanderson*, 30 Cal. 167, that a legislative or judicial officer could not be a trustee of the state university. Approved in *Ex parte Griffiths*, 118 Ind. 84. *S. C.* 10 Am. St. Rep. 108, holding that a statute requiring judges of the supreme court to prepare syllabi of their decisions was unconstitutional. Doctrine approved in *Thompson v. Williams*, 6 Cal. 89, but the grant of authority to the county judge to award injunctions held not to be prohibited. So, in *Tuolumne County v. Stanislaus County*, 6 Cal. 442, holding that the appointment by the county judges of two counties, of commissioners to settle the proportionate indebtedness assumed by each, was the proper exercise of judicial functions. Explained as to the scope of the decision, in *Hastings v. San Francisco*, 18 Cal. 59; and referred to in *People v. Bircham*, 12 Cal. 54, as bearing on the transfer by statute of general and specific powers from the courts of sessions to the boards of supervisors. Reviewed and overruled in *People v. Provines*, 34 Cal. 525-548, expound-

ing the third article of the state constitution, and concluding that the department of which the constitution speaks, and in respect to which it provides that no person employed in one shall be employed in either of the other two, are the departments of the state government, and not the local governments thereafter to be created by the legislature. Cited in *Attorney General v. Common Council*, 112 Mich. 160, discussing overruling by *People v. Provines*, 34 Cal. 541. So, in *Staudé v. Election Commissioners*, 61 Cal. 322, following the case last cited. Denied in *Mendenhall v. Burton*, 42 Kan. 574, maintaining the power of the probate court, under a legislative act, to declare a town incorporated as a village.

5 Cal. 23-36. PEOPLE v. BIGLER.

Legislature.—Motives of in passing a law will not be inquired into, p. 26.

Approved in *Harpending v. Haight*, 39 Cal. 202; and cited in *Jones v. Jones*, 51 Am. Dec. 623.

Same.—May exercise all powers not prohibited to it by the constitution, p. 27.

Approved in *Cohen v. Wright*, 22 Cal. 308.

5 Cal. 36-39. STOAKES v. BARRETT.

Mines.—The gold and silver mines in the state belong to the state, and the policy of legislation permits all persons to work them, p. 39.

Approved in *Martin v. Browner*, 11 Cal. 14; also in *Merced Mining Co. v. Fremont*, 7 Cal. 324; S. C. 68 Am. Dec. 269, granting an injunction restraining trespass upon a mining claim.

Same.—To authorize an invasion of private property, in order to enjoy a public franchise, would require more specific legislation than any yet resorted to, p. 39.

Affirmed in *Tartar v. Mining Co.*, 5 Cal. 398; *Boggs v. Merced Mining Co.*, 14 Cal. 376; *Rogers v. Soggs*, 22 Cal. 454; and cited in *McClintock v. Bryden*, 63 Am. Dec. 102, note.

Same.—Prior possessory rights of settlers on public lands for agricultural purposes, must yield to the rights of miners, p. 39.

Cited in *Burdge v. Underwood*, 6 Cal. 46, holding that the statute giving such rights to miners cannot be extended by construction; and so, in *Rupley v. Welch*, 23 Cal. 456; *Jennison v. Kirk*, 98 U. S. 462, note; *McClintock v. Bryden*, 63 Am. Dec. 94, 95, note; *Levaroni v. Miller*, 91 Am. Dec. 694.

5 Cal. 40-42. CASTRO v. GILL.

Verdict.—Affidavit of jurors will not be allowed to contradict their verdict, p. 42.

Approved in *Boyce v. California Stage Co.*, 25 Cal. 75; *People v. Azoff*, 105 Cal. 633; *Territory v. Taylor*, 1 Dak. 487; *People v. Ritchie*, 12 Utah, 194; *Griffiths v. Montandon*, 4 Idaho, 379, affidavits of jurors cannot be received under Revised Statutes, section 4439, subdivision 2, to impeach verdict unless verdict obtained by resort to chance.

Deed.—Description of land conveyed by a certain number or name is sufficient, p. 42.

Approved in *Stanley v. Green*, 12 Cal. 166; *People v. Leet*, 23 Cal. 163, description of land in an assessment for taxes; *Phelan v. Poyoreno*, 74 Cal. 455, under Mexican grant. Cited as authority for the rule stated, in *Beard v. Federy*, 3 Wall. 494.

Possession is prima facie evidence of title, p. 42.

Approved in *Merced Mining Co. v. Fremont*, 7 Cal. 319; S. C. 68 Am. Dec. 263, a case of possession of a mining claim; so, in *Kellogg v. King*, 114 Cal. 363; S. C. 55 Am. St. Rep. 77, question of possession under a lease of a game preserve.

5 Cal. 43-44. **PARSONS v. TUOLUMNE COUNTY WATER COMPANY.** S. C. 63 Am. Dec. 76.

Government.—No one department of government can control or dictate to another department, p. 44.

Cited to this point, in *State v. Sloss*, 69 Am. Dec. 469, note; *State v. Noble*, 10 Am. St. Rep. 161, note; 75 Am. Dec. 621, note.

Constitutional Law.—Term "special cases" in state constitution is confined to such new cases as are the creation of statutes, p. 44.

Approved in *Brock v. Bruce*, 5 Cal. 280, holding that proceedings to enforce a mechanic's lien is not within this definition. So, in *Appeal of Houghton*, 42 Cal. 6, holding that the statutory proceeding, modifying grades of streets in San Francisco, is a special one; and cited in dissenting opinion of Rhodes, C. J., in same case, approving definition of the term "special cases." Definition also approved in *Bixler's Appeal*, 59 Cal. 555; and cited as to what are "special cases," in *Porter v. Purdy*, 86 Am. Dec. 291, note. Approved in *Ricks v. Reed*, 19 Cal. 574, and applied to a proceeding under the town site act of 1860. Cited in *People v. Fowler*, 9 Cal. 89, holding that the county court had no original jurisdiction in civil suits, except in such special cases as the legislature prescribed, and that these special cases could not arise in justices' courts. Also cited in *Williams v. Walton*, 9 Cal. 146, holding that the county court had no jurisdiction over the subject matter of the award of arbitrators in that case. Cited, also in *McNiel v. Borland*, 23 Cal. 147, in which case it is held that the proceeding to enforce a mechanic's lien under the law of 1861, is a special case, distinguishing *Brock v. Bruce*, supra.

5 Cal. 44-46. WILSON v. BERRYMAN. S. C. 63 Am. Dec. 78.

Verdict obtained by resort to chance will be set aside, p. 45.

Affirmed in *Donner v. Palmer*, 23 Cal. 48.

Same.—Where jurors agree severally to mark down such amounts as they respectively see fit, and the quotient of the sum of these amounts, divided by the number of jurors, to be their verdict, a verdict thus obtained is vicious, and will be set aside, p. 45.

Affirmed in *Turner v. Tuolumne County Water Co.*, 25 Cal. 400, 402; and approved in *Goodman v. Cody*, 1 Wash. Tr. 330; 34 Am. Rep. 809; *Gordon v. Trevarthan*, 13 Mont. 393; 40 Am. St. Rep. 458, holding that the "quotient proceeding" to obtain a verdict is a resort to chance. Cited in *Empson etc. Co. v. Vaughn*, 27 Colo. 76, but sustaining average verdict not made pursuant to such agreement. Cited in *Hilton v. Southwick*, 35 Am. Dec. 260, note; *Monroe v. State*, 76 Am. Dec. 66, note; *Sawyer v. Railroad Co.*, 90 Am. Dec. 390, note; *Goodman v. Cody*, 34 Am. Rep. 816, note; *Sulleno v. Railway Co.*, 7 Am. St. Rep. 507, note; *Richardson v. Coleman*, 31 Am. St. Rep. 432, note.

Same.—But the rule is otherwise in such case, if the jurors do not agree to be bound by the result, but reserve to themselves the right to dissent, p. 45.

Affirmed in *Turner v. Tuolumne County Water Company*, 25 Cal. 400, 402. So, in *Simons v. Mills*, 80 Cal. 120, and applied to an award of arbitrators. Approved in *Goodman v. Cody*, 1 Wash. Tr. 330; S. C. 34 Am. Rep. 809. Cited in *Village of Ponca v. Crawford*, 8 Am. St. Rep. 149, note.

Same.—Affidavits of jurors cannot be received to impeach their own verdict, p. 46.

Affirmed in *Boyce v. California Stage Co.*, 25 Cal. 475; *People v. Azoff*, 105 Cal. 633; and approved in *Territory v. Taylor*, 1 Dak. Tr. 487; *People v. Ritchie*, 12 Utah, 194. Cited in *Saltzman v. Sunset etc. Co.*, 125 Cal. 505, discussing reasons for rule; *People v. Flynn*, 7 Utah, 384, as to misunderstanding of instructions. *Little v. Birdwell*, 73 Am. Dec. 250, note; *Knowlton v. McMahon*, 97 Am. Dec. 239, note; 65 Am. Dec. 764, note.

Same.—Testimony of officer in charge of jury is competent to disclose what transpired in the jury room, p. 46.

Cited as authority in *Wright v. Abbott*, 160 Mass. 397; S. C. 39 Am. St. Rep. 500.

5 Cal. 49-51. CHIPMAN v. EMERIC. 63 Am. Dec. 80.

Lease.—Covenant in lease not to assign without consent of lessor is waived forever by one license to assign, p. 51.

Cited to this point in *Washington Natural Gas Co. v. Johnson*, 10

Am. St. Rep. 560, note. Cited in *De Peyster v. Michael*, 57 Am. Dec. 496, note, and stating that covenants and conditions in leases not to assign are not favored. Referred to in *Remy v. Olds*, 88 Cal. 541, in construing contract, and held not to be in point.

Pleadings must be strongly taken against pleader, p. 51.

Cited in *Green v. Covillaud*, 70 Am. Dec. 739, note; *Groff v. Ankenbrandt*, 7 Am. St. Rep. 345, note; *McPhail v. People*, 52 Am. St. Rep. 312, note.

5 Cal. 53-56. **EGERY v. BUCHANAN.**

Sheriff's Return is Not Traversable.—If a sheriff fail to pay over money collected on execution, the action should be for a false return, p. 56.

Explained and doctrine approved, in *Giffin v. Smith*, 2 Nev. 378; *Nash v. Muldoon*, 16 Nev. 414; *Bowyer v. Knapp*, 15 W. Va. 291; *Stewart v. Stewart*, 27 W. Va. 179; *Schneider v. Ferguson*, 77 Tex. 577; and cited in *Boone County v. Lowry*, 43 Am. Dec. 536, note. Cited in *Bowe v. Hardy*, 97 Va. 678, 75 Am. St. Rep. 814 (quoted in *New River etc. Co. v. Roanoke etc. Co.*, 110 Fed. 345), sustaining presumption that undated return was made within sheriff's term, and in due time. Explained in *Baker v. Bucher*, 100 Cal. 218, 219, holding that a sheriff's return upon execution certifying that he sold the property after due notice is only prima facie evidence in his favor in an action against him for selling the property without notice, and that the return may be overcome by only slight evidence aliunde. Referred to in *Gregory v. Ford*, 14 Cal. 143; S. C. 73 Am. Dec. 643, as authority for the rule that a defendant, having no defense to an action, cannot go into equity and enjoin a judgment by default, on the ground that the sheriff's return of service on him is false, and that in fact he had no notice of the proceeding. Cited in *Johnson v. Gorham*, 6 Cal. 196; S. C. 65 Am. Dec. 502, and holding that statutory penalties against a sheriff are only recoverable when, by the return of the sheriff, he admits the collection of the money, and refuses to pay it over.

5 Cal. 57-58. **SANNICKSON v. BROWN.**

Statute of Limitations.—Accounts bearing upon their face the words "audited and approved," and "certified to be correct," are instruments of writing within the meaning of the statute, p. 58.

Approved and applied in *Ashley v. Vischer*, 24 Cal. 328; 85 Am. Dec. 68. Cited in *Atlantic Trust Co. v. Woodbridge etc. Co.*, 86 Fed. 983, holding time checks such instruments in writing.

New Trial Granted because of irregularity in proceedings on trial in court below, p. 58.

Cited in *Calderwood v. Tevis*, 23 Cal. 337, denying new trial, no objection having been made at time of trial.

Notes Cal. Rep.—11

5 Cal. 58-60. CLARKE v. PERRY. 63 Am. Dec. 82.

Jurisdiction.—Probate court is one of special and limited jurisdiction, and most of its general powers belong to the court of chancery, p. 60.

Doctrine approved in *Deck v. Gerke*, 12 Cal. 436; S. C. 73 Am. Dec. 556, maintaining jurisdiction in equity over probate matters. So, in *Belloc v. Rogers*, 9 Cal. 129, suit for mortgage foreclosure. So, in *Townsend v. Gordon*, 19 Cal. 205, case involving questions affecting validity of sales of an infant through probate proceedings. So, in *Griggs v. Clark*, 23 Cal. 429, action for settlement of partnership affairs. Cited in *Toland v. Earl*, 129 Cal. 154, 79 Am. St. Rep. 104, but held inapplicable under present system. As to jurisdiction of probate courts, in *Morrow v. Weed*, 66 Am. Dec. 137, note; *Soye v. McCallister*, 67 Am. Dec. 693, note; *Wyatt v. Rambo*, 68 Am. Dec. 101, note; *Beckett v. Selover*, 68 Am. Dec. 257, note; *Haynes v. Meeks*, 70 Am. Dec. 709, note; *Michael v. Baker*, 71 Am. Dec. 595, note; *Deck v. Gerke*, 73 Am. Dec. 558, note; *Tracy v. Roberts*, 51 Am. St. Rep. 401, note; *Buckley v. Superior Court*, 41 Am. St. Rep. 140, note.

Same.—Settlement in the probate court is final, but a complainant who was no party to it may treat it as a nullity, and invoke the equitable powers of the court, p. 60.

Cited in *Wall v. Walker*, 37 Cal. 426; S. C. 99 Am. Dec. 291; but denying the application of the doctrine as to the finality of the settlement in the particular case. Approved and applied in *Brodrig v. Brodrig*, 56 Cal. 565, to the settlement and allowance of the final account of a guardian. Approved in *Rosenberg v. Frank*, 58 Cal. 400, 401. Cited in *Deck v. Gerke*, 73 Am. Dec. 559, note; *Picot v. Biddle*, 86 Am. Dec. 143, note.

5 Cal. 62. WOOD v. FOBES.

Construction.—Statutes fixing time for filing papers are merely directory, p. 62.

Approved in *Territory v. Flowers*, 2 Mont. 393; also, in dissenting opinion of *Fenner, J.*, in *Ford v. Brooks*, 35 La. An. 155.

5 Cal. 63. SCARLETT v. LAMARQUE.

Forcible Entry and Detainer.—Proof of threats, showing intention to resort to violence, sufficient to maintain action for, p. 63.

Approved in *O'Callaghan v. Booth*, 6 Cal. 66; explained and distinguished in *Fogarty v. Kelly*, 24 Cal. 319.

5 Cal. 63-64. ANDERSON v. POTTER.

Administration.—Right of next of kin to letters of administration—construing statute, p. 64.

Cited in *In re Eggers*, 114 Cal. 466, but held not in point, the decision being based upon a statute, the language of which has since been materially changed by the code (Cal. Code Civil Proc. sec. 1365).

5 Cal. 64-66. **MORRISON v. ROSSIGNOL.**

Lease.—Covenant for renewal of lease indefinitely, is to create a perpetuity, which is against the policy of the law, p. 65.

Approved in *Diffenderfer v. Board of Public Schools*, 120 Mo. 455, where the covenant was construed to provide for one renewal only; *Brush v. Beecher*, 110 Mich. 601, 64 Am. St. Rep. 373, but holding no perpetuity created unless such intention clearly appears from the lease. Cited to the ruling stated in *In re Walkerly*, 49 Am. St. Rep. 134, note.

Same.—Renewal clause in lease, uncertain as to the basis for ascertaining the rent to be paid, is void, p. 65.

Cited on this point in *Atwood v. Cobb*, 26 Am. Dec. 669, note; so, in *Mayger v. Cruse*, 5 Mont. 496; *Rankin v. Newman*, 114 Cal. 660, holding that the consideration must be free from doubt.

Specific Performance of an indefinite contract will not be enforced, p. 66.

Approved in *Minturn v. Baylis*, 33 Cal. 133, case of contract relating to lands; so, in *Agard v. Valencia*, 39 Cal. 301; so, in *Hollenbeck v. Prior*, 5 Dak. Tr. 303; so, in *Magee v. McManus*, 70 Cal. 557, case of contract for indemnity; *Johnson v. Plotner*, 15 S. Dak. 158, refusing specific performance of agreement on payment of part of price to convey realty at future date, on vendee executing such security for deferred payment as may be agreed upon. Cited to the ruling stated, in *Atwood v. Cobb*, 26 Am. Dec. 662, note.

5 Cal. 66-68. **PEOPLE v. HAYS.**

Sheriff's Sale.—Purchaser thereat acquires no rights against sheriff, unless he pays down in cash the whole of the purchase money, p. 68.

Affirmed in *Williams v. Smith*, 6 Cal. 92, denying mandamus to compel a sheriff to make a deed to a purchaser at execution sale, who refused to pay the purchase money. To same effect, also, in *Harvey v. Fisk*, 9 Cal. 94. So, in dissenting opinion of Whitfield, J., in *Judah v. Brothers*, 72 Miss. 633. Cited in *Durnford v. Degruys*, 13 Am. Dec. 287, note; also, in *Thomas v. Kerr*, 96 Am. Dec. 266, note, as to remedy where bidder refuses to complete his purchase.

5 Cal. 69. **PEOPLE v. THURSTON.**

Criminal Law.—Indictment found by a body of men, not a valid grand jury, is void, p. 69.

Approved in *Levy v. Wilson*, 69 Cal. 108; *Bruner v. Superior Court*, 92 Cal. 249, 255, 261, 265; *Rainey v. The State*, 19 Tex. App. 482; cited in *State v. Ostrander*, 18 Iowa, 442, holding that an indictment found by a grand jury consisting of fourteen jurors was valid; and in *State v. Collyer*, 17 Nev. 281, discussing generally the effect of irregularities in the mode of selecting a grand jury; dissenting opinion, *Eastham v. Holt*, 43 W. Va. 628, when court evenly divided.

5 Cal. 70. McLERAN v. SHARTZER. S. C. 63 Am. Dec. 84.

Appeal.—Where object of notice of appeal is accomplished, it is immaterial whether the notice is given or not, p. 70.

Approved in *Acock v. Halsey*, 90 Cal. 220, in which case counsel for each of the parties were present. Doubted as authority and held to be inapplicable, in *Killip v. Empire Mill Co.*, 2 Nev. 43. Approved in *Payne v. Davis*, 2 Mont. 384, holding irregularities in taking an appeal to be waived. Cited to the rule stated, in *Godchaux v. Mulford*, 85 Am. Dec. 186, note.

5 Cal. 71. BILLINGS v. ROADHOUSE.

Appeal.—Trifling defects will not invalidate an appeal bond, and even were it otherwise, leave should be granted to file a good bond, p. 71.

Cited as authority in *Territory v. Milroy*, 7 Mont. 562; *Towle v. Bradley*, 2 S. Dak. 478. Also, in *Norton v. Meader*, 4 Sawyer, 619, and applied in matter of sufficiency of service of summons.

5 Cal. 72. PEOPLE v. KOHLER.

Criminal Law.—In cases of felony, the prisoner is required to be present during the whole of the trial, p. 72.

Approved in *People v. Higgins*, 59 Cal. 358, holding that without his presence no valid verdict can be given in the case. Rule also approved in *Commonwealth v. McCarthy*, 163 Mass. 459, but an exception to the rule is declared to exist, where the prisoner is on bail and is present at the commencement of the trial, and afterwards voluntarily departs without leave and is absent when the verdict is returned. Cited in *People v. Holmes*, 118 Cal. 448, holding that absence of defendant must be made to appear affirmatively in the record. Also cited in *Warren v. State*, 68 Am. Dec. 221, note.

5 Cal. 73-75. GUY v. HERMANCIE. 63 Am. Dec. 85.

State Lands.—State has right to lands under water, where the tide ebbs and flows, by virtue of her sovereignty, p. 74.

Affirmed in *Wright v. Seymour*, 69 Cal. 126. So, in *People v. Williams*, 64 Cal. 499, holding that the establishment of a harbor line

does not deprive the state of the right to control the navigable waters within the line. Doctrine approved in *Miller v. Mendenhall*, 43 Minn. 101; 8 C. 19 Am. St. Rep. 224. Cited in *Monongahela Bridge Co. v. Kirk*, 84 Am. Dec. 540, note.

Legislature cannot exercise judicial functions, p. 74.

Approved and applied in *Stone v. Elkins*, 24 Cal. 127, holding a statutory provision purporting to confer judicial power upon the board of supervisors to be void. Cited to this doctrine, in *Parsons v. Tuolumne Co. Water Co.*, 63 Am. Dec. 77, note; *State v. Sloss*, 69 Am. Dec. 469, note; *State v. Noble*, 10 Am. St. Rep. 161, note; 75 Am. Dec. 621, note.

Cloud on Title.—Right of party to have his title to land protected from a sale which may cast a cloud upon it, upheld, p. 75.

Approved in *Englund v. Lewis*, 25 Cal. 357, a sale by a sheriff of real estate under an execution. Explained and distinguished in *Archbishop of S. F. v. Shipman*, 69 Cal. 591, case of a sale under a judgment for the foreclosure of a lien. Approved in *Tucker v. Kenniston*, 47 N. H. 271; 8 C. 93 Am. Dec. 431, case of sale on execution of debtor's right of redeeming the family homestead. Cited in support of the doctrine that equity will prevent cloud on title, in *Bayerque v. Cohen*, *McAllister* 117; *Scott v. Onderdonk*, 67 Am. Dec. 112, note; *Holland v. Mayor, etc.*, 69 Am. Dec. 205, note; *Tucker v. Kenniston*, 93 Am. Dec. 432, note; *Quimby v. Slipper*, 38 Am. St. Rep. 901, note; *Huntington v. Railroad Co.*, 2 Sawyer, 514.

5 Cal. 75. **COYLE v. BALDWIN.**

Appeal.—It is the duty of county court, on appeal from justice's court, to proceed with the trial on the merits, p. 75.

Affirmed in *Acker v. Superior Court*, 68 Cal. 246, and applied in case of appeal from justice's court to superior court.

5 Cal. 78-79. **HOWARD v. HARMAN.**

Appeal.—Objection that appeal bond is defective should be made in court below, p. 79.

Approved in *Coulter v. Stark*, 7 Cal. 245; also, in *Towle v. Bradley*, 2 S. Dak. 478, holding that if the objection be not then taken motion to dismiss appeal in appellate court is proper.

Distinguished in *People v. Reclamation Dist.*, 130 Cal. 612, holding rule inapplicable to objections to petition for formation of district.

Same.—When objection is made within proper time, appellate courts will permit a new undertaking to be filed, if the original be defective, p. 79.

Approved in *Coulter v. Stark*, 7 Cal. 245; *Territory v. Milroy*, 7 Mont. 562; *Towle v. Bradley*, 2 S. Dak. 478; *Rudolph v. Herman*, 4 S. Dak. 206.

5 Cal. 79-80. TAYLOR v. RANDALL.

Admission by Attorney of Record, of correctness of amount due, for which judgment is taken, is binding on client, in absence of fraud or collusion, p. 80.

Approved in *Sampson v. Ohleyer*, 22 Cal. 210, holding that the remedy of the client in such cases is against the attorney.

5 Cal. 81-82. CUNNINGHAM v. HARRIS.

Former Recovery.—When a recovery of part bars a suit for the remainder, considered, pp. 81, 82.

Cited in *Herriter v. Porter*, 23 Cal. 387, as sustaining the principle, that if a plaintiff bring an action for a part only of an entire and indivisible demand, the verdict and judgment in that action will be a conclusive bar to any subsequent suit for another part of the same demand. So, to the same effect, in *Madden v. Smith*, 28 Kan. 800, 801.

5 Cal. 82-84. KING v. HALL.

Adverse Claims.—The right of action given to one person against another, to determine an adverse claim which the latter makes against the former for money or property, upon an alleged obligation, does not deprive the latter of his right of action, p. 84.

Principle affirmed in *Smith v. Sparrow*, 13 Cal. 597, dismissing bill to restrain suit upon a note.

5 Cal. 84-86. DUELL v. BEAR RIVER ETC. MINING COMPANY.

Estoppel in Pais.—When set up against vendee, arising from declarations of his vendor, party setting it up must show that such declarations were the main inducement to obtain the right in controversy, p. 84.

Cited in *Yunker v. Nichols*, 1 Colo. 563, as authority for extending the doctrine of estoppel in pais to real property.

5 Cal. 86-87. RYAN v. JOHNSON.

Special Legislation.—Act regulating fees in office, is not of a general nature, within meaning of constitution, p. 87.

Cited in *People v. Central etc. R. R. Co.*, 43 Cal. 434, as sustaining the doctrine that a special act upon a general subject, is constitutional. So, in *ex parte Burke*, 59 Cal. 8, and applied to the Sunday law (Cal. Pol. Code, sec. 300). So, in *State v. Fogus*, 19 Nev. 253, applied to act regulating compensation of county officers. So, in *McGill v. State*, 34 Ohio St. 242, applied to act regulating the selection of jurors for the county of Cuyahoga.

5 Cal. 87-88. POTTER v. KNOWLES.

Title.—Where two rely upon possession solely, as proof of title, the presumption is in favor of first possessor, p. 88.

Cited on subject of possession as evidence of title, in *Plume v. Seward*, 60 Am. Dec. 601-2-3, note.

5 Cal. 89. McDERMOTT v. DOUGLASS.

Appeal.—None allowed from justice's court, until payment of the costs of the motion, p. 89.

Approved in *Bray v. Redman*, 6 Cal. 287, holding that the justice may refuse to send up the transcript, unless all his fees be first paid by appellant. Criticised, but said to have been correctly decided, in dissenting opinion of Beatty, J., in *Webster v. Hanna*, 102 Cal. 181.

5 Cal. 90-93. McHENRY v. MOORE.

Findings.—Court may interfere and set aside findings by referee, p. 92.

Cited in *Lyons v. Lyons*, 18 Cal. 449, holding that when there are findings in an equity case, they are not to be disregarded.

5 Cal. 93-94. BABB v. OAKLEY.

Bail.—Offer by party to surrender himself in discharge of his sureties, is a good surrender, and discharges them, p. 94.

Cited in *People v. McReynolds*, 102 Cal. 312, holding that when a party has been taken into the sheriff's custody the sureties on his bail bond are released.

5 Cal. 94-95. JACKSON v. WHARTENBY.

Jurisdiction.—Judgment may be rendered for an amount less than the sum limiting the jurisdiction of the court, when the action was commenced in good faith for a sum greater than that fixed as the limit, p. 95.

Cited in *Lenhardt v. Jennings*, 119 Cal. 199.

5 Cal. 97-102. McCLINTOCK v. BRYDEN. S. C. Am. Dec. 87.

Mining Rights.—A settler for agricultural purposes upon any mining lands of the state, settles thereon subject to the rights of miners, p. 102.

Cited in *Burns v. Clark*, 133 Cal. 637, on point that no title to mineral lands can be acquired by occupancy except for mining purposes. Distinguished in *Fitzgerald v. Urton*, 5 Cal. 310, holding that settlers upon lots in mining towns, carrying on business, should be reasonably protected. Affirmed in *Martin v. Browner*, 11 Cal. 14. Cited in *Burdge v. Underwood*, 6 Cal. 46, holding that the statute defining rights of

miners cannot be extended by construction; in *Rupley v. Welch*, 23 Cal. 456, holding the right of the miner to apply only to the possession of public lands held purely for agricultural and grazing purposes; in *Merced Min. Co. v. Fremont*, 7 Cal. 324; S. C. 68 Am. Dec. 269, examining the question as to the protection given by law to parties holding mining claims upon the public lands of the state. Referred to in *Lux v. Haggin*, 69 Cal. 444, in discussing matter of riparian rights and appropriation of water on public lands. So, in *Reynolds v. Cook*, 83 Va. 820; S. C. 5 Am. St. Rep. 318, discussing right to quarry and remove limestone. Cited in *Jennison v. Kirk*, 98 U. S. 462, note, to the point that the rights of miners cannot be extended by construction of the statute. Cited also in the following cases and to the points stated: *Stiles v. Laird*, 63 Am. Dec. 113, note, priority of appropriation as a rule of property; so, in *Sims v. Smith*, 68 Am. Dec. 234, note; *Irwin v. Phillips*, 63 Am. Dec. 116, note, right to mining claims and running water on public lands; so, in *Conger v. Weaver*, 65 Am. Dec. 533, note; *Hill v. Newman*, 63 Am. Dec. 141, note, prior appropriation of water in running streams; so, in *Burwell v. Hobson*, 65 Am. Dec. 254, note; *Hartwell v. Camman*, 64 Am. Dec. 455, note, estate of inheritance in mines; *Merced Min. Co. v. Fremont*, 68 Am. Dec. 274, note, right to mine on public lands; *Parke v. Kilham*, 68 Am. Dec. 313, note, water rights for mining purposes; so, in *Kidd v. Laird*, 76 Am. Dec. 479, note; 22 Am. St. Rep. 393, note; *Bear River, etc. Min. Co. v. N. Y. Min. Co.*, 68 Am. Dec. 331, note, prior appropriation of water upon public lands; *Tate v. Ohio, etc., R. R. Co.*, 71 Am. Dec. 311, 315, note, parties defendant in bill to restrain nuisance, *Brown v. Mining Co.*, 76 Am. Dec. 471, note, customs of miners; so, in *Lanfear v. Meattier*, 89 Am. Dec. 665, note; so, in *Beatty v. Gregory*, 85 Am. Dec. 553, note; *Moore v. Smaw*, 79 Am. Dec. 139, note, right to mine; so, in *Williams v. Gibson*, 5 Am. St. Rep. 375, note; so, in *Reynolds v. Cook*, 5 Am. St. Rep. 323, note; *Nixon v. Water & Min. Co.*, 85 Am. Dec. 73, note, law of waters on public mineral lands; *Union Water Co. v. Crary*, 85 Am. Dec. 150, note, acquisition of water rights for mining; *Mallett v. Gold & Silver Min. Co.*, 90 Am. Dec. 497, note, effect of mining customs; *Bullion Min. Co. v. Mining Co.*, 90 Am. Dec. 537, note, right to mine and to follow ledge; so, in *Lewey v. Fricke Coke Co.*, 45 Am. St. Rep. 692, note; so, *Fitzgerald v. Clark*, 52 Am. St. Rep. 693, note; *Levaroni v. Miller*, 91 Am. Dec. 694, note, respective rights of miners and others on public lands; so, in *Omar v. Soper*, 7 Am. St. Rep. 254, note; *Gloninger v. Franklin Coal Co.*, 93 Am. Dec. 722, note, grant of minerals is grant of corporeal hereditament; *White v. Lee*, 12 Am. St. Rep. 117, note, location of mining claims; *Justice Mining Co. v. Lee*, 52 Am. St. Rep. 219, note, who may locate mineral lands.

5 Cal. 102-103. **TINNEY v. ENDICOTT.**

Instructions.—Rule requiring counsel to submit instructions to court

before argument, does not apply where cause is submitted without argument, p. 103.

Cited in *People v. Williams*, 32 Cal. 289, as authority that it is competent for courts to adopt a rule requiring counsel to submit instructions before argument.

5 Cal. 103-105. PEOPLE v. AH CHUNG.

Court of Sessions consists of county judge and two associates, and all must be present to transact business, p. 104.

Approved in *People v. Barbour*, 9 Cal. 234. Distinguished in *People v. Roberts*, 6 Cal. 216, construing statute providing for composition of grand jury.

5 Cal. 106-107. PEOPLE v. AIKENHEAD.

Official Bond.—Sureties on bond of officer for one term, are not liable for any act done by him after election to a second term, p. 107.

Affirmed in *Hubert v. Mendheim*, 64 Cal. 223, holding that the sureties on the bond of a deputy sheriff are only liable during the term of the principal officer for which the appointment as deputy was made. Principle of the decision also affirmed in *Brown v. Lattimore*, 17 Cal. 97, holding that the sureties on an official bond are not liable for the official conduct of the officer during the time for which the term was extended by the legislature. So, in *King County v. Ferry*, 5 Wash. St. 554-5-6; S. C. 34 Am. St. Rep. 895-6. Cited as authority in *State v. Wells*, 8 Nev. 110, holding that so long as the officer holds the office continuously, without re-appointment or election, so long are his sureties bound. So, in *Wheeling v. Black*, 25 W. Va. 277. And cited in support of the rule that the liability of sureties in an official bond cannot be extended by legislation extending the term of the officer, in *People v. Vilas*, 93 Am. Dec. 527, extending note on subject. Approved in *Riddel v. School District*, 15 Kan. 170, where an officer was appointed to fill a vacancy, and at the next election was elected his own successor, the court holding that the sureties on the bond given upon his appointment were not liable for any default occurring after the commencement of the term to which he was elected.

5 Cal. 108. BUCKELEW v. ESTELL.

Breach of Condition cannot be availed of by a naked trespasser, p. 108.

Cited to this effect, in *Cross v. Carson*, 44 Am. Dec. 758, note.

Injunction Is Proper Remedy to stay commission of irreparable waste, p. 108.

Approved in *Kittle v. Pfeiffer*, 22 Cal. 491, case of threatened injury to right of way.

5 Cal. 109-111. **HAMES v. CASTRO.**

Community Property.—By the Mexican laws, all property acquired during marriage was common property, p. 111.

Cited as authority, *In re Buchanan's Estate*, 8 Cal. 510, holding that one-half interest vested in the wife upon death of the husband, and was not subject to his testamentary disposition. So, in *Scott v. Ward*, 13 Cal. 470, affirming that the same rule prevails under the act of 1850, defining the rights of husband and wife.

5 Cal. 112-113. **EXLINE v. SMITH.**

Jury Trial.—Legislature alone can determine in what cases may be waived, p. 112.

Approved in *Tabor v. Cook*, 15 Mich. 325.

Constitutional Law.—Words "prescribed by law," used in state constitution, mean actual legislation upon the subject matter, and cannot be construed to mean the exercise of this power by others, p. 113.

Overruled in *People v. Provines*, 34 Cal. 526, 531, where it is said that the case was decided upon a misconception of the true meaning and scope of the third article of the constitution. See *Burgoyne v. Board of Supervisors*, and notes thereto, 5 Cal. 9, ante, p. 148.

5 Cal. 113-114. **TREAT v. STUART.**

Forcible Entry and Detainer.—Plaintiff in action of, must show an actual peaceable possession in himself at the time of the entry, p. 114.

Doctrine affirmed in *Hoag v. Pierce*, 28 Cal. 191; *Castro v. Tewksbury*, 69 Cal. 564.

5 Cal. 114-116. **WILSON v. LASSEN.**

Jurisdiction.—Court of equity will not permit litigation by piecemeal, but the whole subject matter and all the parties should be before the court, and their respective claims determined, p. 116.

Approved and applied in *Sutter v. San Francisco*, 36 Cal. 116, which was an action for the partition of land. So, in *O'Connor v. Irvine*, 74 Cal. 443, an action to establish and enforce a trust. Doctrine approved in *Watson v. Sutro*, 86 Cal. 529.

Leave to Amend Complaint changing nature of action, not sanctioned, p. 116.

Referred to in *Wheeler v. West*, 78 Cal. 96, holding that such an amendment cannot be objected to by way of answer setting up the change as a defense.

5 Cal. 117. **REYES v. SANFORD.**

Change of Venue.—Application for not heard, after party has appeared and answered to the merits, p. 117.

Approved in *Pearkes v. Freer*, 9 Cal. 643; *Cook v. Pendergast*, 61 Cal. 75; *Clarke v. Lyon County*, 8 Nev. 186. Denied in *Sheckles v. Sheckles*, 3 Nev. 406, where the convenience of witnesses requires the change.

5 Cal. 118-119. **SMITH v. BROWN.**

Garnishee is liable for amount found due and judgment should be rendered against him accordingly, p. 119.

Cited in *Broadway etc. Co. v. Wolters*, 128 Cal. 168, holding sheriff's return of service of garnishment not sufficient alone as basis for judgment against him.

5 Cal. 119-120. **WALDRON v. MARSH.**

Injunction.—Will not be granted in aid of action of trespass, unless it appear that the injury will be irreparable, p. 119.

Cited in *California etc. Co. v. Union etc. Co.*, 122 Cal. 643, holding complaint insufficient; *Real Del Monte etc. Min. Co. v. Pond etc. Min. Co.*, 23 Cal. 85, holding that the solvency of the defendant is a question to be considered in such cases. Cited to the rule stated, in *Jerome v. Ross*, 11 Am. Dec. 500, note; *Smith v. Gardner*, 53 Am. Rep. 350, note; and approved in *Thorn v. Sweeny*, 12 Nev. 256, where the trespass complained of was the construction of a ditch across the plaintiff's land. Distinguished in *Schneider v. Brown*, 85 Cal. 207, trespass in tearing up soil and destroying growing crops. Cited, holding that an injunction will not be granted when the remedy at law is adequate, in *McGregor v. Min. Co.*, 14 Utah, 62; S. C. 60 Am. St. Rep. 887.

Same.—Facts must be stated, so that the court may see how and why the injury would be irreparable, p. 120.

Approved in *Mechanics' Foundry v. Ryall*, 75 Cal. 603; *Crisman v. Heiderer*, 5 Colo. 594, case of alleged trespass by diverting water; *Mead v. Stirling*, 62 Conn. 596; *Burns v. Sanderson*, 13 Fla. 384, case of alleged trespass in interfering and intermeddling with plaintiff's property; *Verdin v. St. Louis*, 131 Mo. 107, bill to restrain collection of taxes; *McCormick v. Riddle*, 10 Mont. 470, bill to restrain sale of property under execution; *Schoonover v. Bright*, 24 W. Va. 701, case dissolving an injunction granted to restrain the cutting and removing of timber from land claimed by plaintiff. Cited to the rule stated, in *Dudley v. Hurst*, 1 Am. St. Rep. 378, note.

5 Cal. 120-123. **STILES v. LAIRD.** 63 Am. Dec. 110.

Nuisance.—Statute defining nuisances and prescribing a remedy by action, does take away any common law remedy which the statute does not embrace, p. 122.

Referred to in *Parsons v. Tuolumne County Water Co.*, 63 Am. Dec. 77, note. Cited in *Parke v. Kilham*, 68 Am. Dec. 313, note, to the

point that damming a stream is a nuisance; in *Wolcott v. Melick*, 66 Am. Dec. 799, note, as to when injunction against nuisance will be granted; in *Graves v. Shattuck*, 69 Am. Dec. 545, note, abatement of nuisance at common law; so, in *Mohr v. Gault*, 78 Am. Dec. 689, note; so, in *Morrison v. Marquardt*, 92 Am. Dec. 460, note; so, in *Crosland v. Pottsville*, 12 Am. St. Rep. 894, note; and so, in *Hickey v. Mich. etc. R. R. Co.*, 35 Am. St. Rep. 625, note. Also cited to the rule stated, in argument of counsel, in *State v. Wilson*, 43 N. H. 417, the court holding accordingly.

Right to Mining Claims and running water on public lands in California, considered, p. 122.

Cited in *Blair v. Boswell*, 37 Or. 170, as sustaining rule that prior appropriator may use water of non-navigable stream to carry off tailings. See in this connection in *Irwin v. Phillips*, 63 Am. Dec. 116, note; *Hill v. Newman*, 63 Am. Dec. 141, note; *Conger v. Weaver*, 65 Am. Dec. 533, note; and *Sims v. Smith*, 68 Am. Dec. 234, note.

5 Cal. 124-126. SURVEY v. WELLS ETC. CO.

Check Value in case of loss and payment on forged indorsement is prima facie amount for which drawn, p. 126.

Cited in *Patterson v. Plummer*, 10 N. Dak. 101, applying rule to par value of bank stock, no market value existing.

General citation: *Turner v. Lacy*, 27 Or. 160.

5 Cal. 127-131. PEOPLE v. MILGATE.

Criminal Law.—Proof beyond a reasonable doubt is necessary to establish a fact against a prisoner, p. 129.

Cited with approval, in *People v. Rodrigo*, 69 Cal. 605.

Criminal Law.—Preponderating proof is sufficient to establish fact in prisoner's favor, p. 129.

Rule approved in *People v. Stonecifer*, 6 Cal. 410; *People v. Coffman*, 24 Cal. 236; *People v. Hong Ah Duck*, 61 Cal. 395; *People v. Knapp*, 71 Cal. 9; *United States v. Crow Dog*, 3 Dak. Tr. 118; and *State v. Pierce*, 8 Nev. 301. Cited in *State v. Ballou*, 20 R. I. 613, as to plea of self-defense; *State v. Yokum*, 11 S. Dak. 558, quoting *People v. Hong Ah Duck*, 61 Cal. 395. Denied in *State v. Bartlett*, 43 N. H. 233; S. C. 80 Am. Dec. 161, where insanity is set up as a defense to an indictment. Cited in *Commonwealth v. Parker*, 43 Am. Dec. 396, note.

Same.—Evidence of character can only be considered in reference to the whole case, not to any isolated fact, p. 130.

Approved in *People v. Roberts*, 6 Cal. 217; and cited to this point, in *O'Bryan v. O'Bryan*, 53 Am. Dec. 134, note.

Homicide being admitted or proved, the law raises the presumption of malice, p. 129.

Approved in *People v. Roberts*, 6 Cal. 217, 218, almost all the points in which had been previously settled in the principal case. Cited in *Brown v. Commonwealth*, 86 Va. 474, in discussing subject of "malice aforethought," holding that passion and malice are inconsistent, and an act which proceeds from the one, cannot also proceed from the other; *People v. Dillon*, 8 Utah, 96, holding burden of proof of insanity on defendant.

5 Cal. 131-133. **CHENERY v. PALMER.**

Evidence.—When the plaintiff claims right to property by virtue of a conveyance shown by the testimony of a witness to be a mortgage, the defendant may, on cross-examination, show that the mortgage had been satisfied, p. 132.

Principle approved and applied in *Thornburgh v. Hand*, 7 Cal. 567.

5 Cal. 133-134. **PEOPLE v. DAVIDSON.**

Under California law, an accessory is treated as a principal, and as if the person charged as such had committed the offense, p. 134.

Approved in *State v. Beebe*, 17 Minn. 248, construing the Minnesota statute on the subject. So, in *State v. King*, 9 Mont. 450, construing statute of Montana. So, construing the Pennsylvania statute, in *Campbell v. Commonwealth*, 84 Pa. 200.

Indictment charging an assault with intent to commit murder will sustain a conviction of an "assault with a deadly weapon with intent to inflict a bodily injury," p. 134.

Rule approved in the following cases: *People v. English*, 30 Cal. 218; *People v. Congleton*, 44 Cal. 94; *People v. Lightner*, 49 Cal. 229; *Territory v. Conrad*, 1 Dak. Tr. 355; *State v. White*, 45 Iowa, 327; *State v. Robey*, 8 Nev. 321; *State v. Johnson*, 3 N. Dak. 152. Examined in *People v. Vanard*, 6 Cal. 563; and in *People v. Murat*, 45 Cal. 283, holding that such a conviction cannot be sustained, unless it sufficiently appear upon the face of the indictment that the assault was made with a deadly weapon; *State v. Young*, 22 Wash. 277, holding erroneous the refusal to instruct as to law regarding lesser offense.

5 Cal. 137-138. **PINKHAM v. McFARLAND.**

Promissory Note.—Proof of indorsement of, is necessary to entitle it to admission in evidence, unless waived when the indorsement is offered in evidence, p. 137.

Approved in *Poorman v. Mills*, 35 Cal. 121; S. C. 95 Am. Dec. 92.

Opening Case.—Power of opening up a case after it has been once submitted, rests in the sound discretion of the court, p. 137.

Approved in *McLeod v. Lee*, 17 Nev. 119.

5 Cal. 138-139. **PIERCE v. KENNEDY.**

Liability of Guarantor on a promissory note is strictly that of an indorser, p. 139.

Affirmed in *Geiger v. Clark*, 13 Cal. 580; and *Reeves v. Howe*, 16 Cal. 153. Cited in *Ford v. Hendricks*, 34 Cal. 675, holding that a third person who indorses a promissory note in blank before delivery is a guarantor. Referred to in *Fessenden v. Summers*, 62 Cal. 486, holding that under section 3117, Civil Code of California, a person so indorsing is to be regarded not as a guarantor, but as an indorser. Referred to, also, in *First Nat. Bank v. Babcock*, 94 Cal. 102; S. C. 28 Am. St. Rep. 96, in which it is held that said section of the Civil Code relates only to negotiable instruments, and that one who writes his name upon the back of a non-negotiable note to give it credit is a guarantor, and *Loustalot v. Calkins*, 120 Cal. 690, discussing joinder of maker and indorser as defendants. Denied in *Rothschild v. Grix*, 31 Mich. 154; S. C. 18 Am. Rep. 174, holding that one indorsing a note as stated becomes an original promisor. So, to same effect, in *Burton v. Hansford*, 10 W. Va. 479; S. C. 27 Am. Rep. 573. Cited to the rule stated, in *Perkins v. Catlin*, 29 Am. Dec. 297, note; note to *Cadwalader v. Hirshfeld*, 72 Am. St. Rep. 680, on indorsement before delivery. See *Riggs v. Waldo*, 2 Cal. 485.

5 Cal. 140-147; 63 Am. Dec. 113. **IRWIN v. PHILLIPS.**

Judicial Notice.—Courts are bound to take notice of the political and social condition of the country which they judicially rule, p. 146.

Approved in *Merced Min. Co. v. Fremont*, 7 Cal. 325; S. C. 68 Am. Dec. 269; and referred to in *Druley v. Adam*, 102 Ill. 202, discussing riparian rights. Cited in dissenting opinion of Ross, J., in *Lux v. Haggin*, 69 Cal. 447; *Lanfear v. Mestier*, 89 Am. Dec. 690, 694, note.

Mining Rights.—The policy of the state, in conferring the privilege to work the mines, equally confers the right to divert the streams from their natural channels, p. 146.

Cited with approval as maintaining this right in *Conger v. Weaver*, 6 Cal. 558; S. C. 65 Am. Dec. 532. Examined in *Crandall v. Woods*, 8 Cal. 141, 142, 143, deciding that, as between an occupant of riparian land and a subsequent appropriator of the waters of the stream, the former may assert the riparian right; *Blair v. Boswell*, 37 Or. 170, noted under *Stiles v. Laird*, 5 Cal. 120. Approved in dissenting opinion of Ross, J., in *Lux v. Haggin*, 69 Cal. 446, 448; so, in *Atchison v. Peterson*, 20 Wall. 513; and in *Boyle v. San Diego Land & Town Co.*, 46 Fed. Rep. 711. Principle also approved, in *Drake v. Earhart*, 2 Idaho, 721, and applied to diversion of water for irrigation. Examined in *Thorp v. Freed*, 1 Mont. 685, and held to be inapplicable because the decision turned upon the fact that the title to the land was in the government. And so, in *Vansickle v. Haines*, 7 Nev. 289. Cited in

McClintock v. Bryden, 63 Am. Dec. 93, 96, 104, note; *Union W. Co. v. Cary*, 85 Am. Dec. 150, note.

Same.—These two rights stand upon equal footing, and when conflicting, must be decided by the fact of priority, p. 147.

Approved in *Lux v. Higgin*, 69 Cal. 355. Cited in *Stiles v. Laird*, 63 Am. Dec. 113, note; *Hill v. Newman*, 63 Am. Dec. 141, note; *Sims v. Smith*, 68 Am. Dec. 234, note; *Bear River etc. Min. Co. v. N. Y. Min. Co.*, 68 Am. Dec. 331, note.

Same.—The miner takes the land as he finds it, subject to prior rights which have an equal equity, p. 147.

Doctrine approved in *Tartar v. Mining Co.*, 5 Cal. 398; *Rogers v. Soggs*, 22 Cal. 453, 455; *De Necochea v. Curtis*, 80 Cal. 405. Cited in *Burwell v. Hobson*, 65 Am. Dec. 254, note; *Conger v. Weaver*, 65 Am. Dec. 533, note; *Parke v. Kilham*, 68 Am. Dec. 313, note; *Levaroni v. Miller*, 91 Am. Dec. 694.

General citation: *Watson v. Sutro*, 86 Cal. 529.

5 Cal. 148. **REDMAN v. GULNAC.**

Trial.—After jury have retired, it is error to allow them to come into court and receive instructions in the absence of the parties or their counsel, p. 148.

Cited in *State v. Meagher*, 49 Mo. App. 582, as the California rule, and holding it to be also the rule in a criminal cause in Missouri. So cited, likewise, in *Chapman v. Railroad Co.*, 26 Wis. 307; *S. C. 7 Am. Rep. 84*, but the rule stated to the opposite in Wisconsin.

5 Cal. 149-152. **DE JOHNSON v. SEPULBEDA.**

Appeal.—Cause will not be reversed upon an error of law, unless it appears that the complainant was thereby injured, p. 151.

Approved in *Calderwood v. Tevis*, 23 Cal. 337, case of demurrer not first disposed of.

Same.—It is unnecessary to embody matter of record in bill of exceptions, p. 150.

Approved in *Rickey v. Ford*, 2 Oreg. 252; *Lobdell v. Hall*, 3 Nev. 530.

Same.—An appeal can be heard upon a bill of exceptions taken at the trial, if signed by the judge, p. 150.

Cited in *People v. Lockwood*, 6 Cal. 205, as sustaining the propriety of the rule, that in every criminal case the instructions given and refused should be so marked, and signed by the judge who tried the cause.

Cotenancy.—Two or more of several cotenants cannot join in an action of ejectment, p. 151.

Rule approved in *Throckmorton v. Burr*, 5 Cal. 401. So, in *Parke v. Kilham*, 8 Cal. 79; S. C. 68 Am. Dec. 312, holding, however, that cotenants may join in actions for the diversion of waters of ditches.

5 Cal. 155. MARTINEZ v. GALLARDO.

Appeal.—Where an appeal is dismissed for want of a proper bond, and no final judgment has been rendered, a second appeal may be taken, p. 155.

Rule approved in *Dooley v. Foster*, 5 Kan. 279. So, in *Marshall v. Railroad Co.*, 20 Wis. 646, where first appeal was dismissed for want of prosecution. Cited in *Clark v. Ostrander*, 13 Am. Dec. 550, note. Denied in *Casanova v. Kreusch*, 21 W. Va. 728, holding that the party in default cannot have a second appeal in such cases.

5 Cal. 156-160. FRAZIER v. HANLON.

Forcible Entry and Detainer.—Mere trespass upon land is not sufficient to sustain action of, p. 158.

Approved in *Castro v. Tewksbury*, 69 Cal. 568, setting forth what must be shown in order to maintain the action. So, in *Smith v. Reeder*, 21 Oreg. 550; and *Romero v. Gonzales*, 3 New Mex. 19, holding that actual force in the nature of a breach of the peace must be shown.

5 Cal. 160-161; 63 Am. Dec. 116. GUSHEE v. LEAVITT.

Pleading.—Defense of want of consideration to action on note cannot be pleaded in general terms, p. 161.

Cited in *Lyts v. Keevey*, 5 Wash. St. 609, holding that an illegal consideration cannot be shown under an allegation of no consideration, and that the facts must be alleged. Also cited as to this rule, in *Conwell v. Humphrey*, 68 Am. Dec. 615, note.

Same.—Facts constituting fraud must be alleged, p. 161.

Approved in opinion of Britt, C., in *Blood v. La Serena Land & Water Co.*, 113 Cal. 237, case of mortgage foreclosure. Rule also approved in *Water Works v. San Francisco*, 82 Cal. 321; so, in *Martin v. Fox*, 40 Mo. App. 666, where the rule is said to be the prevailing American doctrine. Cited in *Clapp v. County of Cedar*, 68 Am. Dec. 696, note; *Hamilton v. Scull*, 69 Am. Dec. 462, note; *Keller v. Johnson*, 71 Am. Dec. 357, note; *Stacy v. Ross*, 84 Am. Dec. 605, note; *Spring Valley Water Co. v. San Francisco*, 16 Am. St. Rep. 134, note.

Same.—Plea that note sued on is the property of another than the plaintiff is not good, without showing some substantial matter of defense against such other, which could not be set up against the plaintiff, p. 161.

Approved in *Giselman v. Starr*, 106 Cal. 658, an action to reform, and as reformed to foreclose, a mortgage executed by the defendant.

5 Cal. 169-172. **SAN FRANCISCO v. HAZEN.**

Construction of Charter.—Where a city charter provides that no ordinance shall be passed except by a majority of all the members elected, an ordinance passed by a vote of less than a majority, is void. p. 172.

Sustained in *Holland v. San Francisco*, 7 Cal. 375, 380; *McCracken v. San Francisco*, 16 Cal. 618. So, in *Satterlee v. San Francisco*, 23 Cal. 318, on principle of *stare decisis*.

Same.—In construing statutes, force and effect should be given to every part of them, p. 172.

Principle approved in *Lehman v. Robinson*, 59 Ala. 235; so, in *Matter of State Lands*, 18 Colo. 365.

5 Cal. 173-176. **HUMPHREYS v. CRANE.**

Alteration in Note, not varying the meaning of the contract, is immaterial, p. 175.

Approved in *Fuller v. Green*, 64 Wis. 165, S. C. 54 Am. Rep. 601, holding that merely affixing the name of an attesting witness to a promissory note is not a material alteration. Rule approved in *Laub v. Paine*, 46 Iowa, 551; S. C. 26 Am. Rep. 164, holding, however, that if one sign a note as surety, adding the word "surety" to his signature, the erasure of that word before indorsement discharges him from liability.

Pleading.—Answer alleging alteration in instrument must state that it was made with the knowledge or consent, or by the authority of the plaintiff, p. 175.

Explained and distinguished in *Bryan v. Berry*, 6 Cal. 397, in that the question of demand and notice did not arise in the former case.

Promissory Note.—Where in the body of a note, one party signs as principal, and one as surety, both are liable, p. 175.

Rule approved in *Aud v. Magruder*, 10 Cal. 289, placing the obligation of the surety in such cases upon the footing of an original promise; *Riley v. Jarvis*, 43 W. Va. 45, holding both parties liable as to creditor as principals; *Randall v. Simmons*, 40 Or. 558, tacit admission in answer to suit on note of receipt for value not inconsistent with affirmative defense of suretyship.

Same.—A mere neglect to sue the principal will not exonerate a surety, p. 175.

Rule affirmed in *Kritzer v. Mills*, 9 Cal. 23; *Hartman v. Burlingame*, 9 Cal. 561; *Dane v. Corduan*, 24 Cal. 165; S. C. 85 Am. Dec. 57; *Bull v. Coe*, 77 Cal. 60; S. C. 11 Am. St. Rep. 239; *Biggins v. Raisch*, 107 Cal. 213; and approved in *Smith v. Freyler*, 4 Mont. 496; S. C. 47 Am. Rep. 361; *Mulvane v. Sedgeley*, 63 Kan. 126, quoting *Bull v. Coe*, 77 Cal. 60.

Notes Cal. Rep.—12

Parties.—In cases of joint and several contracts an administrator cannot be joined with the survivor, p. 176.

Approved in *May v. Hanson*, 6 Cal. 643; and *Mattison v. Childs*, 5 Colo. 79; *Briggs v. Breen*, 123 Cal. 661, as instance of rule before section 379, Code of Civil Procedure.

Principal and Surety.—Right of the surety to pay the debt and proceed against the principal, asserted, p. 176.

Approved in *Hayes v. Josephi*, 26 Cal. 543.

5 Cal. 181-182. DUNLAP v. KELSEY.

Cloud on Title.—Conditions entitling party to removal of, stated, pp. 181, 182.

Cited in *North Pac. R. R. Co. v. Amacker*, 49 Fed. Rep. 536, as to the necessity of possession under section 254, former California Practice Act, in order to maintain an action to determine an adverse claim to real property.

5 Cal. 183-185. PEOPLE v. LABRA.

Criminal Law.—Where two are jointly indicted for a felony, and are tried separately, each is a competent witness for his codefendant, pp. 184, 185.

Affirmed in *People v. Newberry*, 20 Cal. 440, which was a joint indictment for murder. Approved in *McGinness v. State*, 4 Wyo. 121, 122. Cited in *Moffit v. State*, 36 Am. Dec. 303, note.

5 Cal. 186-189. WESTON v. BEAR RIVER ETC. MINING COMPANY.

S. C. 63 Am. Dec. 117; on second appeal, 6 Cal. 425.

Corporations.—No transfer of stock in a corporation formed under the act of 1853 is good against third parties, unless the transfer be made upon the books of the company, p. 189.

Cited in *West Coast etc. Co. v. Wulff*, 133 Cal. 317, 318, applying rule to contest between pledgee and execution purchaser, and discussing rights of pledgee; *Ottumwa etc. Co. v. Stodghill*, 103 Iowa, 441, construing local statute and holding notice on creditor's part immaterial; *Lyndonville etc. Bank v. Folsom*, 7 N. Mex. 615, holding unrecorded transfer to assignee for creditors invalid. Affirmed in *Weston v. Bear River etc. Min. Co.*, 6 Cal. 429, as to the construction of the act named. So, in the similar cases of *Strout v. Natoma Water & Min. Co.*, 9 Cal. 80; *Naglee v. Pacific Wharf Co.*, 20 Cal. 532; *People v. Elmore*, 35 Cal. 655, upon the principle of stare decisis. Approved and applied in *Parrott v. Byers*, 40 Cal. 625, where the question arose as between the assignee of the stock and unfaithful trustees of the corporation. Approved also, in *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 604, where the assignee was not protected

because of his own negligence. Approved and applied in construing a similar statutory provision in *State v. Leete*, 16 Nev. 250; *Application of Thomas Murphy*, 51 Wis. 525; *Lyndonville Nat. Bank v. Folsom*, 7 N. Mex. 615; *Conway v. John*, 14 Colo. 33; *Berney Nat. Bank v. Pinckard*, 87 Ala. 583. So, in *In re Argus Printing Co.*, 1 N. Dak. 444; S. C. 26 Am. St. Rep. 647, in which case it is held, that a creditor of a pledgor of stock, who attaches it in ignorance of a transfer thereof, no transfer on the books having been made, secures a lien which is superior to the interest of the pledgee, and his paramount lien cannot be defeated by subsequent notice of the transfer. Referred to and disapproved as authority for the issue of a writ of mandamus to compel the transfer of stock, in *Freon v. Carriage Co.*, 42 Ohio St. 39; S. C. 51 Am. Rep. 797. Cited in *Pendergast v. Bank of Stockton*, 2 Sawyer, 116, as authorizing a corporation to make by-laws forbidding the transfer of stock, until all the indebtedness of the owner should be liquidated. Cited as sustaining the rule stated, in *United States v. Vaughan*, 5 Am. Dec. 380, note; *Bank of Utica v. Smalley*, 14 Am. Dec. 530, note; *Lippitt v. Paper Co.*, 2 Am. St. Rep. 891, note; *Harbold v. Stobart*, 15 Am. St. Rep. 626, note; *Gammel v. Davis*, 32 Am. St. Rep. 420; *Wilson v. St. Louis etc. R. R. Co.*, 32 Am. St. Rep. 640, note.

5 Cal. 190-191. **MIDDLETON v. GOULD.**

Where no appeal is allowed by law, a case may be taken to an appellate court by writ of error, p. 191.

Approved in *Ex parte Thistleton*, 52 Cal. 224, holding that a writ of error might be issued by the county court to the city criminal court of the city and county of San Francisco, there being no statute providing the mode of appeal; *State v. Reed*, 3 Idaho, 558, order overruling application for change of venue is reviewable on appeal from final judgment. Examined in *People v. Jordan*, 65 Cal. 649, holding that the provisions of the Penal Code with reference to appeals in criminal actions amounting to felonies, are applicable to misdemeanors, prosecuted by indictment or information. Cited to the rule stated, in *Wheeler v. Winn*, 91 Am. Dec. 196, note.

5 Cal. 192. **WALKER v. SEDGWICK.**

Trial.—Upon the trial of an issue of fact by the court the statute does not require the decision to state separately the facts and conclusions of law in equity cases, p. 192.

Doubted in *Duff v. Fisher*, 15 Cal. 380, 383, leaving the question of overruling it open. Affirmed in *Lyons v. Lyons*, 18 Cal. 448, holding that, in equity cases no findings are necessary to support a judgment; but also holding that the act of 1861, regulating appeals, changed the rule laid down, and makes the statute, as to findings of fact and conclusions of law, applicable to cases both in law and equity. Referred

to in *Sharon v. Sharon*, 67 Cal. 188, 214, discussing subject of appellate jurisdiction in divorce cases.

Same.—Parties to suit in equity are not entitled to trial by jury, p. 192.

Approved in *Still v. Saunders*, 9 Cal. 236.

5 Cal. 195-213. COHEN v. BARRETT.

Insolvency.—Proceedings in, are not *stricti juris* either proceedings in law or equity, but a special remedy, created by statute, p. 210.

Approved in *Mayer v. Kohlman*, 8 Cal. 47. So, in *People v. Rosborough*, 29 Cal. 418, but holding that since the adoption of the constitutional amendments of 1863, such proceedings have ceased to be "special cases" in the sense in which that phrase was applied to them previously.

Same.—The court has no jurisdiction of the proceedings, where the petition shows upon its face, that a part of the indebtedness had been contracted by the petitioner as a banker, p. 211.

Cited in *California Furniture Co. v. Halsey*, 54 Cal. 318, and holding that the insolvency law of the state makes no provision authorizing a partnership to apply for its benefits. Cited in *Frankel v. Creditors*, 20 Nev. 55, construing the same statutory provisions, and holding that bankers and brokers were included.

Same.—Benefit of statute denied to insolvents who have been guilty of fraud, p. 211.

Cited in *Sanborn v. His Creditors*, 37 Cal. 613, as to the administration of the insolvent's property for the benefit of creditors in cases of fraud.

Statutes.—Title of statute may be referred to in cases of doubt as a guide to the intention of the legislature, p. 209.

Rule approved in *Garrigus v. Board of Commissioners*, 39 Ind. 71, construing an act authorizing aid for the construction of railroads.

5 Cal. 214-218. LOW v. MAYOR ETC. OF MARYSVILLE.

Powers of municipalities are limited to express grant of their charters, p. 216.

Approved in *Vallejo Ferry Co. v. Vallejo*, 146 Cal. 397, Vallejo cannot establish wharf so as to injure ferry right at foot of parallel street vested in others by city.

Corporations.—Except for municipal purposes, must be formed under general laws, and the legislature cannot confer on such corporations any powers by special act, p. 216.

Cited in *Los Angeles v. Los Angeles etc. Co.*, 177 U. S. 572, as overruled by *California etc. Co. v. Alta etc. Co.*, 22 Cal. 428, and the latter

as the constitutional construction existing at time of passage of act of 1870, incorporating Los Angeles. Disapproved in Cal. State Tel. Co. v. Alta Tel. Co., 22 Cal. 428. But this case is overruled in San Francisco v. Spring Valley Water Works, 48 Cal. 517, affirming the doctrine of the principal case. Approved in Ames v. Lake Superior etc. R. R. Co., 21 Minn. 259, which decision was, however, overruled upon reargument. Harmonized in Cook v. Port of Portland, 20 Oreg. 587, holding that the act establishing such port, forms a corporation for municipal purposes, and so not within the constitutional provision against creating corporations by special laws. Cited in Sharpless v. Mayor etc., 59 Am. Dec. 788, note.

5 Cal. 218-220. **JOHNSON v. RICKETT.**

Specific Performance may be decreed of contract relating to personality, p. 220.

Cited in Fleishman v. Woods, 135 Cal. 280, as to contract to transfer water stock.

5 Cal. 220-222. **CONNOLLY v. GOODWIN.**

Promissory Notes.—By the act concerning notaries public, notes are made protestable, and the protest of a notary is made evidence of demand and nonpayment of notes as well as bills, p. 221.

Cited in Dupre v. Richard, 43 Am. Dec. 219, note.

Common-law Rules are inoperative where reason therefor has ceased, p. 221.

Cited in Katz v. Walkinshaw, 141 Cal. 124, discussing rules as to water rights.

Seal is Sufficient, where the impression is made upon the paper only, p. 222.

Affirmed in Hastings v. Vaughn, 5 Cal. 318, holding that such impression may be made as well by a pen as by a stamp. Approved in Swink v. Thompson, 31 Mo. 30. Cited in Dupre v. Richard, 43 Am. Dec. 224, note.

5 Cal. 222-224. **RAMIREZ v. MURRAY.**

Landlord and Tenant.—To recover rent, eo nomine, plaintiff must show that defendant's possession was by virtue of some agreement, p. 223.

Approved in Warnock v. Harlow, 96 Cal. 303; S. C. 31 Am. St. Rep. 211. Cited in Fitzgerald v. Beebe, 46 Am. Dec. 289, note.

Pleading.—It is error to permit a plaintiff to amend his complaint, changing an action ex contractu into one ex delicto, p. 224.

Approved in Hackett v. Bank of California, 57 Cal. 336; Givens v.

Wheeler, 6 Colo. 150. Cited in *Stevenson v. Mudgett*, 34 Am. Dec. 159, 160, note; also in *Wheeler v. West*, 78 Cal. 96, 97, as to the proper remedy in such case; *Frost v. Witter*, 132 Cal. 427, but held not to include amendments under Code of Civil Procedure, 472, 473; dissenting opinion, *Thomas v. Hawkins*, 13 Ind. App. 330, main opinion denying right so to amend after reversal and remittitur.

Landlord and Tenant.—Rent is recoverable only under theory of contract, p. 223.

Cited in *Baker v. Maier*, 140 Cal. 534, holding assignee of lease liable through privity of estate; *Murphy v. Hopcroft*, 142 Cal. 46; noted in *O'Conner v. Corbitt*, 3 Cal. 370.

5 Cal. 226-227. **SAMUELS v. GORHAM.**

Statute of Frauds.—In determining whether there was a delivery within a reasonable time, so as to meet the requirement of the statute, all the circumstances must be taken into consideration, and the question will often be one of fact for the jury, p. 227.

Cited and approved in *Dubois v. Spinks*, 114 Cal. 293; *Carpenter v. Clark*, 2 Nev. 246.

Fraudulent Conveyance.—Delivery need not be made instantan, p. 227.

Cited in *Feeley v. Boyd*, 143 Cal. 285, holding delivery sufficient as against creditors.

5 Cal. 230-234. **ZANDER v. COE.**

Jurisdiction.—The constitution has distributed judicial power among the several courts, and the legislature cannot confer on one court the functions and powers which the constitution has conferred on another, p. 231.

Disapproved in *Courtwright v. Bear River etc. Min. Co.*, 30 Cal. 577, 579. Approved in *People v. Fowler*, 9 Cal. 86, 87, discussing criminal jurisdiction of the courts. Harmonized in *Robinson v. Fair*, 128 U. S. 78, 80, discussing power of probate courts of California, under the constitution in force prior to 1880.

Same.—Disposition of cases, where the sum does not exceed \$200, may be vested by the legislature in justices' courts, p. 232.

Referred to in discussing jurisdiction of such courts, in *Bradley v. Kent*, 22 Cal. 172; *Small v. Gwinn*, 6 Cal. 449.

Same.—Law vesting justices of the peace with jurisdiction, where the amount involved exceeds \$200, is void, p. 233.

Approved in *Ford v. Smith*, 5 Cal. 331, holding that an appeal from the judgment of a justice of the peace for an amount exceeding his jurisdiction, should be dismissed. Also approved in *Hart v. Moon*, 6

Cal. 162; *Small v. Gwinn*, 6 Cal. 449; *Freeman v. Powers*, 7 Cal. 105, but holding that the decision does not apply to proceedings under the forcible entry and detainer statute. Cited in *Brown v. Scott*, 25 Cal. 196, holding that the assignment of a judgment which is void within the rule stated carries with it the debt on which it was obtained.

Same.—A void judgment may be reversed or set aside, p. 234.

Approved in *Hastings v. Burning Moscow Company*, 2 Nev. 97.

5 Cal. 235-236. PEOPLE v. GORDON.

Objects of Election Laws are to prevent illegal voting, but also to simplify and facilitate process of voting, p. 236.

Cited in *Ferguson v. Allen*, 7 Utah, 273, where cited also at page 275, on point that acts of election officers are reviewable on election contests.

5 Cal. 237-239. MATTER OF MANCHESTER.

Habeas Corpus.—State courts have jurisdiction by, to investigate cases where a party is arrested as a fugitive from justice, escaped from another state, p. 238.

Cited as authority, in *Matter of Mohr*, 73 Ala. 516; S. C. 49 Am. Rep. 70; so, in *Jones v. Leonard*, 50 Iowa, 110; S. C. 32 Am. Dec. 119; so, in *Re Cook*, 49 Fed. Rep. 839, holding that it is competent for the courts to determine whether in fact the demanded person is a fugitive from justice. Also cited in *Matter of Fetter*, 57 Am. Dec. 393, note; *Kurtz v. State*, 1 Am. St. Rep. 179, note.

Habeas Corpus lies where party is arrested as fugitive from justice from another state, p. 238.

Cited in note to *Barranger v. Baum*, 68 Am. St. Rep. 131, on Extradition.

Same.—Governor of state issuing the requisition for the fugitive, is the only proper judge of the authenticity of the affidavit, p. 239.

Approved in *Kurtz v. State*, 22 Fla. 44; S. C. 1 Am. St. Rep. 177. Cited in *State v. Tax Collector*, 48 La. An. 33, review of exercise of power by city council.

Same.—The affidavit need not set forth the crime charged with all the exactness necessary in an indictment. It is enough, if it distinctly charge the commission of an offense, p. 238.

Approved in *Davis' Case*, 122 Mass. 330. Cited in *Hartman v. Avenue*, 63 Ind. 353; S. C. 30 Am. Rep. 223, holding that the affidavit should show an actual fleeing from justice, and that the recitals in a governor's requisition are not of themselves sufficient. Cited as to sufficiency of affidavit, in *Matter of Fetter*, 57 Am. Dec. 397, 398, note.

5 Cal. 239-240. CHIPMAN v. EMERIC.

Pleading.—When double or treble damages are given by a statute, judgment therefor must be demanded in the complaint, which must recite the statute, or conclude to the damage of the plaintiff against the form of the statute, p. 240.

Rule approved in *Bell v. Norris*, 79 Ky. 51; *Neff v. Pennoyer*, 3 Sawyer, 498. Referred to as a rule of pleading in such cases, in *Bettys v. Milwaukee etc. Railroad Co.*, 37 Wis. 326.

5 Cal. 240-241. HOUGHTON v. BLAKE.

Mechanics' Lien.—To entitle a materialman to enforce a lien upon a building for materials furnished, he must allege and prove that the materials were used in the construction of the building, and that by the express terms of the contract, they were furnished for the particular building on which the lien is claimed, p. 240.

Affirmed in *Holmes v. Richet*, 56 Cal. 310; *Cohn v. Wright*, 89 Cal. 88; *Stimson M. Co. v. Los Angeles etc. Co.*, 141 Cal. 32, upholding lien as to materials used in temporary structure; *Roebing v. Bear Valley Irrigation Co.*, 99 Cal. 490, an action to enforce a materialman's lien against a telephone line; *Tabor v. Armstrong*, 9 Colo. 289; *Hill v. Bowers*, 45 Kan. 593, material furnished for fencing, and holding it must also appear that the same was in fact so used as to become a part of the realty; *Gordon v. Canal Co.*, *McAllister*, 514, 522; and *The James H. Prentice*, 36 Fed. Rep. 782, case of materials furnished for building a vessel. Cited on subject, in *Odd Fellows' Hall v. Masser*, 64 Am. Dec. 679, note; so, in *Chapin v. Paper Works*, 79 Am. Dec. 273, note.

5 Cal. 241-243. HAYS v. HOGAN.

Taxes.—If a tax be illegal, and is paid under protest, it may be recovered back, p. 243.

Affirmed in *Falkner v. Hunt*, 16 Cal. 170; *Guy v. Washburn*, 23 Cal. 113. Cited in *Meek v. McClure*, 49 Cal. 627, where it is said that the purpose and effect of the protest is not satisfactorily defined, and that if money illegally exacted is paid, under coercion, to a party for his own use, no protest is necessary in order that it may be recovered back. Explained in *Mariposa Co. v. Bowman*, *Deady*, 232, discussing question as to when real property is in duress. Examined and disapproved in *Bucknall v. Story*, 46 Cal. 596, 598, S. C. 13 Am. Rep. 224, 225, in which case it is held that a protest alone cannot change what would otherwise be a voluntary payment into an involuntary one, or change the rights of the parties. So, in *Detroit v. Martin*, 34 Mich. 177; S. C. 22 Am. Rep. 517, and see 520, note.

5 Cal. 244-245. WOLF v. FLEISCHACKER.

Homesteads.—Lands held in joint tenancy, or by tenancy in common, are not subject to dedication for homestead purposes, p. 245.

Affirmed in *Reynolds v. Pixley*, 6 Cal. 167; *Kellersberger v. Kopp*, 6 Cal. 565; *Giblin v. Jordon*, 6 Cal. 417, case of land held by a husband with his wife and child, as tenants in common; *Bishop v. Hubbard*, 23 Cal. 517, S. C. 83 Am. Dec. 133, partnership lands; *Elias v. Verdugo*, 27 Cal. 425, where it is said to be too late to reinvestigate the reasons upon which the foregoing decisions are based; *First Nat. Bank v. Guerra*, 61 Cal. 112; *Seaton v. Son*, 32 Cal. 483, even if the joint tenant or tenant in common, who claimed the homestead, was in the exclusive possession. Such is affirmed to have been the law prior to the act of March 9, 1868, in *Fitzgerald v. Fernandez*, 71 Cal. 507. Doctrine affirmed in *Rosenthal v. Merced Bank*, 110 Cal. 202; so, in *In re Carriger*, 107 Cal. 619, holding that undivided interest in land of a deceased cotenant cannot be set aside as a probate homestead. Doctrine approved in dissenting opinion of Brickell, C. J., in *McGuire v. Van Pelt*, 55 Ala. 357; so, in *Lindley v. Davis*, 6 Mont. 456, which is overruled, however, in *Lindley v. Davis*, 7 Mont. 214. Approved in *West v. Ward*, 26 Wis. 581; so, in *In re Blodgett*, 10 Bank. Reg. 145, under Michigan statutes. But denied in *Greenwood v. Maddox*, 27 Ark. 660; *Thorn v. Thorn*, 14 Iowa, 54, S. C. 81 Am. Dec. 453, and *In re Swearinger*, 5 Sawy. 55, 57, construing Nevada statute; *Dallemand v. Mannon*, 4 Colo. App. 268; and *McClary v. Bixby*, 36 Vt. 259; S. C. 84 Am. Dec. 688. Cited in *Smith v. Chenault*, 48 Tex. 462, but an opinion as to the ruling not expressed. So, in *Newton v. Summey*, 50 Ga. 400; and *In re Parks*, 9 Bank. Reg. 273. Cited in *Pryor v. Stone*, 70 Am. Dec. 346, note on subject; so, in *Thorn v. Thorn*, 81 Am. Dec. 455, note; *Bishop v. Hubbard*, 83 Am. Dec. 134; *McElroy v. Bixley*, 84 Am. Dec. 690, note; and *McCoy v. Brennan*, 1 Am. St. Rep. 594.

5 Cal. 245-247. **MULLIKEN v. HULL.**

Judgment.—If irregular, as embracing too many parties, it is the proper practice to move to correct the judgment of the court below, p. 247.

Rule approved in *Fox v. West*, 1 Idaho, 784.

5 Cal. 248. **SANCHEZ v. ROACH.**

Appeal.—Attorney cannot take nor perfect appeal in name of deceased client, p. 248.

Cited in *Judson v. Love*, 35 Cal. 468, as to motion for new trial and appeal after such death and without substituting representative. See *McCormick Harvesting Mach. Co. v. Snedigar*, 3 S. D. 303.

5 Cal. 249-251. **NORRIS v. RUSSELL.**

Prior Possession is Evidence of Title, and cannot be made to yield to mere color of title, p. 250.

Rule approved in *Hicks v. Coleman*, 25 Cal. 141; S. C. 85 Am. Dec. 119.

Tax Title.—In order to be sustained, every pre-requisite to the exercise of the power of sale by the officer must be shown to have been accomplished, p. 250.

Affirmed in *Ford v. Holton*, 5 Cal. 321, an action of ejectment. Cited in *Jackson v. Shepard*, 17 Am. Dec. 506, 513, note.

Same.—A pre-requisite to the validity of a tax sale is the authority under which the taxes are assessed, p. 250.

Approved in *Treadway v. Schnauber*, 1 Dak. Tr. 247.

Same.—Statute makes tax deed prima facie evidence of title, p. 250.

Cited in *Maguiar v. Henry*, 4 Am. St. Rep. 189, note, as to the effect of such statute.

5 Cal. 252-257. BEARD v. KNOX. 63 Am. Dec. 125.

Community Property.—The common property cannot be disposed of by the husband by will, so as to defeat the rights of the surviving wife, p. 256.

Affirmed in *Matter of Buchanan's Estate*, 8 Cal. 510, holding that the Mexican law was the same as under the California statute. So, in *Scott v. Ward*, 13 Cal. 469, 470. Cited in *Estate of Wickersham*, 138 Cal. 363, holding no intent shown by will to dispose of widow's interest; *Smith v. Becker*, 62 Kan. 543 (cf. dissenting opinion, 548), construing local statutes as to effect of civil death. Affirmed also, in *Smith v. Smith*, 12 Cal. 225; S. C. 73 Am. Dec. 536; *Payne v. Payne*, 18 Cal. 301, holding that one-half of the common property goes absolutely to the wife, and the remaining half to the descendants of the deceased husband, if not made by him the subject of testamentary disposition; *De Godey v. Godey*, 39 Cal. 164; *Estate of Silvey*, 42 Cal. 213; *Greiner v. Greiner*, 58 Cal. 119; *Guttman v. Scannell*, 7 Cal. 459, in dissenting opinion of Burnett, J. Cited in *Meyer v. Kinzer*, 73 Am. Dec. 543, note; *Bennett v. Child*, 88 Am. Dec. 695, note; *Enyeart v. Kepler*, 10 Am. St. Rep. 99, note.

Same.—The wife is entitled to her own share of the common property, and may also be entitled to a legacy out of the share of the husband, p. 257.

Affirmed in *In re Gwin*, 77 Cal. 315; *In re Gilmore*, 81 Cal. 243. So, in *Morrison v. Bowman*, 29 Cal. 348, discussing the effect of election by the wife to take under her husband's will; and cited on subject of election in *Carper v. Crowl*, 149 Ill. 481. Cited in *Theall v. Theall*, 26 Am. Dec. 505, note; *Worthen v. Pearson*, 81 Am. Dec. 216, note.

Pleading.—Objection to nonjoinder of parties should be taken by demurrer, p. 257.

Cited in *Macy v. Combs*, 77 Am. Dec. 107, note; *Proprietors etc. v. Mining Co.*, 97 Am. Dec. 513, note; *Fillmore v. Wells*, 3 Am. St. Rep.

578, note; *Great West Min. Co. v. Mining Co.*, 13 Am. St. Rep. 220, note.

Domicile of husband is that of the wife, p. 256.

Cited in *Howland v. Granger*, 22 R. L. 3, denying wife's right to acquire separate domicile, except where interests were adverse. See *Bennett v. Child*, 87 Am. Dec. 340, note; *Prater v. Prater*, 10 Am. St. Rep. 629, note; and 34 Am. St. Rep. 254, note.

General citation: *Spreckles v. Spreckles*, 116 Cal. 344.

5 Cal. 258-260. *MAGEE v. MOKELUMNE HILL ETC. MIN. COMPANY.*

Appeal.—Affidavit of attorney in cause showing objections made to the selection of a jury, though copied into the transcript, is no part of the record, and cannot be noticed, p. 259.

Cited as authority in *Abbott v. Douglass*, 28 Cal. 296, holding that interlocutory orders will not be reviewed on appeal unless embodied in a statement or bill of exceptions.

Corporations.—Act of 1850, concerning corporations, prohibits them from issuing bills or notes for circulation as money, p. 259.

Affirmed in *Smith v. Eureka Flour Mills*, 6 Cal. 7. Cited in *Seeley v. San Jose etc. Independent Mill and Lumber Co.*, 59 Cal. 25, holding that corporations having power to incur debts may provide for their payment and may create the ordinary evidences of indebtedness for that purpose.

5 Cal. 260-262. *COIT v. HUMBERT.* S. C. 63 Am. Dec. 128.

Collateral Securities.—Party pledging negotiable securities transferable by delivery, loses all right thereto, when transferred by the pledgee in good faith to a third party, p. 261.

Cited as sustaining this rule, in *Griggs v. Day*, 32 Am. St. Rep. 712, extended note on subject.

5 Cal. 262-265. *NORTON v. JACKSON.*

Covenant of Warranty.—There is no breach of this covenant, until eviction by process of law, p. 265.

Distinguished in *Reynolds v. Harris*, 9 Cal. 340, in which case the sale was void under the statute of frauds. Denied in *McGary v. Hastings*, 39 Cal. 365, S. C. 2 Am. Rep. 458, holding that it is not necessary that the eviction should be by process of law, consequent on a judgment.

Same.—Relief in equity by rescission of contract, on proper allegations in complaint, p. 265.

Referred to in S. C. again 6 Cal. 189, holding that the court below properly refused an injunction in the case.

5 Cal. 266. MOORE v. GOSLIN.

Forcible Entry and Detainer.—Statute of, provides a remedy for an unlawful as well as a forcible entry, its policy being to avoid nice distinctions as to what constitutes force in an entry upon lands, p. 266.

Affirmed in *Frazier v. Hanlon*, 5 Cal. 159, 160.

Same.—What constitutes an actual possession, sufficient under the statute, considered, p. 266.

Referred to as authority on this point, in *Jarvis v. Hamilton*, 16 Wis. 578. Cited in *Winterfield v. Stauss*, 24 Wis. 405, holding that the question of title to land is not involved in an action under the statute.

5 Cal. 268-274. TAYLOR v. THE STEAMER COLUMBIA.

Jurisdiction.—States have the power to confer jurisdiction in admiralty and maritime cases to its fullest extent upon their own courts, p. 273.

Affirmed in *Warner v. Uncle Sam*, 9 Cal. 710, 733.

5 Cal. 275-278. PEOPLE v. BACKUS.

New Trial.—If jurors in a criminal trial separate without leave of court, whereby they might have been improperly influenced, it is ground for a new trial, p. 276.

Cited in *Salzman v. Sunset etc. Co.*, 125 Cal. 507, 508, holding decision weakened by later ones and stating rule in civil cases; but see *People v. Adams*, 143 Cal. 210, granting new trial for separation of jury; *State v. Morgan*, 23 Utah, 226, new trial granted where jurors on voir dire gave false answers; *People v. Thornton*, 74 Cal. 484, receiving evidence out of court; *People v. Stokes*, 103 Cal. 198, S. C. 42 Am. St. Rep. 106, 107, reading of newspaper article in juryroom; *State v. Church*, 7 S. Dak. 292, *State v. Robinson*, 20 W. Va. 752, holding that if the verdict is against the prisoner, he is entitled to the benefit of the presumption, that such separation has been prejudicial to him; *Territory v. Hexter*, 3 Mont. 207, holding the rule to be inapplicable where the separation occurs after having agreed upon a verdict. Distinguished in *People v. Bonney*, 19 Cal. 445, where it is said that the principal case goes to the verge of, if not beyond the true rule. Cited in *McKinney v. People*, 43 Am. Dec. 81, 86, note, discussing the question at length. Cited in *Woods v. The State*, 43 Miss. 373, holding the verdict in a capital case vitiated by separation of jury.

Criminal Law.—A defendant convicted of one of the lesser offenses included in the indictment, cannot, if a new trial be granted, be again tried for a higher offense than that of which he was convicted, p. 278.

Affirmed in *People v. Apgar*, 35 Cal. 391. Distinguished in *People v.*

Schmidt, 64 Cal. 264, and the question whether the rule would be considered binding under the provisions of the Penal Code, not decided. Cited in *People v. Smith*, 134 Cal. 455, noted under *People v. Gilmore*, 4 Cal. 376; *People v. Webb*, 38 Cal. 478, as sustaining the rule that if a party charged with an offense has been once acquitted by the verdict of a jury, he cannot be held to answer again for the same offense. Cited in *People v. Gilmore*, 60 Am. Dec. 624, note; *Commonwealth v. Arnold*, 4 Am. St. Rep. 117, note.

Same.—Defendant may question the jurors whether they have formed or expressed an opinion as to the guilt or innocence of the accused without first challenging them for cause, p. 277.

Explained with reference to this rule, in *People v. Hamilton*, 62 Cal. 380.

5 Cal. 279-280. **BROCK v. BRUCE.**

County court has no jurisdiction to enforce a mechanic's lien, if the amount in controversy exceeds two hundred dollars, p. 280.

Cited in *Miller v. Carlisle*, 127 Cal. 329, on point that foreclosure of mechanics' lien is within equitable jurisdiction of court; *Bradbury v. Butler*, 1 Colo. App. 433, sustaining right of court to submit special issues to jury therein; *Williams v. Walton*, 9 Cal. 146, which was an action for work and labor, and for materials furnished. The parties entered into a submission to arbitration, stipulating that the award be entered as the judgment of the county court. The award was held void in toto, such court having no jurisdiction of the subject matter thereof. Examined in *McNiel v. Borland*, 23 Cal. 147, 149, holding that the proceeding to enforce a mechanic's lien under the law of 1861, is a "special case," of which the legislature might properly give jurisdiction to the county courts. Cited as to the definition of "special cases," in *Parsons v. Tuolumne County Water Co.*, 63 Am. Dec. 78, note.

Mechanic's Lien Law creates a sort of mortgage or security, which follows the original debt or obligation, p. 280.

Approved in *Duncan v. Hawn*, 104 Cal. 15, maintaining the assignability of liens. So, in *Skyrme v. Occidental Mill & Min. Co.*, 8 Nev. 231.

5 Cal. 281-283. **BROOKS v. HAGER.**

Intervention.—Under provisions of Practice Act, party may intervene in an action in case of the transfer of any interest during the pendency thereof, or where he is directly interested in the subject matter in litigation, either before or after issue joined, p. 282.

Approved in *Coburn v. Smart*, 53 Cal. 744, discussing right of sureties to intervene. Cited in *Brown v. Saul*, 16 Am. Dec. 182, note, discussing question as to who may intervene.

5 Cal. 283-284. **VAN NORDEN v. BUCKLEY.**

Demand and Notice.—When payment by maker to indorser is relied upon to excuse want of demand and notice, it must be payment directly and specifically for the note, and not as security for all transactions in the aggregate, p. 284.

Cited in *Kramer v. Sandford*, 39 Am. Dec. 98, note, where the subject is examined at length.

5 Cal. 285-287. **EVOY v. TEWKSBURY.**

Guaranty, at foot of, and part of lease, is not within the statute of frauds, p. 286.

Approved and applied in *Hazeltine v. Larco*, 7 Cal. 34, case of a guaranty indorsed on a charter-party at the same time with its execution. So, in *Otis v. Haseltine*, 27 Cal. 83, which was the case of an indorsement by a third person on a contract entered into between two parties, and made simultaneously with the contract. So, in *Ford v. Hendricks*, 34 Cal. 675, and *Howland v. Aitch*, 38 Cal. 135, holding that the promise of a guarantor is not within the statute of frauds, if made before the delivery of the note. Cited in *Siemers v. Seimers*, 60 Am. St. Rep. 434, note, discussing at length subject of expressing consideration in contract.

5 Cal. 288-290. **HUNSAKER v. BORDEN.**

Constitutional Law.—Constitutionality of the act of 1855, to fund the debt of Contra Costa county, sustained, p. 290.

Affirmed in *Sharp v. Contra Costa County*, 34 Cal. 291.

Counties.—A county cannot sue or be sued, except where specially permitted by statute, and such permission can be withdrawn at any time by the legislature, p. 290.

Approved in *Dotterer v. Bowe*, 84 Ga. 770, holding that without express authority by statute, a county is not subject to garnishment. So, in *Langford v. King*, 1 Mont. 39, holding that territorial contracts have no legal obligation, but rest upon the good faith of the territory. Doctrine also approved in *People v. Ingersoll*, 58 N. Y. 46; *Vincent v. Lincoln County*, 30 Fed. Rep. 749. Affirmed in *Sharp v. Contra Costa County*, 34 Cal. 290, holding that the creditors of the state must rely solely upon her good faith as to the time, mode, and measure of payment. Commented on, in *Hastings v. City and County of San Francisco*, 18 Cal. 59, in which case the rule is asserted that liability to suit has no necessary connection with ability to sue, and instancing the liability of boards of supervisors, and other like bodies, to mandamus, and to the writ of certiorari, without any legislative provision. Approved as authority in *Ex parte State*, 52 Ala. 236, holding that laws authorizing suits against the state confer mere privileges. Cited in

Divine v. Harvie, 18 Am. Dec. 203, note on garnishment; *Gilman v. Contra Costa County*, 68 Am. Dec. 296, 299, note on suits against counties; so, in *Clapp v. County of Cedar*, 68 Am. Dec. 694, note; *Emeric v. Gilman*, 70 Am. Dec. 746, note; *United States v. Murdock*, 89 Am. Dec. 658, note; *Moore v. Tate*, 10 Am. St. Rep. 724, note; *Heigel v. Wichita County*, 31 Am. St. Rep. 66, note; 53 Am. St. Rep. 417, note.

Funding Act.—Where an act is passed to fund the indebtedness of a county, the holders of warrants on the county treasury are not compelled to accept bonds for them. They are simply left unprovided for in any other way, p. 290.

Cited as authority in *Rose v. Estudillo*, 39 Cal. 275, construing funding act. Also cited in 68 Am. Dec. 300, note.

5 Cal. 294. **CAHOON v. LEVY.**

Jurisdiction.—In equity cases parties cannot of right demand a trial by jury, but it is otherwise in all cases at law, p. 294.

Approved in *Fish v. Benson*, 71 Cal. 435, holding that when the facts constituting fraud and the relief sought are such as are cognizable in a court of law, the parties are entitled to a jury trial. Cited in *Treadway v. Wilder*, 12 Nev. 116, holding that a court has no jurisdiction to try an issue of fact in an action at law unless a jury is waived by consent.

5 Cal. 295-296. **PEOPLE v. APPELEGATE.**

Jurisdiction.—Supreme court has no appellate jurisdiction in cases of misdemeanor or crimes of a less degree than felony, p. 296.

Affirmed in *People v. Shear*, 7 Cal. 140, an appeal from a judgment imposing a fine for gaming; so, in *People v. Vick*, 7 Cal. 166, an appeal from a conviction for petit larceny; so, in *People v. Johnson*, 30 Cal. 101, an appeal from a judgment imposing a fine for wrongfully demanding and collecting toll; and so, in *People v. Apgar*, 35 Cal. 390, which was an appeal from a conviction of a simple assault.

5 Cal. 297-299. **SANFORD v. HEAD.**

Jurisdiction.—The district court, as a court of chancery, has assumed and will exercise jurisdiction over probate matters, p. 298.

Affirmed in *Deck v. Gerke*, 12 Cal. 436; *S. C. 73 Am. Dec. 556*; *Aldrich v. Willis*, 55 Cal. 86, control over conduct of guardian ad litem; *Rosenberg v. Frank*, 58 Cal. 400, 401, jurisdiction of action to construe will. Cited in *Deck v. Gerke*, 73 Am. Dec. 560, discussing jurisdiction of chancery over settlement of estates, etc.

Same.—Court of chancery may set aside decrees obtained by fraud on an original bill filed for the purpose, p. 298.

Approved as authority in *Manlon v. Fahy*, 11 W. Va. 494, 496.

5 Cal. 299-300. BARNSTEAD v. EMPIRE MIN. COMPANY.

Partnership.—One mining partner cannot sue another at law. The remedy is by bill in equity for a dissolution and account, p. 299.

Cited to this ruling, in *Skillman v. Lachman*, 83 Am. Dec. 110, note.

5 Cal. 300-306. EX PARTE KNOWLES.

Power to Naturalize is Made a judicial power by congressional act, and Congress cannot confer judicial power upon state courts, p. 301.

Approved in *United States v. Severino*, 125 Fed. 951, perjury committed in making preliminary affidavit required by state law in naturalization proceedings is not punishable in federal courts.

When Congress Establishes Uniform Rule of naturalization it is executed by the states, p. 302.

Approved in *United States v. Severino*, 125 Fed. 954, 955, perjury committed in preliminary affidavit required by state statute in naturalization proceedings is not punishable in federal court. Distinguished in *Levin v. United States*, 128 Fed. 828, St. Louis court of appeals is empowered to admit qualified aliens to citizenship.

Naturalization.—Courts of inferior and limited powers, having only statutory, and not common-law jurisdiction, have no power to grant naturalization, p. 302.

Disapproved in *Matter of Conner*, 39 Cal. 101, S. C. 2 Am. Rep. 429, holding that the county courts, as organized, had power to issue papers of naturalization. Cited as authority in *State v. Boyd*, 31 Neb. 710, holding that naturalization cannot be established by parol. Denied in *Robertson v. Baldwin*, 165 U. S. 278, so far as the decision conflicts with the doctrine that Congress may authorize state officers to naturalize aliens.

5 Cal. 306-307. TOUCHARD v. TOUCHARD.

Municipal Corporations.—A municipal corporation, apart from its delegated powers of government, must be looked upon and treated as a private person, and its contracts construed in the same manner, and with like effect, as those of natural persons, p. 307.

Approved in *Hart v. Burnett*, 15 Cal. 599, discussing right of pueblo to regrant after condition broken; *Water Co. v. Breed*, 139 Cal. 437, holding city liable for reasonable value of water furnished, although ordinance therefor was invalid; *Monteith v. Parker*, 36 Or. 175, 78 Am. St. Rep. 770, holding city liable for interest on unpaid warrants; *Argenti v. San Francisco*, 16 Cal. 270; also in dissenting opinion of *Buskirk and Pettit, JJ.*, in *Lucas v. Board of Commissioners*, 44 Ind. 575. Discussed in *Holliday v. West*, 6 Cal. 525, which was an action of ejectment, involving the doctrines of the Mexican civil law. So, in dissenting opinion of *Cope, J.*, in *Hart v. Burnett*, 15 Cal. 618, and is

referred to in the prevailing opinion in the same case, p. 600, as having been overruled. Examined in *Norris v. Moody*, 84 Cal. 146-150, denying that the decision was overruled in *Holliday v. West*, supra. Cited in *Commonwealth v. Cullen*, 53 Am. Dec. 471, note. Cited in *State v. Denny*, 118 Ind. 417, as authority for the ruling stated.

5 Cal. 308-310. FITZGERALD v. URTON.

Mines.—Occupant of mineral land may rely upon his possession against a mere trespasser, p. 309.

Cited as authority in *Kellogg v. King*, 114 Cal. 383, S. C. 55 Am. St. Rep. 77, granting an injunction to restrain threatened trespass upon a gaming preserve.

Same.—Act prescribing rights of miners cannot be extended by implication to a class not specially provided for, p. 309.

Affirmed in *Tartar v. Mining Co.*, 5 Cal. 398; *Burdge v. Underwood*, 6 Cal. 46, holding that a miner has no right to dig or work within the enclosure surrounding a dwelling-house; *Boggs v. Merced Mining Co.*, 14 Cal. 377; *Rupley v. Welch*, 23 Cal. 456; and cited in *Jennison v. Kirk*, 98 U. S. 462, note; *McClintock v. Bryden*, 63 Am. Dec. 94, 95, 96, 110, note; *Levaroni v. Miller*, 91 Am. Dec. 694, 695, note.

Same.—Persons settled in good faith upon lots in mining towns, and carrying on business, should be reasonably protected, p. 310.

Affirmed in *Rogers v. Soggs*, 22 Cal. 453.

5 Cal. 310-312. PAYNE v. TREADWELL.

Ejectment.—To support the action, four things are necessary, namely: Title, lease, entry, and ouster, p. 311.

Cited in *Watson v. Zimmerman*, 6 Cal. 47, holding that to recover on prior possession, the plaintiff must allege and prove an actual ouster; in *Toland v. Mandell*, 38 Cal. 43, holding that to maintain ejectment, a right of entry and possession is all that is required. Distinguished in *Alexander v. Campbell*, 74 Mo. 145, as being based on a statute essentially different.

Same.—Mere averments in complaint, that plaintiffs have lawful title as owners in fee simple of the premises, and that the defendant is in possession, and unlawfully withholds the same, are insufficient, pp. 311, 312.

Cited in *Jones v. Memmott*, 7 Utah, 341, 343, as overruled by *Payne v. Treadwell*, 16 Cal. 246, and other cases; and see *Wilmington etc. Co. v. Garner*, 27 S. C. 52, where case disapproved.

Overruled in *Payne v. Treadwell*, 16 Cal. 246, so far as it decides that a more particular statement of the circumstances of defendant's possession or withholding is necessary; and disapproved as to this point in *Tyson v. Shepherd*, 90 N. C. 316.

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5 Cal. 314. FORD v. SMITH.

Evidence.—Receipts executed by third party, acknowledging the payment of money, are but secondary evidence, p. 314.

Referred to and distinguished in *People v. Van Ewan*, 111 Cal. 148.

5 Cal. 315-318. HASTINGS v. VAUGHN.

Deed.—Delivery of is a question of fact, depending more upon the intention of the parties, than upon the mode of fulfilling the intention, p. 318.

Approved in *Black v. Sharkey*, 104 Cal. 281. Cited in *Whitney v. American etc. Co.*, 127 Cal. 467, holding no delivery shown under facts stated. Examined and cited as authority in *Hibberd v. Smith*, 67 Cal. 553, 558, 562, S. C. 56 Am. Rep. 730, 739, holding that delivery is not complete until the person delivering has so dealt with the instrument as to lose all control over it. Cited in *Hannah v. Swarner*, 34 Am. Dec. 444, note.

Same.—An impression upon paper constitutes a good seal, p. 318.

Approved in *Swink v. Thompson*, 31 Mo. 340, holding that a mere scroll affixed to the end of the name is sufficient.

Same.—If the acknowledgment of a deed be defective, its registration will not be of such a character as to charge constructive notice, p. 319.

Cited as authority in *Stevens v. Hampton*, 46 Mo. 407, and *Tavener v. Barrett*, 21 W. Va. 688; *Spegal v. Krag etc. Co.*, 21 Ind. App. 209, on point that authority of notary cannot be questioned collaterally; also in *Livingston v. Kettelle*, 41 Am. Dec. 173, note; *Rindskoff v. Malone*, 74 Am. Dec. 369, note.

5 Cal. 319-323. FORD v. HOLTON.

Appeal.—All intendments are in favor of the regularity of the court below, and error will not be presumed, p. 321.

Rule affirmed in *Owen v. Morton*, 24 Cal. 378.

Ejectment.—Practice act permits allowance for improvements to the extent of being used as a setoff to the damages for withholding the property recovered, p. 321.

Cited as authority in *Childs v. Shower*, 18 Iowa, 269, discussing constitutionality of statute compensating bona fide occupant for permanent and beneficial improvements. Cited in *Whitledge v. Wait*, 2 Am. Dec. 725, note.

5 Cal. 323-325. MEYER v. GORHAM.

Chattel Mortgage.—Stipulating for enjoyment of possession by mort-

gagor until breach of condition, is void under the statute of frauds, as to all except the parties to it, p. 324.

Cited as authority in *Gassner v. Patterson*, 23 Cal. 301, holding the parties to a chattel mortgage to a strict performance of the conditions on which the validity of the mortgage depends.

5 Cal. 327-329. **CONROY v. FLINT.**

Damages.—Nominal only are recoverable, when property, the subject of the suit, is delivered and accepted, pending the suit, p. 328.

Cited as authority to this point, in *Jones v. Smith*, 79 Me. 455.

5 Cal. 329-331. **SMITH v. HARPER.**

Conditional Payment.—When holder of a note accepts a draft or check in payment, he is not bound to give up the note before payment of the draft or check, p. 330.

Rule approved in *Comptoir D'Escompte v. Dresbach*, 78 Cal. 20. Cited in *Belville Sav. Bank v. Bornman*, 124 Ill. 206, holding that where a note or draft is taken in renewal of a former one, the presumption of law is that the new note is not a payment of the old one, as between the parties thereto. So, to same effect, in *Young v. Hibbs*, 5 Neb. 437.

Note.—Surrender is *prima facie* evidence of payment, p. 330.

Cited in *Chamberlain v. Woolsey*, 60 Neb. 523, further holding burden to be on creditor to show nonpayment in fact.

5 Cal. 332-334. **TAYLOR v. BROOKS.**

County Expenses.—Under act of 1850, respecting county treasurers, one who registers his warrants becomes a preferred creditor, and is to be paid as soon as there are sufficient funds in the treasury, and the prior registered warrants are paid, p. 333.

Principle approved in *McCall v. Harris*, 6 Cal. 283, construing statute of 1855, creating boards of supervisors. So, in *Mason v. Purdy*, 11 Wash. St. 599, construing a similar statute. Cited in *Phillips v. Reed*, 107 Iowa, 337, and *S. C.*, 109 Iowa, 194, construing local statutes.

5 Cal. 334-336. **PETERS v. JAMESTOWN BRIDGE COMPANY. S. C.**
63 Am. Dec. 134.

Mortgages.—Deed from mortgagee to third party, for conveyance of the mortgaged premises, does not operate as an assignment of the mortgage, p. 336.

Approved as authority, in *McCamant v. Roberts*, 87 Tex. 244. So cited, in *Hunt v. Hunt*, 25 Am. Dec. 410, note.

Same.—A mortgage is a mere security for a debt, and cannot pass without a transfer of the debt, p. 336.

Cited in *Wood v. Bragg*, 75 Minn. 530, holding guaranty assigned on transfer of note and mortgage; dissenting opinion in *Hooper v. Young*, 140 Cal. 282, on point that deed by mortgagee of the land does not pass his interest in the debt. Approved and applied in the following cases: *Payne v. Bensley*, 8 Cal. 267, holding that a pledge of personal property is a "mortgage," within the meaning of the attachment act; *McMillan v. Richards*, 9 Cal. 410, S. C. 70 Am. Dec. 662, discussing the foreclosure, and results of foreclosure suit; *Nagle v. Macy*, 9 Cal. 429, holding that the debt and mortgage are inseparable; so, in *Willis v. Farley*, 24 Cal. 498; so, in *Hyde v. Mangan*, 88 Cal. 327; *Ladue v. Railroad Co.*, 13 Mich. 396; S. C. 87 Am. Dec. 763. Cited in support of the doctrine stated, in *McMillan v. Richards*, 70 Am. Dec. 675, note; 73 Am. Dec. 682, note; *Bethlehem v. Annis*, 77 Am. Dec. 705, note; *Carroll v. Ballance*, 79 Am. Dec. 360, note; *Bank of State v. Anderson*, 83 Am. Dec. 396, note; *Craig v. Parkis*, 100 Am. Dec. 475, note.

5 Cal. 337-338. CHEEVER v. FAIR.

Mortgages.—Where a mortgage covers several parcels, and the mortgagor conveys one or more of them, and the mortgagee has no notice of the transaction, he could have all the parcels in the mortgage subjected to the payment of his debt, p. 338.

Cited as authority in *Adair v. Mergentheim*, 114 Ind. 308, holding that the mortgagee has a right to presume, until he has notice to the contrary, that the condition of affairs respecting the property remains the same. So, to same effect, in *Gage v. McGregor*, 61 N. H. 49. Cited as to the right of subsequent encumbrancers to compel the general mortgagee to satisfy his debt by selling in the inverse order of the sales or mortgages by the owner, in *Abbott v. Powell*, 6 Sawyer, 94; and also cited on the subject, in *Morrison v. Beckwith*, 16 Am. Dec. 142, note.

5 Cal. 339-341. GOODALE v. WEST.

Evidence.—Objection to sufficiency of should be made at the time it is offered to be introduced, p. 341.

Approved in *People v. Rolfe*, 61 Cal. 542, and holding that in such case a motion to strike out should not be allowed. Cited in *Schroeder v. Gerneinder*, 10 Nev. 367, holding that objection to deed should be made when tendered.

Same.—A refusal in writing to execute a conveyance is evidence proving a demand of such conveyance, p. 341.

Cited as authority in *Kinhead v. Shreve*, 17 Cal. 276, maintaining that a demand for a deed must be made; and so, in *Gray v. Dougherty*, 25 Cal. 279.

To Entitle a Party to Specific Performance, he must have performed, on his part, every essential of the agreement, p. 341.

Approved in *Evans v. Lee*, 12 Nev. 309.

5 Cal. 342. **GAVEN v. DOPMAN.**

New Trial.—Not granted on ground of newly discovered evidence which is merely cumulative, p. 342.

Approved in *Lander v. Miles*, 3 Oreg. 43.

5 Cal. 343-345. **DICKEY v. HURLBURT.**

Legislation.—Legislature cannot confer upon a county judge the power of designating the place and manner of holding an election, p. 344.

Approved in *People v. Town of Nevada*, 6 Cal. 144, holding that the act of 1850, conferring upon the county court the power of incorporating towns, is unconstitutional. Principle approved also, in *People v. Sanderson*, 30 Cal. 167. Distinguished in *Upham v. Supervisors*, 8 Cal. 384, which holds that the legislature can delegate the power to the voters of a county, to select a county seat. Overruled in *People v. Provines*, 34 Cal. 526, 531, as to rule of interpretation given to the third article of the state constitution. Cited as to authority conferred upon courts and judges, in *Mendenhall v. Burton*, 42 Kan. 574. Explained and distinguished in *State v. Burbridge*, 24 Fla. 128, 135, sustaining legality of election held under provisions of city charter.

Elections.—Time and place are of the substance of every election, p. 344.

Cited as authority to this point, in *State v. Ruark*, 34 Mo. App. 331, time of holding election under local option law; *District Township v. Independent District etc.*, 34 Iowa, 309, time of holding election to vote upon organization of independent school district; *Ex parte Rodriguez*, 39 Tex. 773, 776, holding that an election must be legal and valid to subject a party to the penalty of the statute against illegal voting. Also cited in note to *People v. Bates*, 83 Am. Dec. 751.

Election is not invalidated by failure of municipal officers to make call therefor where time is appointed by law, p. 344.

Cited in *Sanchez v. Fordyce*, 141 Cal. 431, noted under *People v. Brenham*, 3 Cal. 477.

5 Cal. 345-346. **JONES v. BAILEY.**

Arbitration.—Partner cannot bind copartner by a submission of partnership matters to arbitration, but the submission would be good as to him, p. 346.

Approved as authority, in *Taylor v. Smith*, 93 Mich. 163, where husband and wife joined in a submission to arbitration, and the husband

was held bound, but not so the wife. Cited as authority that one partner has not implied authority to bind his copartner by a submission to arbitration, in *Walker v. Bean*, 34 Minn. 430. So, in *Hutchins v. Johnson*, 30 Am. Dec. 630, note, collecting and collating the authorities.

5 Cal. 347-351. **PEOPLE v. REYES.**

Criminal Law.—Extent of the examination of jurors on the voir dire in criminal trials, considered, pp. 349, 350.

Approved as the correct and proper practice, in *Pinder v. State*, 27 Fla. 375; S. C. 26 Am. St. Rep. 78. So, in the analogous case of *Lavin v. The People*, 69 Ill. 305; so, in *State v. Mann*, 83 Mo. 599; *State v. McAfee*, 64 N. C. 341; *State v. Boyle*, 104 N. C. 835. Cited in *Purple v. Horton*, 27 Am. Dec. 174, note, where the decisions on the subject are fully collected.

Same.—Prejudice is a state of mind, which, in the eye of the law, has no degree, p. 350.

Approved in *Monaghan v. Agricultural etc. Ins. Co.*, 53 Mich. 246. Cited in *Nelms v. State*, 53 Am. Dec. 101, note; *Commonwealth v. Brown*, 9 Am. St. Rep. 745, note, where the subject is discussed at length.

5 Cal. 351-353. **ARGENTI v. BRANNAN.**

Sale by Agent is ratified by principal for purchase price, p. 353.

Cited in *Mullaney v. Evans*, 33 Or. 33, holding sale ratified under facts stated.

5 Cal. 353-354. **PEOPLE v. LEE.**

Change of Venue.—Sufficient ground for, where one hundred citizens united in employing counsel to prosecute the defendant, p. 354.

Commented upon in *People v. Graham*, 21 Cal. 265, the court saying, "It appears to have been decided without an examination of the law as it is now settled, and we should not be justified in applying it as authority in any case falling short of it in any degree." So, in *State v. Millain*, 3 Nev. 434, 462; and referred to in *Boyle v. The People*, 4 Colo. 181; S. C. 34 Am. Rep. 79, as being modified in *People v. Graham*, supra. Cited in *Shattuck v. Myers*, 74 Am. Dec. 245, note.

Same.—Order refusing change of venue will be reviewed in cases of gross abuse of discretion, p. 354.

Cited in *People v. Fisher*, 6 Cal. 155, sustaining the correctness of the decision.

5 Cal. 355-356. **PEOPLE v. LITTLEFIELD.**

Criminal Law.—Indictment is sufficiently certain as to time, if it

appear from it that the offense was committed at some time prior to the finding of the indictment, p. 356.

Cited as authority in *State v. Elliott*, 34 Tex. 151; *State v. Harp*, 31 Kan. 498; *State v. Thompson*, 10 Mont. 559; *State v. Williams*, 13 Wash. St. 338, cases holding that an indictment laying the time of the offense "on or about" a certain date, is sufficient.

Same.—An indictment charging the defendant with feloniously taking "three head of cattle," without showing the particular species is sufficiently certain, p. 356.

Approved in *State v. King*, 31 La. An. 179, an information charging that the accused stole "one mule." Cited in *People v. Warren*, 130 Cal. 684, sustaining indictment for larceny of "four calves." So, to same effect, in *State v. Stelly*, 48 La. An. 1480. So, in *State v. Credle*, 91 N. C. 646, an indictment for injury to livestock, describing the animal injured as a "certain cattle beast." So, in *United States v. Jones*, 69 Fed. Rep. 982, an indictment for larceny describing the property as "gold metal" of a specified value.

Same.—Description in indictment is sufficiently certain if no legal prejudice can result therefrom to the defendant, p. 356.

Approved in *People v. Ah Woo*, 28 Cal. 21, holding that an indictment for forging an instrument in a foreign language is good, if it set out a translation in the English language of the instrument charged to be forged.

Same.—In cases of grand larceny, if the jury do not agree to the punishment of death upon finding the defendant guilty, they should find a general verdict, p. 356.

Approved in *People v. Welch*, 49 Cal. 180, indictment for murder, construing provisions of Penal Code. So, in *Territory v. Miller*, 4 Dak. Tr. 179, construing Penal Code of Dakota.

5 Cal. 357-359. PEOPLE v. HASKELL.

Officers.—The legislature has power to alter or abridge the term of office of purely legislative creation, pp. 358, 359.

Affirmed in *Attorney-General v. Squires*, 14 Cal. 17, office of sheriff; *Cohen v. Wright*, 22 Cal. 319, office of attorney at law; *Pennie v. Reis*, 80 Cal. 269, case of police officer; and approved in *People v. Wright*, 70 Ill. 395, office of police commissioner; *People v. Van Gaskin*, 5 Mont. 367, 368, office of county commissioner. Cited as authority for the proposition that a statute should have a prospective operation only, unless otherwise expressly declared in *Farrell v. Pingree*, 5 Utah, 448, 450. Cited in *Davidson v. Carson*, 1 Wash. Ter. 311, sustaining act of Congress as to terms of territorial officers. Also, cited in *Hoke v. Henderson*, 25 Am. Dec. 703, note, discussing subject of legislative control of offices.

5 Cal. 360-365. **MAY v. HANSON.** 63 Am. Dec. 135.

Ferryman are Common Carriers, and the law has imposed upon them the same duties and liabilities, p. 364.

Rule approved as authority in *Slimmer v. Merry*, 23 Iowa, 94. Cited in *Chevallier v. Straham*, 47 Am. Dec. 653, note, collecting the authorities on the subject; *Sanders v. Young*, 73 Am. Dec. 176, note; also in 87 Am. Dec. 720, 722, note.

Ferryman Becomes Liable as soon as he signifies his assent or readiness to receive the passenger, or has accepted and received the property, for carriage, p. 364.

Affirmed in *Griffith v. Cave*, 22 Cal. 535; S. C. Am Dec. 82. Cited 64 Am. Dec. 124, note.

Negligence.—In an action for injury, if the negligence of the plaintiff contributed to produce the injury, the burden of proving it is on the defendant, p. 365.

Affirmed in *Finn v. Vallejo Street Wharf Co.*, 7 Cal. 255; and approved as authority in *Sheff v. City of Huntington*, 16 W. Va. 317. Cited in 55 Am. Dec. 519, note.

New Trial.—Terms may be imposed to the granting of new trials in proper cases, p. 365.

Affirmed in *Battelle v. Connor*, 6 Cal. 141, granting new trial on condition that defendant should file a stipulation waiving all objections to the pleadings, and consenting that the case be tried on the merits. Cited, 67 Am. Dec. 654, note. Cited, *Delmas v. Margo*, 78 Am. Dec. 518, note.

General citation: *Krutz v. Robbins*, 12 Wash. 12.

5 Cal. 366-369. **MONTGOMERY v. HUNT.**

Sale of Personalty.—A delivery as immediate and complete as the nature of the case will admit, followed by an actual and continued change of possession, is sufficient, p. 369.

Approved in the analogous cases of *Hodgkins v. Hook*, 23 Cal. 584; *Williams v. Lerch*, 56 Cal. 334. Cited in *Rosenbaum v. Hayes*, 10 N. Dak. 323, holding possession sufficient to sustain factor's lien under local statutes.

5 Cal. 373-380. **PEOPLE v. FOLSOM.**

Alien may Hold Real Estate against every one, and even against the government, until office found, p. 378.

Doctrine approved in *Merle v. Mathews*, 26 Cal. 477; *Racouillat v. Sansevain*, 32 Cal. 386; *McNeil v. Polk*, 57 Cal. 324; *Harley v. State*, 40 Ala. 696; *Territory v. Lee*, 2 Mont. 129. Cited in *Commonwealth v. Hite*, 29 Am. Dec. 234, note on subject; also in *Avery v. Everett*,

6 Am. St. Rep. 382, note. Also cited as authority that this is the rule of the civil law of Mexico, in *Hammekin v. Clayton*, 2 Woods, 339.

There is no Common Law of the United States, as contradistinguished from the individual states, p. 379.

Approved in *Gatton v. Chicago etc. Railroad Co.*, 95 Iowa 136; and cited to this proposition, in *re Wong Kim Ark*, 71 Fed. Rep. 385.

5 Cal. 381-387. *PEOPLE v. GERKE*.

Aliens.—Treaties made by the United States removing the disability of aliens to inherit, are valid, and within the intention of the federal constitution, pp. 384, 386.

Cited in *Blythe v. Hinckley*, 127 Cal. 435, discussing right of alien to inherit. Doubted in *Siemssen v. Bofer*, 6 Cal. 252, discussing the constitutionality of a similar treaty. Commented on, in *Forbes v. Scannell*, 13 Cal. 282, the court saying the decision "went further than it is necessary to go to uphold the treaty (with China) and laws in question." Approved in *Wunderle v. Wunderle*, 144 Ill. 54; *Opel v. Shoup*, 100 Iowa, 423; and *Geofroy v. Riggs*, 133 U. S. 267. Principle of the decision also approved, in *Parrott's Chinese case*, 6 Sawyer, 371, S. C. 1 Fed. Rep. 503, wherein the constitutionality of the treaty with China of 1868, is considered. Cited in *Hauenstein v. Lynham*, 100 U. S. 490, holding that the constitution, laws, and treaties of the United States are a part of the law of every state.

Constitutional Law.—A state law in conflict with the provisions of a treaty must give way, p. 385.

Cited as authority in *Parrott's Chinese case*, 6 Sawyer, 371, S. C. 1 Fed. Rep. 503, wherein the constitutionality of the treaty with China, of 1868, is considered. So, in *Re Race Horse*, 70 Fed. Rep. 611, treaty of 1868, between the United States and the Bannack Indians.

Same.—A constitution, like any other instrument, is to be construed so as to reconcile and give meaning and effect to all its parts, p. 382.

Approved in *Cohen v. Wright*, 22 Cal. 312.

5 Cal. 389-391. *PEOPLE v. CLINGAN*.

Appeal.—When a state is appellant, it is not necessary to file the usual undertaking on appeal, p. 389.

Approved as authority in *State v. Rushing*, 17 Fla. 226. Cited in *Harrison v. Stebbins*, 104 Iowa, 464, but holding rule inapplicable to counties under local statutes.

Office and Officer.—The fact that claimant to office of sheriff acted as sheriff, in connection with his certificate of election, is sufficient to raise the presumption that he had executed his bond and taken the oath of office, p. 391.

Approved in *Hull v. Superior Court*, 63 Cal. 176, which was a summary proceeding to recover books and papers pertaining to the offices of sheriff and tax collector.

5 Cal. 392-393. GUY v. MIDDLETON.

In judicial sales, the statute does not contemplate that possession shall change to the purchaser until expiration of time limited for redemption, p. 392.

Approved and applied in *Harlan v. Smith*, 6 Cal. 174; *Stout v. Macy*, 22 Cal. 650, cases of lands sold under decrees of foreclosure. Approved, also, in *Wood v. Conrad*, 2 S. Dak. 410; *Cantwell v. McPherson*, 3 Idaho, 725, proceeding under Revised Statutes, section 4498, to revive an original judgment does not accrue until fact that property was not subject to execution and sale becomes known to purchaser. Cited and distinguished in *Reynolds v. Lathrop*, 7 Cal. 46, holding that a purchaser at sheriff's sale can maintain an action for rent against the tenant in possession, before the expiration of the time allowed for redemption.

5 Cal. 395-399. TARTAR v. SPRING CREEK ETC. MINING COMPANY.

Prior Occupancy.—The law awards the right of peaceable enjoyment to the first occupant either of the public lands or of anything incident thereto, except in the case of agricultural and grazing lands, as against the privileges granted to miners, p. 398.

Doctrine affirmed in *Burdge v. Underwood*, 6 Cal. 46; *Merced Min. Co. v. Fremont*, 7 Cal. 325; S. C. 68 Am. Dec. 270; *State of California v. Moore*, 12 Cal. 70; *Boggs v. Merced Min. Co.*, 14 Cal. 376; *Rogers v. Soggs*, 22 Cal. 453, a case involving the right to the use of growing wood and timber upon the public mineral lands; *Rupley v. Welch*, 23 Cal. 456, right of first occupant to control water for irrigation; approved in dissenting opinion of Ross, J., *Lux v. Haggin*, 69 Cal. 446; so, in *Natoma etc. Min. Co. v. Hancock*, 101 Cal. 66, dissenting opinion of McFarland, J.; so, in *Drake v. Earhart*, 2 Idaho 721, 722; so, in *Basey v. Gallagher*, 20 Wall. 682. Cited as to rights of miners in note to *Jennison v. Kirk*, 98 U. S. 462. So, in *McClintock v. Bryden*, 63 Am. Dec. 94, 96, 103, note, discussing the subject at length; so, in 63 Am. Dec. 116, note; so, in *Levaroni v. Miller*, 91 Am. Dec. 694, note.

5 Cal. 400-401. THROCKMORTON v. BURR.

Cotenancy.—Tenants in common of an estate must sue separately in real actions, p. 401.

Followed as authority in *Covillaud v. Tanner*, 7 Cal. 40; *Park v. Kilham*, 8 Cal. 79.

5 Cal. 401-403. SEALE v. MITCHELL.

Mexican Title.—Party suing for a lot in the former pueblo of San Francisco, and deraining title from the city, is *prima facie* entitled to recover, p. 402.

Construed in *Hart v. Burnett*, 15 Cal. 587, 598, 618, and held not to be distinguishable from the case at bar.

Redemption.—Statute allowing redemption of lands sold under execution, is inoperative as to those cases where the debt was contracted before the passage of the act, p. 402.

Approved in construing a similar statute, in *Scobey v. Gibson*, 17 Ind. 574; S. C. 79 Am. Dec. 492; *Welch v. Cross*, 146 Cal. 630, subsequent change of statute extending time for redemption before levy and sale under execution on judgment does not apply to redemption from such sale. Cited in *Goshen v. Stonington*, 10 Am. Dec. 138, note.

Jurisdiction.—Superior court of City of San Francisco had constitutionally all the powers specified in the act creating it, p. 403.

Affirmed in *Vassault v. Austin*, 36 Cal. 696.

Stare Decisis.—In construing statutes and the constitution, the rule of stare decisis is to be adhered to, p. 403.

Approved in *Evans v. Job*, 8 Nev. 344; *Multnomah County v. Sliker*, 10 Oreg. 66, question of constitutionality of statute; *Germania etc. Co. v. James*, 89 Fed. 817, 61 U. S. App. 11, applying rule to practice of Interior Department; *Shreve v. Cheesman*, 69 Fed. Rep. 791, applied in construing statutes which establish or declare rules of property.

5 Cal. 404-405. LEET v. WADSWORTH.

Agency.—Purchase of property by a factor in his own name, makes him to all the world the apparent owner, and he has the right to sell or pledge, p. 405.

Affirmed in *Hutchinson v. Bours*, 6 Cal. 385; and approved as authority in *Dewing v. Hutton*, 40 W. Va. 536. Cited in *Weyse v. Crawford*, 85 Cal. 202, as sustaining the rule that possession by a factor, who does not purchase on his own account, is not evidence of ownership. Examined in *Bragg v. Meyer*, 1 McAllister, 411, 412, holding that if one is acting notoriously as broker, his operating in two or three instances on his own account does not denude him of the character of broker. Cited in *Bigelow v. Walker*, 58 Am. Dec. 164, note on subject.

5 Cal. 406-407. CARPENTIER v. HART.

Judgments.—After adjournment of the term, the court loses all control over its judgments, unless reserved by statute, of by some appropriate action on the part of the court itself, p. 406.

Cited in *White v. White*, 130 Cal. 599, holding judgment in divorce

suit conclusive as to relief granted and withheld, and denying right to make further order of sale by receiver thereafter; *Daniels v. Daniels*, 12 Nev. 121, as to order after term vacating default. Affirmed in *Shaw v. McGregor*, 8 Cal. 521; *De Castro v. Richardson*, 25 Cal. 51, which holds that the power to amend the record after the term only extends to the correction of a mere clerical error; *Casement v. Ringgold*, 28 Cal. 337, in which the question was presented in precisely the same form; *Wiggin v. Superior Court*, 68 Cal. 401, excepting from the general rule clerical errors and misprisions. Approved as authority in *Darke v. Ireland*, 4 Utah, 196. Cited in *Brackett v. Banegas*, 99 Cal. 626, 627; *Kaufman v. Shain*, 111 Cal. 20, S. C. 52 Am. St. Rep. 141, where a different rule, prescribed by the Code of Civil Procedure, is pointed out and construed.

Same.—Party may resort to a court of equity for relief against a judgment obtained by fraud.

Approved in *Cavanaugh v. Smith*, 84 Ind. 383. Cited in *Eppinger v. Scott*, 130 Cal. 277, sustaining injunction against execution on satisfied judgment.

5 Cal. 409-410. **MORGAN v. HUGG.**

Appeal.—Errors cannot be relied on in appellate court, when not taken advantage of and raised at the trial, p. 410.

Rule approved in *State v. Dodson*, 4 Oreg. 67; *State v. Zorn*, 22 Oreg. 592. Cited in 56 Am. Dec. 329, note.

5 Cal. 412-413. **PICKETT v. SUTTER.**

Contracts.—Influence of liquor which avoids a contract, must be shown to exist to such an extent as to seriously impair the reasoning faculties, p. 412.

Approved in *Loftus v. Maloney*, 89 Va. 604.

5 Cal. 414-415. **DOBBINS v. BOARD OF SUPERVISORS.**

Construction.—Where two statutes regulate the same matter, one merely incidentally and the other mainly, the latter must govern, p. 415.

Rule followed in *People v. McGuire*, 32 Cal. 144.

5 Cal. 416-417. **GUY v. FRANKLIN.**

Judgments.—A mistake in computation of interest, or taxation of costs, should be called to the attention of the court below, and cannot be attacked for the first time on appeal, p. 417.

Approved as authority in *Howard v. Richards*, 2 Nev. 133; S. C. 90 Am. Dec. 523; *Ehrhardt v. Curry*, 7 Nev. 222.

Same.—In a judgment in a suit on a note bearing interest, the interest is to be computed and made part of the judgment, and the judgment to bear the agreed interest, p. 417.

Affirmed in *Emeric v. Tams*, 6 Cal. 156; *McCann v. Lewis*, 9 Cal. 247; *Mount v. Chapman*, 9 Cal. 297; *Corcoran v. Doll*, 32 Cal. 88; and approved in *Union Inst. for Savings v. Boston*, 129 Mass. 91; S. C. 37 Am. Rep. 310.

Damages.—In case of failure to pay money due, the measure of damages is the amount of money owing and the interest agreed upon, p. 417.

Rule approved in *Oppenheimer v. Fritter*, 3 Tex. Civ. App. 320. Cited in 56 Am. Dec. 370, note.

5 Cal. 418. **QUIGLEY v. GORHAM.** 63 Am. Dec. 139.

Statutes.—Words of, must be interpreted according to their common acceptance, p. 418.

Approved in *Equitable Life Ins. Co. v. Gleason*, 56 Iowa, 49, construing a statute providing for mortgage foreclosure. So, in *Cone v. Lewis*, 64 Tex. 333, 53 Am. Rep. 768, construing exemption statute, with reference to meaning of the term "wagon." Cited in 63 Am. Dec. 238, note; 70 Am. Dec. 415, note; 53 Am. Rep. 771, note.

5 Cal. 426-428. **GILMAN v. COUNTY OF CONTRA COSTA.** Again 6 Cal. 676; 8 Cal. 52.

Counties.—Under act of 1854, counties may prosecute and defend actions, in the same manner and with the same effect as individuals, p. 428, and S. C. again 8 Cal. 57.

Affirmed in *Placer County v. Astin*, 8 Cal. 305.

Same.—Jurisdiction of county to build bridge and liability of in respect thereto, considered, p. 428.

Cited as authority in *McCullom v. Black Hawk County*, 21 Iowa, 418. Cited, also, in 68 Am. Dec. 300, note.

5 Cal. 428-429. **ROBINSON v. HOWARD.**

Judgment upon Demurrer bars a subsequent action when it determines the whole merits of the case, p. 429.

Principle affirmed in *McLaughlin v. Kelly*, 22 Cal. 222. Approved and applied in *Los Angeles v. Mellus*, 58 Cal. 20, maintaining the conclusiveness of a judgment in an action for subsequent installments due. Approved in *Lockett v. Lindsay*, 1 Idaho, 327, 329, holding that a judgment on demurrer to a bill in chancery, that the bill does not state facts sufficient to constitute a cause of action is, in no sense, a judgment on the merits. So to same effect in *Kleinschmidt v. Binzel*, 14 Mont. 53; S. C. 43 Am. St. Rep. 607; *Aurora City v. West*, 7 Wall.

100; *Gould v. Evansville etc. R. R. Co.*, 91 U. S. 533; *Lindsay v. Union Silver Star Min. Co.*, 115 Fed. 50.

5 Cal. 435. CARRIERE v. MINTURN.

Mortgage.—Counsel fees stipulated to be paid on foreclosure are not the cause of action, but a mere incident to it, and may be fixed by the court, at its discretion, and no averment in the complaint as to what would be a reasonable fee is necessary, p. 435.

Cited in *Thrasher v. Moran*, 146 Cal. 685, where mortgages provided for ten per cent. counsel fees and complaint prayed for principal with interest and for application of proceeds to payment of amount found due with interest, costs and counsel fees, decree providing for less counsel fees than stipulated is valid; *McNamara v. Oakland etc. Assn.*, 131 Cal. 347, also holding finding as to reasonableness of fee unnecessary. Affirmed in *Monroe v. Fohl*, 72 Cal. 571, mortgage foreclosure; *Rapp v. Spring Valley Gold Co.*, 74 Cal. 534, foreclosure of mechanics' lien; so, in *Mulcahy v. Buckey*, 100 Cal. 490; *First Nat. Bank v. Holt*, 87 Cal. 161; *White v. Allatt*, 87 Cal. 248, and *Woodward v. Brown*, 119 Cal. 309, mortgage foreclosures. Examined in *Prescott v. Grady*, 91 Cal. 521, 522, an action at law upon a promissory note, and holding that the principal case is not authority for the proposition that the stipulation for counsel fees must not be pleaded.

5 Cal. 436. MONSON v. COOKE.

There is Surprise Where Referee Admits testimony over objection and it is thrown out after submission of cause, p. 436.

Approved in *Porter v. Printing Co.*, 26 Mont. 182, where plaintiff defaulted on counterclaim and court adopted findings of referee, but declared only part of counterclaims sufficiently pleaded, new trial granted on ground of surprise.

5 Cal. 437-443. WILLSON v. HERNANDEZ.

Administration.—A decree of the probate court ordering an administrator, on settlement, to pay over money in his hands into court, is void, and his refusal to do so is no breach of the conditions of his bond, p. 443.

Approved in *Estate of McMahon*, 19 Nev. 242, in which case an executor was ordered by the court to pay over the money in his hands to the county treasurer, to be placed to the credit of the heirs and devisees of the testator. Cited in *Commonwealth v. Stubb*, 51 Am. Dec. 528, note, fully discussing the subject.

5 Cal. 444. ELLIS v. JASZYNSKY.

Depositions.—If taken without notice to the adverse party are not admissible in evidence, p. 444.

Approved in *Gordon v. Warfield*, 74 Miss. 561.

5 Cal. 445-446. HILL v. NEWMAN. 63 Am. Dec. 140.

Right to Water must be treated as a right running with the land, and as a corporeal privilege bestowed upon the occupier or appropriator of the soil, p. 446.

Cited in *Smith v. Denniff*, 24 Mont. 21, discussing means of acquisition of such right; *Katz v. Walkinshaw*, 141 Cal. 135, discussing modification of common-law rules under local necessities. Approved as correctly defining the right to running water in California, in *Lux v. Haggin*, 69 Cal. 392; *Santa Paula Water Works v. Peralta*, 113 Cal. 43. *Heath v. Williams*, 43 Am. Dec. 279, note, collecting and reviewing the authorities. Also cited in notes in the following cases; 63 Am. Dec. 113, 116; 64 Am. Dec. 136; 65 Am. Dec. 401, 533; 68 Am. Dec. 234; 76 Am. Dec. 479; 20 Am. St. Rep. 225; 36 Am. St. Rep. 291.

5 Cal. 448. GRAY v. EATON.

New Trial.—In a chancery cause, the granting of a new trial is discretionary with the chancellor, and his action is not revisable, p. 448.

Cited as authority in *Still v. Saunders*, 8 Cal. 286. Referred to in *Gray v. Palmer*, 9 Cal. 637; S. C. 70 Am. Dec. 683; *Gray v. Larrimore*, 4 Sawy. 638, Fed. Cas. No. 5721. Overruled in *Duff v. Fisher*, 15 Cal. 390, stating that the decision was made without notice of the provisions of the Practice Act, which applied as well to equitable as to legal actions.

5 Cal. 449. JOYCE v. JOYCE.

Officers.—The act and return of a deputy sheriff is a nullity, unless done in the name and by the authority of his principal, p. 449.

Affirmed in *Rowley v. Howard*, 23 Cal. 403; *Reinhart v. Lugo*, 86 Cal. 398; S. C. 21 Am. St. Rep. 53; approved in *Gibbens v. Pickett*, 31 Fla. 151; and the principle approved in *Sammis v. Wightman*, 25 Fla. 558, where the return to the writ was in the name of the sheriff. So, in *Robinson v. Hall*, 33 Kan. 143, holding that a sheriff's deed executed by a deputy, to be valid, must be executed in the name of the sheriff. Cited as authority in *Fee v. Railroad Company*, 58 Mo. App. 96, holding that an officer's return in a garnishment proceeding should be signed by the officer. Cited in notes on subject, in *Ditch v. Edwards*, 26 Am. Dec. 415; *Lanfear v. Mestier*, 80 Am. Dec. 684.

Default.—In taking judgment by default, a strict compliance with the statute is required, p. 449.

Approved as authority in *Palmer v. McMaster*, 8 Mont. 195; *Barber v. Briscoe*, 8 Mont. 219. And cited as authority in *Kidd v. Mining Co.*, 3 Nev. 385, holding that appeal is a proper remedy to set aside a judgment by default irregularly and erroneously entered.

5 Cal. 450-453. LANDSBERGER v. GORHAM.

Attorneys.—Confidential attorney or counselor cannot be compelled to disclose communications made to him by his client in that capacity, p. 451.

Rule affirmed in *Gallagher v. Williamson*, 23 Cal. 333; 83 Am. Dec. 116.

Witnesses cannot be cross-examined, except as to facts and circumstances connected with the matter stated in his direct examination, p. 452.

Criticised, but the rule adhered to, in *Campau v. Dewey*, 9 Mich. 430. Disapproved in *Rush v. French*, 1 Ariz. Ter. 135, and preference given to the English rule. Cited in *Buckley v. Buckley*, 12 Nev. 441, holding that cross-examination should not be allowed to range outside of the subject matter of the evidence in chief. Distinguished in *State v. Larkins*, 5 Idaho, 208, defendant voluntarily taking stand in criminal prosecution may be cross-examined as to any facts testified on direct examination.

Objections to Answer are waived when not raised by demurrer, p. 454.

Cited in *Williams v. Stidger*, 22 Cal. 235, 83 Am. Dec. 65, as to objections to sufficiency of complaint.

5 Cal. 455-457. DILLON v. BYRNE.

Mortgage Security.—Where new mortgage is executed in lieu of old, for the same debt, the execution of the former and satisfaction of the latter may be regarded as simultaneous acts, p. 457.

Followed in *Birrell v. Schie*, 9 Cal. 107, the essential principle in the two cases being the same. Principle of the decision applied in *Swift v. Kraemer*, 13 Cal. 530; S. C. 73 Am. Dec. 604; so, in *Van Sandt v. Alvis*, 109 Cal. 169; 50 Am. St. Rep. 27; *Carr v. Caldwell*, 10 Cal. 385; S. C. 70 Am. Dec. 741.

Equity will not Lend Its Aid to do an injustice and assist a party from escaping a just liability, p. 457.

Approved in *Hirzel v. Schwartz*, 17 Colo. App. 472, refusing to cancel, as to wife's rights, deed of trust on homestead executed by husband and wife to obtain extension on debt due building association secured by trust deed on same premises, because notary was officer of association.

Same.—In case of a mortgage to secure purchase money, the debt is not lost by the acceptance of a new mortgage, intended to supply the old one and secure the same debt, p. 457.

Commented on and distinguished in *Guy v. Duprey*, 16 Cal. 199, S. C. 76 Am. Dec. 520, holding that a mere stranger, who voluntarily

pays money due on a mortgage, cannot claim to be substituted in place of mortgagee, and see *Van Loben Sels v. Bunnell*, 120 Cal. 683. Approved in *Himmelman v. Schmidt*, 23 Cal. 120, an action to foreclose a mortgage on the homestead of the mortgagor; so in *Walters v. Walters*, 73 Ind. 428; *Burnap v. Cook*, 16 Iowa, 156; 85 Am. Dec. 511; *Pratt v. Topeka Bank*, 12 Kan. 572; *Milholland v. Tiffany*, 64 Md. 464; *Causler v. Sallis*, 54 Miss. 449; *Chaffe v. Oliver*, 39 Ark. 545, in which cases the doctrine of subrogation or substitution is discussed. Cited in argument of counsel, in *Howell v. Bush*, 54 Miss. 445. So, in *Roby v. Bank*, 4 N. Dak. 162, S. C. 50 Am. St. Rep. 637, holding that a mortgage of the homestead to secure the purchase price executed by the fee owner need not be signed by the husband or wife of such party. And cited in *Brown v. Saul*, 16 Am. Dec. 182, note, as to who may intervene in suit; *Magee v. Magee*, 99 Am. Dec. 575, note, as to vendor's lien on homestead for purchase money; so, in *Young v. Shaner*, 5 Am. St. Rep. 706, note.

5 Cal. 457-458. **SIMPERS v. SLOAN.**

Married Woman has no power, as a general rule, to make a contract, p. 457.

Affirmed in *Poole v. Gerrard*, 6 Cal. 72; S. C. 65 Am. Dec. 481; and approved in *Vantillburg v. Black*, 3 Mont. 464.

5 Cal. 458-460. **PALMER v. GOODWIN.**

Negotiable Paper.—Holder of, indorsed before maturity, is supposed to be the bona fide owner thereof, and all intendments are in favor of his rights, p. 459.

Approved as authority in *Himmelman v. Hotaling*, 40 Cal. 116; S. C. 6 Am. Rep. 604.

5 Cal. 460-461. **ROBINSON v. PIOCHE.**

Intoxication of plaintiff is no defense to an action for damages for injuries caused by falling through an uncovered hole in the sidewalk of a public street, p. 461.

Approved in *Holmes v. Oregon etc. Ry. Co.*, 6 Sawyer, 290; S. C. 5 Fed. Rep. 539, an action for damages for wrongfully causing the death of libellant's intestate through alleged negligence. Principle of the decision applied in *Bullock v. Wilmington etc. R. R. Co.*, 105 N. C. 187. Cited in *Louisville etc. R. R. Co. v. Johnson*, 25 Am. St. Rep. 39, 46, note, discussing subject of intoxication as contributory negligence.

5 Cal. 461-462. **VALLEJO v. RANDALL.**

Venue.—Where action to foreclose mortgage is brought in wrong county, the court of its own motion should order a change of venue, p. 462.

Notes Cal. Rep.—14

Overruled in *Watts v. White*, 13 Cal. 324, holding that the court is not bound, of its own motion, to change the venue, where a suit for real estate is brought in the wrong county.

5 Cal. 463-465. **WASHBURN v. ALDEN.**

Witnesses.—a person cannot be examined as a witness, as to any matter in which he is interested, in favor of the party calling him, p. 464.

Affirmed in *Easterly v. Bassignano*, 20 Cal. 497, which was an action against two defendants, and it was sought to prove by one of them the fact of partnership against his codefendant. And so, in *Fairchild v. Amsbaugh*, 22 Cal. 574.

5 Cal. 465-466. **GREWELL v. HENDERSON.**

A nonresident defendant is entitled to forty days after the period of publication of the summons, in which to file his answer, p. 466.

Approved in *Conley v. Morris*, 6 Colo. 213, construing the Colorado statute; Approved in *Bowen v. Harper*, 6 Idaho, 657, where order of publication prescribed publication for one month, defendant served out of state has one month and forty days to answer.

5 Cal. 466-467. **SHAW v. DAVIS.**

Witnesses.—A broker, whose commissions depend on his principal's recovery in the action, is incompetent as a witness, on the ground of interest, p. 467.

Cited in opinion of counsel in *Live Yankee Co. v. Oregon Co.*, 7 Cal. 42, in which case it is held that a witness in the employ of the plaintiff at fixed wages, is not incompetent.

5 Cal. 467-470. **POSTEN v. RASSETTE.**

Appeal.—Objection to admissibility of deed in evidence must be taken on the trial, p. 468.

Applied in case of objection to instructions, in *Letter v. Putney*, 7 Cal. 423. Cited as to sufficiency of form of deed, in *Stanley v. Green*, 12 Cal. 166; *Lobdell v. Hall*, 3 Nev. 520, as to review of instructions not excepted to.

Evidence.—Contents of lost instrument, where no copy has been preserved, may be shown by parol evidence, p. 469.

Cited as authority in *Matter of Will of Warfield*, 22 Cal. 68; S. C. 83 Am. Dec. 55, case of petition for probate of will not on file; *Howe v. Taylor*, 9 Oreg. 293, undertaking of county clerk lost or stolen.

Power of Attorney.—If coupled with an interest, a court of equity will restrain its revocation, p. 469.

Cited as authority in *Marzion v. Pioche*, 8 Cal. 536, holding the power to be irrevocable only to the extent of the agent's interest.

Lost Instrument.—Substantial proof of contents is sufficient in absence of copy, p. 470.

Cited in *Kenniff v. Caulfield*, 140 Cal. 44, holding contents of lost deed sufficiently shown.

5 Cal. 470-471. **MUNROE v. THOMAS.**

Ferries.—A ferry is a franchise, and is not the subject of levy and sale under execution, p. 471.

Affirmed in *Thomas v. Armstrong*, 7 Cal. 287. Cited in *Ammant v. Turnpike Road*, 15 Am. Dec. 595, note.

Same.—It involves a personal trust, bestowed on the grantee upon conditions imposed upon him alone, and his liability cannot be removed by substitution, p. 471.

Doctrine approved in *Wood v. Truckee Turnpike Company*, 24 Cal. 487; so, in *People v. Duncan*, 41 Cal. 510; *Gregory v. Blanchard*, 98 Cal. 313; *In re Scott*, 6 Sawyer, 235; S. C. 11 Fed. Rep. 134. Questioned in *Montgomery v. Multnomah Railroad Co.*, 11 Oreg. 353; *Hackett v. Wilson*, 12 Oreg. 37; and disapproved in *Lippencott v. Allander*, 27 Iowa, 464; S. C. 1 Am. Rep. 302, as being unsupported by reason and principles of law. Cited in *Brunawick Gas Light Co. v. United Gas etc. Co.*, 35 Am. St. Rep. 395, note, collecting and collating the authorities on the subject.

5 Cal. 471-474. **MOORE v. McKINLAY.**

Warranty.—Will not be implied except in cases where goods are sold at sea, where the party has no opportunity to examine them, or in case of sale by sample, or of provisions for domestic use, p. 473.

Cited in *Emerson v. Brigham*, 6 Am. Dec. 117, discussing the subject in an extended note; also cited in *Moses v. Mead*, 43 Am. Dec. 680, note; *Fraley v. Bispham*, 51 Am. Dec. 488, note.

Same.—To constitute warranty, no precise words are necessary, p. 472.

Cited in *Ruiz v. Norton*, 60 Am. Dec. 619, note.

5 Cal. 474-475. **NICHOLSON v. PATCHIN.**

Hire of Services.—Services rendered without a new agreement after the contract term has expired are presumptively to be compensated at the same rate, p. 475.

Approved in *Standard Oil Co. v. Gilbert*, 84 Ga. 717; *McCullough v. Carpenter*, 67 Md. 560.

5 Cal. 476-478. CLARY v. HOAGLAND.

Certiorari is the Proper Remedy where a court exceeds its jurisdiction, p. 478.

Examined and distinguished in *Coulter v. Stark*, 7 Cal. 245, holding that a writ of certiorari is not the proper remedy where there has been no excess of jurisdiction. Cited in *Spring Valley W. W. v. Bryant*, 52 Cal. 135, as instance of issuance of writ; *People v. Spiers*, 4 Utah, 396, holding that when a justice of the peace acts without jurisdiction a writ of prohibition is a proper remedy, though an appeal would lie from the judgment of the justice.

Law of Case.—A decision of the supreme court in a given case becomes the law of the case, and cannot be again reviewed, the facts being the same, p. 478.

Affirmed in *Davidson v. Dallas*, 15 Cal. 82; *Lesse v. Clark*, 20 Cal. 417; and approved as authority in *Davenport v. Kleinschmidt*, 8 Mont. 480.

5 Cal. 478-479. PEARSON v. SNODGRASS.

Appeal.—Exception to admissibility of deed in evidence must be taken on the trial in the court below, p. 479.

Approved and applied in cases of instructions given or refused by the lower court, in *Letter v. Putney*, 7 Cal. 423; *Lobdell v. Hall*, 3 Nev. 520.

5 Cal. 480-482. OLENDORF v. SWARTZ. 63 Am. Dec. 141.

Negotiable Paper.—What amounts to a sufficient waiver of presentment and notice, to fix the liability of an indorser considered, p. 482.

Cited in 77 Am. Dec. 332, note; 80 Am. Dec. 327, note; 82 Am. Dec. 179, note; and 28 Am. Rep. 517, note.

5 Cal. 483-485. PRICE v. DUNLAP.

Negotiable Paper.—If lost or destroyed, plaintiff cannot maintain an action without first indemnifying the defendant, p. 484.

Construed in *Randolph v. Harris*, 28 Cal. 564, S. C. 87 Am. Dec. 140, holding that a tender of indemnity before suit is not fatal to the cause of action, but only affects the question of costs, and that in other respects, a tender at the trial is sufficient. Approved in dissenting opinion of Spear, J., in *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 61, in which case an action was maintained against the maker of a lost certificate of deposit, without the tender of an indemnity. Referred to as authority, in *Hoil v. Rathbone*, 98 Mich. 325, that, at common law, the plaintiff was not required to furnish indemnity when the note was not negotiable, or when payable to order and undorsed. Followed as to the sufficiency of the complaint in such action, in *Castro v. Wetmore*,

16 Cal. 380. Cited in *Edwards v. McKee*, 13 Am. Dec. 481, 482, note on subject; so, in 60 Am. Dec. 581, note.

Same.—The party to whom a note is made payable, is *prima facie* the owner, p. 485.

Construed and approved in *Giselman v. Starr*, 106 Cal. 658.

5 Cal. 485-486. **GROVER v. HAWLEY.**

Prior Possession of Public Lands entitles the possessor to maintain an action against a trespasser, p. 486.

Approved as authority in *Duggan v. Davey*, 4 Dak. Ter. 123, case of trespass on mining claim.

Same.—Right of enjoyment of possession to public lands may descend among the effects of a deceased person, and the right of the deceased be conveyed by a regular sale, p. 487.

Cited as authority that equitable estates descend, in *Eversdon v. Mayhew*, 65 Cal. 165; *Watson v. Sutro*, 86 Cal. 527; and the ruling approved in *Burch v. McDaniel*, 2 Wash. Ter. 64.

5 Cal. 487-488. **SAYRE v. NICHOLS.**

Agency.—An agent who signs his own name, instead of that of his principal, when he intends to bind the latter, renders himself liable, p. 488.

Affirmed in *Jones v. Post*, 6 Cal. 104.

Same.—Word "agent," appended to an agent's name, is merely *descriptio personae*, and does not affect his liability, p. 488.

On a second trial of the same case, 7 Cal. 537, S. C. 68 Am. Dec. 281, judgment for the defendant was affirmed, the court holding that the word "agent" was not mere *descriptio personae*, but the designation of the capacity in which he acted. Rule approved in *Hobson v. Hassett*, 76 Cal. 205, S. C. 9 Am. St. Rep. 194, in which case the defendant signed a promissory note in his own name, with the addition thereto of the word "president."

5 Cal. 488-490. **RIDDELL v. SHIRLEY.**

Fraudulent Sales.—A sale by an insolvent of his property to raise funds to discharge debts which are liens upon his homestead, is fraudulent and void as against his creditors, p. 490.

Approved in *Bishop v. Hubbard*, 23 Cal. 518, 519; S. C. 83 Am. Dec. 133, 134; also in *Shinn v. Macpherson*, 58 Cal. 599; dissenting opinion in *In re Wilson*, 123 Fed. 24, majority holding under California laws, use of funds by insolvent debtor to purchase homestead or discharge lien thereon does not invalidate homestead exemption. Explained and distinguished in *Randall v. Buffington*, 10 Cal. 494, in which case

the insolvent paid money in his hands in discharge of a debt which was an encumbrance upon his homestead, and the court held it to be valid. And in accord with this holding are the following decisions: *Reeves v. Peterman*, 109 Ala. 369; *Comstock v. Bechtel*, 63 Wis. 661; *In re Henkel*, 2 Sawyer, 307; *Kelly v. Sparks*, 54 Fed. Rep. 72, all referring to the principal case.

5 Cal. 490-491. JAMSON v. QUIVEY.

Instructions.—Must be given or refused by the court as asked for, and their sense cannot be altered by the court, p. 491.

Rule disapproved in *Boyce v. California Stage Co.*, 25 Cal. 470, so far as it may be construed to mean that a party may of right insist that an instruction shall be given or refused, as asked, and that a modification thereof by the court, whether right or wrong, is of itself error.

5 Cal. 492-493. GRONFIER v. MINTURN.

Mortgage.—Stipulation in, for all the costs of foreclosure, including counsel fees not exceeding five per cent of the amount due, construed, holding that the limitation of five per cent was intended to apply to counsel fees alone, p. 492.

Referred to in *Carriere v. Minturn*, 5 Cal. 435, holding that in foreclosing a mortgage containing such stipulation, it is not necessary to aver in the complaint that five per cent was reasonable counsel fees.

5 Cal. 493. COFFINBERRY v. HORRILL.

Judgment.—Rendered and entered in vacation is void, p. 493.

Affirmed in *Peabody v. Phelps*, 7 Cal. 53, and cited with approval in *Skinner v. Beshoar*, 2 Colo. 387, holding that although the record be not properly authenticated, yet, if it carries upon its face an adjudication between the parties, writ of error will lie.

5 Cal. 494-497. IN THE MATTER OF COHEN AND JONES.

Injunction.—Violation is ground for contempt proceedings where order within jurisdiction of court, although made erroneously, p. 495.

Cited in *State v. Lavery*, 31 Or. 81, holding decree presumed correct when not appealed from; *State v. Downing*, 40 Or. 321, where court has jurisdiction of proceedings in their inception, disobedience of voidable order directing judgment debtor to appear for examination in supplemental proceedings is contempt.

Contempts.—Courts have jurisdiction to punish for contempts of their process, and to issue such writs as are necessary to the exercise of that jurisdiction, p. 496.

Cited as authority in *White v. Superior Court*, 110 Cal. 66, holding

that the court had power to punish as for a contempt the violation of an injunction in an action for divorce restraining the husband from disposing of his property pending the suit. In *In re Cohen*, 30 Oreg. 81, holding that the violation of an invalid injunction is not contempt, but if the court has jurisdiction irregularity in procedure cannot justify disobedience.

Same.—Judgments and orders of courts or judges in contempt cases are final and conclusive, p. 495.

Approved in *Phillips v. Welch*, 12 Nev. 177.

Receivers.—Courts have power to appoint, and may, in a proper case, order, not only the party, but his agents and servants, to deliver the specific property to the receiver, p. 496.

Approved in *Havemeyer v. Superior Court*, 84 Cal. 387, 18 Am. St. Rep. 230, but stating that the case does not decide that when a third party is in possession, claiming to be owner in his own right, a court may determine without hearing that he is a mere agent or servant. Referred as authority for the appointment of a receiver of the property of nonresident defendants, in *Loaiza v. Superior Court*, 85 Cal. 36; S. C. 20 Am. St. Rep. 212. Approved in *Tolleson v. People's Bank*, 85 Ga. 179. Cited in *Cortelyou v. Hathaway*, 64 Am. Dec. 483, note on subject; also in 12 Am. Dec. 185, note; note to *Cameron v. Improvement Co.*, 72 Am. St. Rep. 42.

Same.—When a stranger to a suit, served with a rule to show cause why he should not be ordered to deliver certain property to the receiver, appears and contests the matter before the court, the court thereby acquires full jurisdiction over his person as well as the subject matter, p. 496.

Cited as authority in *Ex parte Stickney*, 40 Ala. 168, 170, case of attachment for contempt. So, in dissenting opinion of Brickell, C. J., in *Ex parte Hardy*, 68 Ala. 334, application for a writ of habeas corpus in a contempt case. Pleading want of jurisdiction, in *Delgado v. Chavez*, 5 N. Mex. 651.

5 Cal. 497-501. BAGLEY v. EATON.

Breach of Bond for Title does not discharge the debt due for the purchase money, and the complaining party may resort to equity for a specific performance, or may maintain an action at law, p. 500.

Cited in *Gilpin County M. Co. v. Drake*, 8 Colo. 591, as sustaining the rule that in civil cases it is sufficient to state the material facts, and the remedy demanded, and that the relief sought will be awarded, if warranted by the facts and the law. Also cited in *Batty v. Beebe*, 22 Kan. 89, holding that in an action to recover installments of purchase money due, it is no defense that the deed has not been made or tendered, or that the plaintiff might have a remedy in another form of action.

5 Cal. 501-502. HOWLAND v. MARVIN.

Covenant Not to Sue for a limited time is no bar to the action, but the defendant must rely upon the covenant for his remedy, p. 501.

Cited in *Staver v. Missimer*, 36 Am. St. Rep. 147, note, discussing the subject.

5 Cal. 502. BENNETT v. TAYLOR.

Mortgage.—Is a mere incident to the debt which it secures, p. 502.

Affirmed in *Phelan v. Olney*, 6 Cal. 483, holding that where two notes are secured by a single mortgage, the transfer of one of the notes carries with it a pro rata portion of the security. So, in *McMillan v. Richards*, 9 Cal. 410; S. C. 70 Am. Dec. 662, 663, holding that the payment of the debt, whether before or after default, operates to extinguish the mortgage.

Same.—Should not be admitted in evidence, without first producing or accounting for the note, p. 502.

Cited as authority in *O'Bannon v. Myers*, 36 Ala. 554, S. C. 76 Am. Dec. 337, holding that the mortgagor should not be estopped from denying the existence of the note as recited in the mortgage. Dissented from in *Hawes v. Rhoads*, 34 Ind. 80, where it is held that in a suit simply to foreclose the mortgage, the plaintiff need not produce the note and offer it in evidence, if it be in the possession of the defendant.

5 Cal. 503-504. MORRISON v. BRADLEY.

Pleading.—Plaintiff cannot recover against "the corporation of B. B. & Co.," upon a written contract between himself and "B. & Co.," p. 504.

Cited as authority in *McCord v. Seale*, 56 Cal. 264, that proof of a partnership contract cannot sustain allegations of an individual contract. Cited also in the similar case of *Harrison v. McCormick*, 69 Cal. 621, as sustaining the rule that the allegations and proofs must correspond.

5 Cal. 504-507. SARGENT v. WILSON.

Homestead.—Alienation of, by the husband alone, is void only as to the homestead value, p. 506.

Affirmed in *Dorsey v. McFarland*, 7 Cal. 346; *Moss v. Warner*, 10 Cal. 298; *Revalk v. Kraemer*, 8 Cal. 74; S. C. 68 Am. Dec. 308. Referred to, but not passed upon, in *Booth v. Hoskins*, 75 Cal. 276. Cited as authority in *Adams v. Beale*, 19 Iowa, 68, that the nature of the wife's interest in the homestead is not liable to be affected or concluded by the omission, neglect, or default of the husband. Cited in *Thoms v. Thoms*, 45 Miss. 274, as the law of California, but not that of Mississippi, where the husband alone had power to alien the home-

stead. Approved, however, in *Bank of Louisiana v. Lyons*, 52 Miss. 184, construing the Mississippi Homestead Act of 1873.

Same.—The wife of the mortgagor is a necessary party in a suit to foreclose a mortgage upon the homestead, and if not made a party, should be allowed to intervene, p. 507.

Affirmed in *Moss v. Warner*, 10 Cal. 297, with the modification that she is a proper party defendant. Fully affirmed in *Mabury v. Ruiz*, 58 Cal. 14. Cited in *Larson v. Reynolds*, 13 Iowa, 584; S. C. 81 Am. Dec. 448; *Chase v. Abbott*, 20 Iowa, 160, holding that it is not essential in all cases to make the wife a party to a proceeding to foreclose a mortgage on the homestead, but that it is in all cases the safer practice, and is necessary when it is sought to bind her by the decree. Also cited in *Horn v. Volcano Water Co.*, 13 Cal. 70, S. C. 73 Am. Dec. 571, as to the right of creditors to intervene in a suit on a note and mortgage. So, in 16 Am. Dec. 182, 184, note on subject.

General citation: *Pittman v. Harris*, 24 Tex. Civ. App. 75.

5 Cal. 507-509. **LARUE v. GASKINS.**

Mandamus lies where a justice of peace improperly refuses to transfer cause or proceed with trial, p. 509.

Explained in *Flagley v. Hubbard*, 22 Cal. 38, holding that the erroneous action of the justice cannot be corrected by *mandamus*, as where he errs in granting or refusing a change of venue. Cited relative to transfer of cause of action for forcible entry and detainer, by a justice of the peace, in *Henderson v. Allen*, 23 Cal. 520. Doubted in *Maxson v. Superior Court*, 124 Cal. 472, and held not reliable as authority because meagerly reported.

5 Cal. 513-514. **ARRINGTON v. SHERRY.**

Judgment by Confession.—Application to set aside should show that the claim was not just, and that the judgment ought not to have been confessed, p. 514.

Cited in *Lee v. Figg*, 37 Cal. 336, S. C. 99 Am. Dec. 274, holding that a judgment by confession, not a nullity on its face, cannot be collaterally attacked.

5 Cal. 515-517. **ORD v. McKEE.**

Multiplicity of Actions.—Equity will adjust all rights involved when all parties properly before it, p. 516.

Cited in *Watson v. Sutro*, 86 Cal. 529, sustaining action for partition by equitable owner.

Mortgage.—Is a mere incident to the debt which it secures, and follows the transfer of the note with the full effect of a regular assignment, p. 516.

Doctrine affirmed and applied in the following cases: Phelan v. Olney, 6 Cal. 483; McMillan v. Richards, 9 Cal. 410; 70 Am. Dec. 662, 663; Willis v. Farley, 24 Cal. 498; Storch v. McCain, 85 Cal. 307; Adler v. Sargent, 109 Cal. 49, holding, in the case last cited, that the one having the right to the note has the right to foreclose the mortgage, although the mortgage be in the possession of another. Approved in Ladue v. Detroit etc. R. R. Co., 13 Mich. 396; S. C. 87 Am. Dec. 763. See also, Bennett v. Taylor, 5 Cal. 202, and notes thereto, ante.

VOLUME VI.

By JOSEPH A. JOYCE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

6 Cal. 1-7. SMITH v. EUREKA FLOUR MILLS.

Corporation has Power to make promissory notes as incident to its expressed powers or objects, p. 7.

Cited, Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 627, reasserting the rule in a case as to the right to loan money or to take mortgages. Note, 13 Am. Dec. 562, as to making notes or other simple contracts.

Corporation's Expressed Powers must be exercised in the manner pointed out by statute, p. 7.

Cited, Alabama etc. R. R. Co. v. Jones, 5 Nat. Bank. Reg. 106, where the rule is applied in determining the character of the corporation under its charter in a bankruptcy case

Corporation.—Powers merely incident to express corporate powers may be exercised by its officers or agents, p. 7.

Cited, Carey v. Philadelphia etc. Co., 33 Cal. 696, holding that private corporations may appoint agents the same as natural persons, except they are limited by charter as to the mode.

6 Cal. 8-13. NIMS v. PALMER. S. C. 7 Cal. 110—NIMS v. JOHNSON.

School Lands.—State may dispose of school lands by absolute title before survey by United States, p. 13.

Cited, Ellis v. Jeans, 7 Cal. 417, where the same statute (act of May 3d, 1852) is considered, and the principal case is declared to sustain the right to locate school warrants upon public lands. Contra: The propositions of the principal cases and in the citing case are opposed by many subsequent decisions in California, noted in Gear's California Index Digest, p. 762, "2. School Lands."

6 Cal. 13-16. HELLMANN v. POTTER.

Power of Attorney—Negotiable Paper.—Principal is bound by all notes, executed under power, in hands of a bona fide purchaser, though executed for attorney's private purposes, pp. 15, 16.

Cited, *Bedell v. Herring*, 77 Cal. 574, 11 Am. St. Rep. 309, holding that fraud is no defense against a bona fide indorser for value before maturity.

6 Cal. 16. BRUMMAGIN v. BOUCHER.

Judgment Against Garnishee cannot direct that amount found due be paid in court, p. 17.

Cited in *Broadway etc. Co. v. Wolters*, 128 Cal. 168, holding sheriff's return of service not sufficient alone as basis for judgment.

6 Cal. 19. VAN ETEN v. JILSON.

Jurisdiction.—Justices of the peace cannot take any jurisdiction by implication, p. 19.

Cited, *Swain v. Chase*, 12 Cal. 286, where it is said the law presumes nothing in favor of the jurisdiction of justices of the peace, and a party who asserts a right under a judgment thereof must affirmatively show every jurisdictional fact; *Wratten v. Wilson*, 22 Cal. 468, in affirmance.

Same.—Justices of the peace have authority to try the right to a mining claim not exceeding in value two hundred dollars, p. 19.

Cited, *Small v. Gwinn*, 6 Cal. 449; in affirmance, excepting cases of forcible entry and detainer; *Freeman v. Powers*, 7 Cal. 105, affirming the rule and its exceptions; *Armstrong v. Paul*, 1 Nev. 141, holding that such courts had jurisdiction up to the organization of the district courts of cases of forcible entry and detainer.

Same.—Justices of the peace have no jurisdiction in actions to recover damages for injury to a mining claim, and the prayer for damages may be disregarded or stricken out, p. 19.

Cited, *Grass Valley Min. Co. v. Stackhouse*, 6 Cal. 414, in affirmance, and applied to the right to strike out a claim for damages; *Wratten v. Wilson*, 22 Cal. 468, as to striking out or disregarding a claim for damages in an action to recover personal property; *Armstrong v. Paul*, 1 Nev. 141, as to expunging or disregarding the prayer for damages.

6 Cal. 19-21. CUNNINGHAM v. DORSEY.

Measure of Damages for breach of executory contract is the value of the labor performed and the profit which could fairly have been derived from the labor left unperformed by the act of defendant, p. 21.

Cited, *Galting v. Newell*, 12 Ind. 125, upon the point that in actions on special contracts for construction of public works the profits must be calculated upon the difference between the contract price and the price at which the performance of the work could be procured at the time of the breach; *Dunn v. Johnson*, 33 Ind. 62, 5 Am. Rep. 182, where the rule as to profits is held to apply alike to public and private contracts, the measure being the difference between the contract price of the entire work and its reasonable cost, at the ordinary prices, in labor, in wear and tear and time of use of machinery; the case being one of a contract to saw logs, and failure to deliver logs for sawing; *The Cincinnati etc. Ry. Co. v. Lutes*, 112 Ind. 283, where the rule as to profits and damages was held to be the difference between the amount due on performance and the cost to perform; *Howe Machine Co. v. Bryson*, 44 Iowa, 166, 167, in dissenting opinion, a case of failure to supply machines as agreed, and damages were stated as the value of time lost without reference to profits which might have been realized by performance. Referred to in *Peninsular Trading etc. Co. v. Pacific etc. Whaling Co.*, 123 Cal. 697.

6 Cal. 21-22. ROBB v. ROBB.

Jurisdiction.—District court had no power to interfere with judgment or decrees after term in which rendered, p. 22.

Cited, *Shaw v. McGregor*, 8 Cal. 521, adding the exception, unless its jurisdiction is saved by some motion or proceeding at the time; *Bell v. Thompson*, 19 Cal. 707, adding the exception of the case provided for by section 68 of the Practice Act; also, the exception above noted; *De Castro v. Richardson*, 25 Cal. 52, affirming the rule and exceptions; *Casement v. Ringgold*, 28 Cal. 337, 338, in affirmance; *Wiggin v. Superior Court*, 68 Cal. 401, where it is declared that, "independent of statute, the court has power to correct mistakes in its proceedings and to annul within a reasonable time orders and judgments inadvertently made;" *Norton v. Atchison etc. R. R. Co.*, 97 Cal. 392, 33 Am. St. Rep. 201, noting the law as it formerly existed to the same effect as the rule and exceptions herein, but adding that terms of court are now abolished; this last also appears under sections 48, 73 74, Cal. Code Civ. Proc.

Judgment.—In cases of fraud in obtaining a judgment, proceeding must be by bill to impeach the original decree, p. 22.

Cited, *Hodgdon v. Southern Pac. R. R. Co.*, 75 Cal. 648, holding that a judgment regular on its face, rendered by a court having full jurisdiction, cannot be collaterally impeached for fraud or other matters aliunde; *Norton v. Atchison etc. R. R. Co.*, 97 Cal. 392, 33 Am. St. Rep. 201, where it was held that an independent action was not necessary to set aside the judgment founded on false return of service, but it might be vacated on motion within a reasonable time.

6 Cal. 24-26. SMITH v. COMPTON.

Right of Nonsuit improperly denied may be waived by supply of evidence by defendant, p. 26.

Cited and followed unwaveringly in the following cases: *Winans v. Hardenbergh*, 8 Cal. 293; *Perkins v. Thornburgh*, 10 Cal. 191; *Schlessinger v. Mallard*, 70 Cal. 334; *Higgins v. Ragsdale*, 83 Cal. 221; *Vaca Valley etc. R. R. v. Mansfield*, 84 Cal. 565; *Jennings v. First Nat. Bank*, 13 Colo. 422; 16 Am. St. Rep. 214; *Thompson v. Avery*, 11 Utah, 223; *Barton v. Kane*, 17 Wis. 45; 84 Am. Dec. 731. Cited, *Elmore v. Elmore*, 114 Cal. 520, where the rule is affirmed, but it is said such motion is not waived by the subsequent introduction of evidence by the defendant, which does not change the status of the case, or supply any defect in the plaintiff's case, as pointed out on the motion for nonsuit. Extended note, 24 Am. Dec. 624, upon the subject of nonsuit.

6 Cal. 26-29. PEOPLE v. PORTER.

Election to fill vacancy is special, p. 29.

Cited in affirmance, *People v. Martin*, 12 Cal. 411; *Westbrook v. Rosborough*, 14 Cal. 187; *Kenfield v. Irwin*, 52 Cal. 169.

Special Election.—Proclamation by the governor is essential to its validity, p. 29.

Cited in the following cases, each holding that such proclamation or notice is essential: *McKune v. Weller*, 11 Cal. 63, 66; 70 Am. Dec. 764, 767; *People v. Martin*, 12 Cal. 411; *Kenfield v. Irwin*, 52 Cal. 169; *George v. Oxford Township*, 16 Kan. 80; *People v. Palmer*, 91 Mich. 290; *Morgan v. Gloucester City*, 44 N. J. L. 143. *People v. Prewett*, 124 Cal. 9, but sustaining notice not specifying election to fill vacancies; *People v. Kerwin*, 10 Colo. App. 477, holding notice insufficient and election void. *People v. Hoge*, 55 Cal. 620, in dissenting opinion, quoting from the principal case as to notice in advance of the time of holding elections. The decision concerned the election of a board of freeholders under section 8, article XI of the constitution, and it was held that, where there has been an election, the voice of the people is not to be rejected for a defect or want of notice. Extended note, 83 Am. Dec. 750, as to notice and proclamation.

Distinguished, *State v. Carroll*, 17 R. I. 599, since in that case the time for holding the election was designated by the board of aldermen, who had authority to designate the time; the question being whether their order designating the particular time for holding the election was void or merely irregular.

Office.—Resignation is effectual without its acceptance by the appointing power, pp. 28-29.

Cited, *State v. Fitts*, 49 Ala. 403, to the same point, case of resigna-

tion of a county solicitor; *State v. The Mayor*, 4 Neb. 261, in affirmance as to the resignation of a municipal officer; *State v. Clark*, 3 Nev. 573, where the rule is applied to the office of district attorney; *Reiter v. State*, 51 Ohio St. 81, and applied to the resignation of mayor; *Bunting v. Willis*, 27 Gratt. (Va.) 156, 21 Am. Rep. 345, as tending to support the right to withdraw a prospective resignation, but not to withdraw a complete and accepted resignation, not even with the consent of the government, and the rule of the principal case is declared to be well settled (the office was that of deputy inspector of customs); *Movins v. Lee*, 24 Blatch. (U. S. C. C.) 295, and applied to an oral resignation of a director of a national bank. Extended note, 36 Am. St. Rep. 525, as to whether a resignation must be accepted. Contra: *State v. Clayton*, 27 Kan. 445, 41 Am. Rep. 420, a case of unconditional resignation of a probate judge, and a conditional acceptance; *Coleman v. Sands*, 87 Va. 698, where the rule of the principal case is declared to be in conflict with the great weight of authority; this was a case of resignation of a registrar.

General citation: *State v. Martin*, 83 Mo. App. 58.

6 Cal. 29-32. **REINA v. CROSS.**

Pleading.—Complaint for money had and received must allege a demand or it is demurrable, p. 31.

Cited, *Anderson v. Hulme*, 5 Mont. 299, in affirmance. Extended note, 52 Am. Dec. 760. Contra: *Quimby v. Lyon*, 63 Cal. 395, where it is said that the words, "a party receiving money to the use of another is rightfully in possession until the same is demanded," were dictum and unnecessary in the principal case.

Charter-Party.—Freight paid in advance cannot be recovered back in case of loss of the ship, pp. 31, 32.

Cited, *Lawson v. Worms*, 6 Cal. 370, in affirmance.

6 Cal. 32-33. **PAGE v. RANDALL.**

Arrest.—Attendance upon court exempts from arrest in civil action, but not from obeying ordinary process, p. 33.

Cited in *Ex parte Harlan*, 39 Ala. 566, where the doctrine is affirmed, but held not applicable to officers in the army under the act of Congress of March 3d, 1799 (1 U. S. Stat. at Large, p. 750, sec. 4). Approved in *Guynn v. McDaneld*, 4 Idaho, 610, nonresident in attendance upon federal court in suit brought by him against resident is not exempt from service of summons in suit in state court. *Christian v. Williams*, 111 Mo. 439, and applied to a nonresident attending court and being there served with summons in another action brought in such county; *Baldwin v. Emerson*, 16 R. I. 305, 27 Am. St. Rep. 742, to the same effect as in the last citing case. Extended note, 77 Am. Dec. 402, note 100 Am. Dec. 515, as to punishment for contempt. Extended note, 38

Am. Rep. 719. *Contra*; *Atchison v. Morris*, 11 Fed. Rep. 583, 11 Biss. 192, holding that a nonresident witness present in court in obedience to a subpoena is privileged from service of summons in a civil action. Disapproved in *Ela v. Ela*, 68 N. H. 314, holding witness present under subpoena exempt from service of process.

6 Cal. 33-34. **RITCHIE v. DORLAND.**

Equity.—Bill of peace will not lie as a substitute for ejectment in favor of plaintiff out of possession, pp. 37-41.

Cited, *Pralus v. Jefferson etc. Mining Co.*, 34 Cal. 559, in support of the point that in an action to quiet title an averment of possession at the commencement of the action was necessary; *Northern Pac. R. Co. v. Amacker*, 49 Fed. Rep. 536, affirming S. C. 46 Fed. Rep. 235, stating the rule as to possession as it existed under the principal case; considering also section 254 of the Practice Act, and declaring that section 738 of the California Code Civ. Proc. changed the rule as to possession. But the case was decided, however, under the Montana code, providing that action might be brought by any person "in possession," to determine adverse claims to land.

Ejectment—Joinder.—Any number of parties defendant may be joined, subject to their right to answer separately or demand separate verdicts; and in actions of this nature, where the defense is the same, the court may compel all to proceed to one trial, pp. 38-40

Cited, *Northern Pac. R. R. Co. v. Amacker*, 46 Fed. Rep. 235, quoting from the principal case. The points determined in this case appear in S. C. 49 Fed. Rep. 536, noted under the preceding heading herein.

Bill of Peace in the nature of ejectment will not lie to avoid multiplicity of suits, pp. 38-40.

Cited, *Northern Pac. R. R. Co. v. Amacker*, 46 Fed. Rep. 236, upon this point, but the court did not decide the point.

Bill of Peace in nature of ejectment will not lie where party had adequate remedy at law, pp. 38-40.

Cited, *Moran v. Palmer*, 13 Mich. 370, to the same point.

Bills of Peace are resorted to where several claim a right as against one or more, or one or more against many (per the court), p. 38.

Cited, extended note, 50 Am. Dec. 450.

6 Cal. 41-42. **MERRILL v. GORHAM.**

Construction.—Two statutes upon the same subject must be construed so as to maintain both if possible without destroying the intent of the later act, p. 42.

Cited, *Nicholson Pavement Co. v. Painter*, 35 Cal. 708, in dissenting opinion upon the point that two acts relating to paving streets were in *pari materia* and must be construed together.

Collection of Taxes will not ordinarily be enjoined where particular tribunal is provided for settlement of irregularities or an adequate remedy at law is provided, p. 43.

Cited, *Noble v. City of Indianapolis*, 16 Ind. 508, quoting from the principal case so far as the rule extends to a particular tribunal; *Northern Pac. R. R. Co. v. Patterson*, 10 Mont. 106, to the full extent of the rule; *Oregon etc. Bank v. Jordan*, 16 Or. 117, holding that a taxpayer should go before the board of equalization in all ordinary cases for redress, and upon failure there should obtain a writ of review. Extended note, 69 Am. Dec. 199.

Equity will not relieve where there is an adequate remedy at law, p. 43.

Cited, *Hager v. Shindler*, 29 Cal. 55, in recognition of the general rule, but held to throw little light on that case, which was one of the right of a purchaser at a sheriff's sale in equity to have a fraudulent deed of the judgment debtor set aside.

Offices.—Sheriff may be tax collector, p. 43.

Cited, *People v. Edwards*, 9 Cal. 292, as only deciding that there is no constitutional inhibition to the exercise of the two offices in the same person, but it is declared that the offices are entirely distinct and are not so blended that the bond for faithful performance of duties of the one would embrace the other; *Attorney General v. Squires*, 14 Cal. 12, as holding the same point as the principal case, and also that a sheriff is not a judicial officer, and that the offices are also distinct under the constitution; *People v. Kelsey*, 34 Cal. 476, in support of the point that a certain act making a county treasurer ex officio tax collector, transferring the duties from the sheriff, was unconstitutional in providing for the transfer to take place before the election of the treasurer; *State v. Rosenstock*, 11 Nev. 141, in support of the point that justice of the peace and city recorder were two distinct offices, but both might be held by the same person.

6 Cal. 43-44. DAUMIEL v. GORHAM.

Trespass Against Sheriff for seizing goods of plaintiff, mingled with those of execution defendant, does not lie without previous demand and notice and delay or refusal to deliver, p. 41.

Cited, *Taylor v. Seymour*, 6 Cal. 514, to the same effect; *Wellington v. Sedgwick*, 12 Cal. 476, stating to what extent the principal case goes; *Paige v. O'Neal*, 12 Cal. 495, where the rule is stated, but the court says: "In the case at bar the officer was not misled by any apparent possession of the defendant in execution, or by any mixture of their property with that claimed by the plaintiff"; *Boulware v. Craddock*, 30 Cal. 191, where it was held that no demand is necessary prior to suit by the owner of property wrongfully seized under execution against another; *Fuller Desk Co. v. McDade*, 113 Cal. 363, where

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the court declares the correct rule to be that "when an officer proceeds to execute an attachment he is authorized to seize any personalty found in the defendant's possession, if he have no reason to suppose it to be the property of another," adding that "a different doctrine seems to be taught in *Boulware v. Craddock*, 30 Cal. 190, and *Wellman v. English*, 38 Cal. 583"; *Vose & Co. v. Stickney*, 8 Minn. 79, holding that notice and demand are necessary, and a refusal or delay to deliver; also *Id.* 83, in dissenting opinion; *Perkins v. Barnes*, 3 Nev. 563, in dissenting opinion, the case holding that demand is only necessary to establish a conversion and that conversion may be otherwise established.

6 Cal. 45. **BURDGE v. UNDERWOOD.**

Mining Law.—Authority of statute to miners to commit a trespass on public lands, occupied by settlers for agricultural or grazing purposes, cannot be extended by implication, p. 46.

Cited, *Weimer v. Lowry*, 11 Cal. 112, in affirmance; *Rogers v. Soggs*, 22 Cal. 453, a case holding that the settler has the right to the wood and timber growing on such lands; note to *Jennison v. Kirk*, 98 U. S. 462, as to the abatement as a nuisance of ditches over such lands; extended note 63 Am. Dec. 94, 95, 96, 110, as to the rights of settlers upon public lands, rights of miners, etc.; notes, 63 Am. Dec. 116, 91 Am. Dec. 694, 695, as to rights of miners and others on public lands.

6 Cal. 46-47. **WATSON v. ZIMMERMAN.**

Ejectment.—Plaintiff to recover on prior possession must allege and prove an actual ouster, p. 47.

Cited, *Alexander v. Campbell*, 74 Mo. 145, where it is held contra under a statute using the expression "unlawfully withholds."

6 Cal. 47-53; 65 Am. Dec. 475. **SMITH v. RANDALL.**

Construction of Statute.—Intent of legislature governs, and this must be ascertained from the whole statute, p. 50.

Cited, *Cleveland etc. Ry. Co. v. Backus*, 133 Ind. 527, and *Pittsburgh etc. Ry. Co. v. Backus*, 133 Ind. 638, declared to be a well-settled rule; *Baker v. Payne*, 22 Oregon, 344, where the same rule is stated; notes 69 Am. Dec. 144; 74 Am. Dec. 534.

Execution Sale.—Statute requiring notice is directory, and failure to comply does not vitiate the sale, p. 50.

Cited, *Welch v. Sullivan*, 8 Cal. 186, as supporting the point that a mere irregularity in the sheriff's proceedings would not vitiate the sale. Cited and followed in *Harvey v. Fisk*, 9 Cal. 94; *Shores v. Scott River Water Co.*, 17 Cal. 628; *Simson v. Eckstein*, 22 Cal. 590; *Blood v. Light*, 38 Cal. 649; 99 Am. Dec. 443; *Hibberd v. Smith*, 67 Cal. 565; *Frink v. Roe*, 70 Cal. 302, 303. Cited, *Ganong v. Green*, 64 Mich. 492,

as to the statute being directory, and as supporting the point that it is the policy of the law to uphold judicial sales when collaterally attacked, by securing purchasers as far as possible without prejudice to others. Notes 44 Am. Dec. 240; 73 Am. Dec. 131, 759; 83 Am. Dec. 459; 84 Am. Dec. 413; 86 Am. Dec. 700; 88 Am. Dec. 688. In *Cloud v. Eldorado County*, 12 Cal. 133, the principal case is cited as sustaining the point that a judgment cannot be collaterally impeached by a stranger; but, except in so far as both cases are sheriff's sales, the citation does not sustain the point by any express decision.

Execution Sale.—Remedy against sheriff for selling on insufficient notice is confined to the statutory remedy, p. 50.

Cited, *Shores v. Scott River Water Co.*, 17 Cal. 628, in affirmance; note 9 Am. St. Rep. 38.

Execution Sale in mass of separate lots will be upheld when occasioned by defendant by failure to direct a sale by parcels or to inform the sheriff of the facts, pp. 51-52.

Cited, *Vigoureux v. Murphy*, 54 Cal. 351, where it is declared that a sale in mass of separate parcels below actual value cannot be sustained against the objection of the judgment debtor, but that such sales are not void but voidable; *Hopkins v. Wiard*, 72 Cal. 262, to the same effect as the principal case; *Hendepohl v. Liberty Hill etc. Co.*, 94 Cal. 592, 28 Am. St. Rep. 150, to the same effect; also declaring that such sales are not void but voidable, and that the judgment debtor may by parol waive a sale in parcels and give authority to sell in mass; *Patton v. Stewart*, 19 Ind. 235, quoting from the principal case; *Nevada etc. Syndicate v. National etc. Co.*, 103 Fed. 403, sustaining sale under facts stated. Notes 80 Am. Dec. 645, 82 Am. Dec. 457, 99 Am. Dec. 108, 28 Am. St. Rep. 141. Contra, *Catlett v. Gilbert*, 23 Ind. 618, so far as the decision and opinion goes, but this result arises from a misunderstanding of the actual ground of the decision in the principal case.

Execution Sale.—Inadequacy of price though a fact admissible in evidence to establish fraud is never of itself sufficient to annul such sale, p. 52.

Cited in *Connick v. Hill*, 127 Cal. 165, further holding no inadequacy shown; *Summerville v. March*, 142 Cal. 558, refusing to vacate foreclosure sale; *Gassner v. Patterson*, 23 Cal. 302, and *Central Pac. R. R. Co. v. Creed*, 70 Cal. 501, both cases of foreclosure of a mortgage; Notes 84 Am. Dec. 596, 619; 100 Am. Dec. 146.

Execution Sale.—Right to redeem lands so sold depends upon statute. In case of failure so to do, equity will not interpose to protect from the negligence, p. 53.

See note 4 Am. St. Rep. 771; extended note, 21 Am. St. Rep. 244, as to who may redeem from execution or foreclosure sale.

6 Cal. 53-55. SHERWOOD v. DUNBAR.

Discharge of a Mortgage by the mortgagee does not of itself discharge the debt, but only the security, p. 54.

Cited, Shaver v. Bear River etc. Co., 10 Cal. 402, a case of a void mortgage held not to invalidate the debt; Thomas v. Linn, 40 W. Va. 135, where it is said, "the lien may be discharged or extinguished and the debt remain, and the debt may be revived without reviving the lien."

Mortgagee and Assignee may adjust their securities by agreement, p. 55.

Cited, Grattan v. Wiggins, 23 Cal. 30, where it is said, "It is clear that the mortgagee has the right by agreement to fix the rights of the holders of the several notes to the mortgage security, and such an agreement may be implied from the circumstances of the transfer."

Contribution.—Statute of limitations does not begin to run until after payment of the debt by the plaintiff, in an action for contribution between joint obligors, p. 55.

Cited, Richter v. Henningsan, 110 Cal. 537, holding that co-obligor acquires a right to contribution as soon as he pays more than his share, and the statute does not begin to run until then. Extended note 61 Am. Dec. 504, as to statute of limitations in actions between sureties, co-promisors, etc.

6 Cal. 55-56. GRANT v. WHITE.

Notices may be served on attorney of record where party changes attorneys and there is no regular substitution, p. 56.

Cited, Roush v. Fort, 3 Mont. 180, to the same point; Abrahams v. Stokes, 39 Cal. 151; First Nat. Bk. v. Bernard, 4 Colo. 72; both cases upon the point that notice of appeal must be served on the attorney of the adverse party if he has an attorney.

6 Cal. 56. HART v. VIDAL.

Attorney—Compensation.—In an action for, nonprofessional witness cannot testify as to value, p. 57.

Cited in Sanders v. Graves, 105 Fed. 851, holding jury not bound by opinion of attorneys as to value.

6 Cal. 57-61. MATOON v. EDER.

Arrest and Bail.—Affidavit may charge fraud on information and belief, p. 59.

Cited, Sayers v. Superior Court, 84 Cal. 645, but declared not in point in a case of a petition for a writ of review upon information and belief as to the order of contempt; United States v. Eldredge, 5

Utah, 166, affirming the same rule as to a complaint before a supreme court commissioner for unlawful cohabitation.

Same.—As to final process against judgment debtor to charge the bail, it would probably be necessary that a ca. sa. should issue and be returned non est inventus (per the court), p. 60.

Cited, *Stewart v. Levy*, 36 Cal. 167, where it is said that in the principal case "the point as to the kind of writ that might be issued upon a judgment for fraud did not arise, but the opinion clearly shows that the court regarded a ca. sa. as proper in such case"; *Ex parte Bergman*, 18 Nev. 340, quoting from the principal case (p. 60) as to the difficulty of reconciling the sections of the statute upon this point.

Same.—By putting in bail and neglecting to move to be discharged, defendant consents to process, and waives all irregularities as to insufficiency of affidavit for arrest, p. 59.

Cited, *Neimitz v. Conrad*, 22 Or. 166, and applied to an irregular or voidable process.

Arrest.—Action on Bail Bond.—Facts on which judgment based must be affirmatively proven and found to warrant arrest, p. 61.

Cited, *Nickerson v. Chatterton*, 7 Cal. 570, holding that in an action on a replevin bond it is necessary to allege and prove that the property was delivered to the party requiring it and for whom the bond was given.

6 Cal. 61-62. **ANGIER v. MASTERSON.**

Pleadings.—Verification.—Where complaint is verified, defendant may verify answer before trial, unless plaintiff is thereby taken by surprise, p. 62.

Cited, *Buell v. Beckwith*, 59 Cal. 482, to the same effect.

6 Cal. 63-67. **O'CALLAGHAN v. BOOTH.**

Pleadings.—Penal statute need not be declared upon in pleadings in justice's courts, and complaint in forcible entry need not pray for treble damages to warrant county court trebling them, p. 66.

Cited, *Hart v. Moon*, 6 Cal. 162, to the same point; *Watson v. Whitney*, 23 Cal. 378, in affirmance; *Lataillade v. Santa Barbara Gas Co.*, 58 Cal. 5, as sustaining the complaint in that case.

6 Cal. 67-68. **GREENFIELD v. STEAMER GUNNELL.**

Verification of Complaint.—Objection for want of, must be specifically made either before or with the answer, or it is too late, p. 68.

Cited in *State v. Chadwick*, 10 Or. 427, holding verification so waived; *Kohlman v. Wright*, 6 Cal. 231, to the point that an objection that a

complaint is not verified is cured by the answer; *Pence v. Durbin*, 1 Idaho, 553, to the point that there must be a specific objection to the want of verification, or it is waived.

6 Cal. 68-71. **ADAMS v. GORHAM.**

Warehouseman.—Receipt for specific goods in store estops warehouseman from denying want of segregation, p. 71.

Cited, *Goodwin v. Scannell*, 6 Cal. 543, declared by the court to be the same as the principal case; *McLaughlin v. Piatti*, 27 Cal. 463, as supporting the point that a sale of a given number of cattle running in a herd of a larger number does not apply to any particular cattle until the number sold have been separated from the herd; note, 100 Am. Dec. 243, as to conclusiveness of a warehouseman's receipt.

6 Cal. 71-73; 65 Am. Dec. 481. **POOLE v. GERRARD.**

Homestead.—Valid sale requires joint deed of husband and wife; separate deeds are invalid, p. 73.

Cited in *Hart v. Church*, 126 Cal. 476, 77 Am. St. Rep. 200, holding separate deeds by each spouse insufficient; *Anderson v. Stadlman*, 17 Wash. 438, and *Hinson v. Booth*, 39 Fla. 348, citing note, 65 Am. Dec. 484. *Dorsey v. McFarland*, 7 Cal. 346, to the same effect; *Revalk v. Kraemer*, 8 Cal. 74, 68 Am. Dec. 308, where a mortgage signed by the husband alone was held void; *Pipkin v. Williams*, 57 Ark. 247, 38 Am. St. Rep. 244, holding that a conveyance of a homestead of a married man is void where his wife does not join therein, although she releases her dower; *Howell etc. v. McCrie*, 36 Kan. 648, 59 Am. Rep. 590, where a mortgage of the homestead without joint consent of husband and wife was held void, although in this case the wife's name had been signed by another person and a notary had certified the wife's acknowledgment, and she had thereafter attempted to ratify the mortgage; *Moran v. Clark*, 30 W. Va. 376, 8 Am. St. Rep. 82, quoting from note 65 Am. Dec. 482, as to homestead rights being statutory, and the power of alienation; note, 76 Am. Dec. 80; notes, 81 Am. Dec. 438, 441, 451, 492, as to conveyance or alienation of homestead; note, 83 Am. Dec. 218, as to joinder and forced sale; note, 84 Am. Dec. 382, as to conveyance of homestead; note, 85 Am. Dec. 512, as to joinder of husband and wife in conveyance; note, 87 Am. Dec. 239, that mortgage and conveyance of homestead must accord with statute; note, 97 Am. Dec. 202, as to conveyance of homestead being limited by statute; note, 5 Am. St. Rep. 777, that husband cannot alienate without wife's consent; note, 7 Am. St. Rep. 47, as to necessity of joinder; note, 8 Am. St. Rep. 825, to the same point; note, 12 Am. St. Rep. 683, 684, where the principal cases are exhaustively considered; note, 21 Am. St. Rep. 166, as to alienation by deed; note, 38 Am. St. Rep. 248, as to joinder of wife; 45 Am. St. Rep. 299, to the same point.

Explained: *Gimmy v. Doane*, 22 Cal. 638, as to the right of husband to convey alone is brought within the rule as to joint tenancy and survivorship as noted below.

Homestead.—Wife Cannot Sue Alone to recover homestead. It is a joint estate with right of survivorship, and both husband and wife must join in the action, p. 73.

Cited, *Guio v. Guio*, 14 Cal. 508, 76 Am. Dec. 441, to the point that the wife cannot sue alone; *Smith v. Shrieves*, 13 Nev. 308, noting *Gee v. Moore*, 14 Cal. 472, which overrules the principal case as to joint tenancy and survivorship. But this Nevada case holds that husband and wife are joint tenants when declaration is filed, and that on death of either the estate vests in the survivor, one judge dissenting.

Explained, *Gimmy v. Doane*, 22 Cal. 638, where the rule as to joint tenancy and survivorship is explained as not applying to the right of the husband to convey alone.

Overruled, *Gee v. Moore*, 14 Cal. 477, as to joint estate and survivorship; *Levins v. Rovegno*, 71 Cal. 280, 281, where the principal case, the affirming, ruling, and the overruling case of *Gee v. Moore* are noted, giving the rule of descent prior to 1862 and the rule under the statute of 1860 as to survivorship; note, 65 Am. Dec. 486; note, 67 Am. Dec. 645, as to right of surviving spouse; 68 Am. Dec. 309, 310, as to homestead, whether in nature of joint tenancy; note, 70 Am. Dec. 344, as to the character of a homestead estate; note, 71 Am. Dec. 711, as to homestead being exempt from forced sale, referring to note 65 Am. Dec. 482; note, 76 Am. Dec. 442, as to suits by wife concerning homestead; note, 83 Am. Dec. 218, as to forced sale; note, 84 Am. Dec. 382, as to forced sale.

General citation: *Thompson v. New England Mortgage Security Co.*, 110 Ala. 406.

6 Cal. 74-75. **SACRAMENTO ETC. R. R. CO. v. MOFFATT.**

Eminent Domain.—Railroad must pay for fences made necessary, as part of the compensation, pp. 74, 75.

Cited, *San Francisco etc R. R. Co. v. Mahoney*, 29 Cal. 117, as supporting the point that a payment or tender of the money awarded is a condition precedent to entering upon land for the purpose of construction, but the principal case only decides as above stated; *Appeal of Houghton*, 42 Cal. 68, in dissenting opinion, merely as being a case where the statute granted an appeal, but this point was not raised in the principal case, although the case first above cited decides this point; *Railway v. Rowland*, 70 Tex. 302, upon the point of damages for construction and keeping crossings in repair over land taken by railroad company.

General citation: *Bockoven v. Board of Supervisors of Lincoln Township*.

6 Cal. 76. HARPER v. FREELON.

Jurisdiction.—Insolvency cases under act of 1852 are special cases within the meaning of the constitution, p. 76.

Cited, *McNiel v. Borland*, 23 Cal. 148, as so deciding, and applied to a case of enforcement of a mechanic's lien under the law of 1861 as being a special case.

6 Cal. 76-78. PEOPLE v. CHURCH.

Election held at time not authorized by law is void, p. 78.

Cited, *Page v. Supervisors*, 85 Cal. 54, to the effect that an election held without authority of law gives no title to office, and in like manner no title to a franchise; *People v. Hardy*, 8 Utah, 73, holding election void under local statutes.

6 Cal. 78-79. POINSETT v. TAYLOR.

Sheriff is liable for trespass by his deputy, p. 79.

Cited, *Hirsch v. Rand*, 39 Cal. 318, to the same point; *Sprague v. Brown*, 40 Wis. 616, to the same effect, but also holding that in an action against a sheriff for conversion for goods seized by his deputy, the specific facts should be pleaded; *Drake v. Paulhamus*, 66 Fed. Rep. 897, upon the point of variance between allegations and proof, holding that it need not be alleged that goods wrongfully taken were taken by a United States marshal as marshal; *Moore v. Winter*, 67 Ark. 194 (but cf. dissenting opinion, page 197), holding sheriff personally liable for deputy's acts on levy.

6 Cal. 80-81. McAULEY v. YORK MINING COMPANY.

Witnesses—Competency.—Stockholders of a corporation were not competent witnesses by reason of their liability and interest, under the act of 1853, p. 81.

Cited, *Mokelumne Hill Canal Co. v. Woodbury*, 14 Cal. 266, to the same point; *Blen v. Bear River etc. Co.*, 20 Cal. 615; 81 Am. Dec. 136, affirming the rule so far as the member was an interested stockholder; *Contra Costa R. R. Co. v. Moss*, 23 Cal. 329, in affirmance.

6 Cal. 81-82. DEN v. DEN.

Officer will not be presumed to have exceeded his authority, p. 82.

Cited, *Ely v. Cram*, 17 Wis. 541, where it is said "the rightful and proper exercise of authority is presumed. This principle seems to be well settled"; a case of a claim of title to property under an act of public officers by virtue of a special statutory authority.

6 Cal. 83-84. JOHNSTON v. DOPKINS.

Appeal.—Order setting aside referee's report taking an account is

interlocutory and not subject of appeal before final judgment or decree, p. 84.

Cited, *Baker v. Baker*, 10 Cal. 528, in affirmance in a matter of an order setting aside the findings of a referee in a divorce case; *Gimny v. Doane*, 22 Cal. 637, to the point that an interlocutory judgment does not form the basis of an appeal, and if it did it would not bar the right of appeal from final judgment.

6 Cal. 85-87. **NEWHALL v. PROVOST.**

Sheriff has no right after making return to amend it so as to affect vested rights, p. 87.

Cited, *McGrath v. Wallace*, 116 Cal. 553, where it is held that after the lapse of the period of redemption from a tax sale, the court has no jurisdiction to allow the sheriff to amend his return so as to validate an otherwise invalid sale; *Chicago etc. Co. v. Merchants' Nat. Bk.*, 97 Ill. 300, and applied to an amendment of a sheriff's return after judgment, holding that the amendment must be in affirmance of the judgment; *Stewart v. Stringer*, 45 Mo. 116, to the same effect as the last citing case; *Renick v. Ludington*, 20 W. Va. 552, but declared not pertinent under the facts, as in that case there had been no amendment of the return on execution or process, nor had the rights of third persons attached since the sheriff's return, "upon the faith of the verity of the sheriff's return"; *French v. Edwards*, 5 Sawy. 274 to the same effect as the principal case; *Richards v. Ladd*, 6 Sawy. 45, to the same point; note, 13 Am. Dec. 180, as to the effect of such amendment.

6 Cal. 87-88. **MOSES v. THORNE.**

Assignee of Judgment must have an assignment of the appeal bond filed in the case to enable him to sue thereon, p. 88.

Cited in *Dray v. Mayer*, 5 Oreg. 186, following rule; *Chilstrom v. Eppinger*, 127 Cal. 327, 78 Am. St. Rep. 46, holding rule applicable to assignment of judgment while appeal pending; but see *Heisen v. Smith*, 138 Cal. 219, overruling both cases, and sustaining action of guardian's bond by assignee of judgment against guardian.

6 Cal. 88-89. **THOMPSON v. WILLIAMS.**

Injunction.—Power of county judge to issue injunctions in district court cases is a mere power to issue auxiliary process, and the grant of authority therefor is not unconstitutional, p. 89.

Cited, *Creanor v. Nelson*, 23 Cal. 468, in a case holding that the county judge may also dissolve or modify such injunction.

Constitution.—Legislature is only limited in the exercise of its powers by express constitutional restrictions, p. 89.

Cited, *Stóckton etc. R. R. Co. v. City of Stockton*, 41 Cal. 162, as

supporting certain general principles as to the relative powers of the federal and state governments, the construction of the federal constitution, and the state legislative powers; note, 60 Am. Dec. 595.

Injunction.—Issuing injunctions is a judicial act, p. 89.

Cited, *People v. Provines*, 34 Cal. 526, 531, a case concerning the interpretation of art. III. of the state constitution, where the court says of the principal case that it takes no exception thereto, "except so far as it confirms the rule in *Burgoyne's case*." (5 Cal. 19).

6 Cal. 91-92. **WILLIAMS v. SMITH.**

Mandamus Will Not Lie to compel sheriff to deed land to judgment creditor who refuses to pay purchase money, if there is an unsettled contest as to question of lien, p. 92.

Cited, *Harvey v. Fisk*, 9 Cal. 94, a case of an action against a purchaser at a sheriff's sale for not paying the amount of his bid, holding that it was no defense that there was no tender of the certificate of sale. The principal case refers to *Kohler v. Hays*, 5 Cal. 66, as settling the principle involved therein, in which latter case there was also an averment of a readiness to pay upon tender of the deed; *State v. Grubb*, 85 Ind. 217, as sustaining the point as to what is necessary to warrant mandamus against a public officer; *United States v. Labette Co.*, 7 Fed. Rep. 320, to support the point that the office of mandamus addressed to a public officer is to compel him to exercise such functions as the law bestows upon him, but that it only commands the exercise of powers already existing; note, 13 Am. Dec. 287, as to sheriff's sale and nonpayment of bid.

6 Cal. 92-94. **PEOPLE v. PHOENIX.**

Construction.—Statutes in *pari materia* are to be construed as one act, p. 93.

Cited, *People v. Wells*, 11 Cal. 339, and applied to a provision concerning the appointee of the office of county treasurer and the power of the board of supervisors to fill a vacancy.

6 Cal. 94-96; 65 Am. Dec. 489. **DOWNER v. LENT.**

Public Officers.—Powers of a board of pilot commissioners are quasi judicial, and they are not civilly answerable. They are public officers intrusted with certain duties requiring the exercise of judgment, p. 95.

Cited, *People v. Supervisors*, 10 Cal. 345, where it was held that supervisors act judicially in determining the sufficiency of official bonds; *Turpen v. Booth*, 56 Cal. 69, 38 Am. Rep. 51, where the rule of the principal case is said to apply equally to grand jurors; *Going v. Dinwiddie*, 86 Cal. 637, where the rule is declared to be well settled that a judicial officer is not liable for acts done in his official capacity and

within his jurisdiction, and applied to acts of a justice of the peace; *Board v. Purse*, 101 Ga. 446, 65 Am. St. Rep. 330, discussing right of board of education to exclude applicants as pupils; *Jordan v. Hanson*, 49 N. H. 204, 6 Am. Rep. 512, and applied to the nonliability of a justice of the peace; *Salisbury v. County*, 59 N. H. 362, where a certain unreversed order of county commissioners was held to have the effect of a judgment; *Daniels v. Hathaway*, 65 Vt. 255, and applied to selectmen of a town as to their powers and nonliability; *Fath v. Koepfel*, 72 Wis. 293; 7 Am. St. Rep. 869, and applied to the powers and nonliability of a fish inspector; extended note, 90 Am. Dec. 727; note, 12 Am. St. Rep. 919, as to civil liabilities of grand jurors.

6 Cal. 96-99. **PEOPLE v. FREELAND.**

Indictment for murder may describe deceased by name of common repute, p. 97.

Cited, *People v. McNulty*, 93 Cal. 445, where accused was charged with having murdered "one James Collins," and the indictment was held sufficient; *Newton v. State*, 15 Fla. 613, to the same point.

Distinguished in *People v. Lee Look*, 137 Cal. 593, holding indictment for killing of Lee Wing insufficient without direct allegation of murder or that deceased was a human being.

Homicide.—Manslaughter is homicide committed under provocation apparently sufficient to render passion irresistible, p. 98.

Cited in *State v. Davis*, 50 S. C. 423, 62 Am. St. Rep. 841, defining and distinguishing murder and manslaughter.

Grand Jury.—Oath of grand juror that he is a naturalized citizen is *prima facie* evidence, p. 98.

Cited, *People v. Roberts*, 6 Cal. 215, 218, to the same point.

Grand Jury.—When indictment is transferred to district court, exception to panel must be made in court of sessions, p. 98.

Cited, *People v. Roberts*, 6 Cal. 216-218, to the same point.

Grand Jury.—Witnesses.—The objection that the name of one of the witnesses sworn before the grand jury was not indorsed upon the indictment must be taken by motion to set aside the indictment, otherwise defendant is afterward precluded from objecting, p. 98.

Cited, *People v. Symonds*, 22 Cal. 354, to the same point; *People v. Lopez*, 26 Cal. 115, in affirmance; *People v. King*, 28 Cal. 272, in affirmance, holding that such motion must be made before demurrer or plea; *People v. Stacey*, 34 Cal. 308, to the same point; *People v. Northey*, 77 Cal. 629, where the defendant testified and the failure to indorse his name on the indictment was held not a ground for a motion to set aside the indictment.

6 Cal. 99-101; 65 Am. Dec. 490. **GUY v. IDE.**

Default.—Failure to move to set aside a default as an objection to appeal, p. 101.

Referred to in *Howard v. Galloway*, 60 Cal. 11, as having been virtually overruled in *Hallock v. Jaudin*, 34 Cal. 172.

Receiver.—Mortgagee could not have receiver appointed, because not entitled to rents and profits before sale, p. 101.

Cited in *Baker v. Varney*, 129 Cal. 565, 79 Am. St. Rep. 141, and *White v. White*, 130 Cal. 599, construing section 564, Code of Civil Procedure; *Marshall etc. Bank v. Cady*, 76 Minn. 117, further holding that such rents can be applied only to protection of mortgaged property; *Norfor v. Busby*, 19 Wash. 454, construing local statute; *Emeric v. Alvarado*, 64 Cal. 623, where the case is considered, but the court said no point was made as to the appealability of the order, that case holding that an order appointing a receiver in an action for partition not an appealable order; *Bank of Woodland v. Heron*, 120 Cal. 618, referred to, with approval; note, 27 Am. St. Rep. 798, stating the rule of the principal case and noting the change under Cal. Code Civ. Proc. sec. 564, subd. 2. See, also, *Societe Francaise v. Selheimer*, 57 Cal. 623.

Contra, *Haas v. Chicago Bldg. Soc.*, 89 Ill. 504, to the extent that a receiver will be appointed in such case to prevent fraud, bad faith, or injustice; *Hyman v. Kelly*, 1 Nev. 186, to the same effect as the last citing case; *Schreiber v. Carey*, 48 Wis. 214, 215, to the same effect as the last above citing cases.

Mortgage Is Mere Security for debt and an incident to the indebtedness, p. 101.

Cited, *Payne v. Bensley*, 8 Cal. 267, 68 Am. Dec. 320, in affirmance as a settled rule; *McMillan v. Richards*, 9 Cal. 410; 70 Am. Dec. 662, to the same point; *Willis v. Farley*, 24 Cal. 498, and declared to be settled law.

General citation: *San Jose Safe Dep. Bank v. Bank of Madera*, 121 Cal. 544.

6 Cal. 101. **HUDSON v. DOYLE.**

Nuisance.—In action to abate, damages are only an incident to the action, p. 102.

Cited in *McCarthy v. Gaston Ridge M. Co.*, 144 Cal. 546, holding verdict of jury thereon merely advisory; *Courtwright v. Bear River etc. Co.*, 30 Cal. 576, as a rule, but upon the point of concurrent jurisdiction of actions to abate nuisances under the equity powers of district courts.

6 Cal. 102-105. **JONES v. POST.**

Statute of Frauds.—Written guaranty not under seal nor expressing

consideration made contemporaneously with the contract guaranteed is a part thereof, and need not express consideration separately, p. 104.

Cited, *Hazeltine v. Larco*, 7 Cal. 34, holding substantially the same doctrine; *Reeves v. Howe*, 16 Cal. 153, and applied to the guaranty of collection of a note; *Otis v. Haseltine*, 27 Cal. 83, to substantially the same effect as the principal case; *Ford v. Hendricks*, 34 Cal. 675, holding that the promise of a guarantor is not within the statute of frauds, if made before delivery of the note; *Howland v. Aitch*, 38 Cal. 135, affirming the rule of the last citing case; *The Singer Mfg. Co. v. Forsyth*, 108 Ind. 339, and applied to a guaranty bond and a contract of agency executed contemporaneously, but construed under a statute permitting the consideration to be proven. See note to *Siemers v. Siemers*, 60 Am. St. Rep. 434, 437, on statement of consideration.

6 Cal. 105-108. KELLY v. THE NATOMA WATER COMPANY.

Water Rights.—Possession or actual appropriation is the test of priority, where claim is not dependent on ownership of land through which water flows; and such appropriation cannot be constructive, p. 108.

Cited, *Hoffman v. Stone*, 7 Cal. 49, but the rule of the principal case was held not to apply, the point being the appropriation of the bed of a stream and also of natural water of a ravine; *Maeris v. Bicknell*, 7 Cal. 262, 68 Am. Dec. 258, holding that cutting a ditch for a drain and appropriating water to no useful purpose confers no right; *McDonald v. Askew*, 29 Cal. 206, as to the character of interest acquired in water by appropriation; *Nevada County etc. Co. v. Kidd*, 37 Cal. 312, quoting from the principal case as to possession and appropriation being the test of priority to water right; *Union Mill & M. Co. v. Dangberg*, 81 Fed. Rep. 95, in affirmance of the general principle; extended note, 43 Am. Dec. 279, 280, 282; note, 58 Am. Dec. 410.

Water Rights.—There must be an actual diversion, but the right may bear relation to the time of commencement of the work, p. 108.

Cited in *Katz v. Walkinshaw*, 141 Cal. 135, discussing modification of common-law rules in California; *Colorado etc. Co. v. Trust Co.*, 3 Colo. App. 553, to the same effect; *Union Mill & M. Co. v. Dangberg*, 81 Fed. Rep. 95, in affirmance of the general principle. See note 60 Am. St. Rep. 803.

6 Cal. 108-113. REYNOLDS v. JOURDAN.

Contract—Assumpsit.—If the performance of a special contract be prevented by either party, or if the contract has been varied by consent, action for work and labor lies in *indebitatus assumpsit* and not upon the contract, p. 111.

Cited, *Adams v. Pugh*, 7 Cal. 151, in affirmance; *O'Connor v. Dingley*,

26 Cal. 20, where the rule is approved, but the decision is apparently contra; this, however, is explained in *Castagnino v. Balletta*, 82 Cal. 257, 259, which also cites the principal case, and the court says, "that the common counts may be resorted to in actions on contracts, within certain defined limits, has been too long and too well settled in this state to be the subject of further debate"; *Griffith v. Happersberger*, 86 Cal. 614, as sustaining the point as to what constituted a compliance with a contract in obtaining the approval of architects, where defendant had rendered strict performance impossible. The case, however, was assumpsit for work and labor, etc., there being a special contract.

Evidence.—Special contract is admissible under the common counts, and may go to the jury, p. 111.

Cited, *Castagnino v. Balletta*, 82 Cal. 259, in affirmance.

6 Cal. 113-116; 65 Am. Dec. 491. **ADAMS v. HASKELL.** S. C. 6 Cal. 475.

Insolvency.—Funds received by assignees are in custody of the law and cannot be attached, though proceeding is illegal, p. 116.

Cited, *County of Yuba v. Adams*, 7 Cal. 37, to the same point; *Adams v. Hackett*, 7 Cal. 204, in dissenting opinion, quoting from the principal case (p. 116) to the same point; *Adams v. Woods*, 8 Cal. 158, 68 Am. Dec. 317, where it is explained and distinguished, and the court says, "It was a proceeding between the court and its officer to which the appellants were not parties; and all that was said by this court with reference to the power of the court below to seize the assets for the purposes of equitable distribution may be regarded as mere dictum"; *Rosenberg v. Frank*, 58 Cal. 405, merely as being an opinion where the words "pro rata" were used; *Woodhull v. Trust Co.*, 11 N. Dak. 163, property of trust company in custody of its receiver appointed in another state cannot, when brought within state for lawful purpose, be attached; *Lewis v. Harwood*, 28 Minn. 439, where it is referred to merely for an understanding of the facts in connection with the case of *County of Yuba v. Adams*, 7 Cal. 35, which is there cited upon the point of the right to intervene and the interest requisite thereto; notes, 67 Am. Dec. 541, as to partnership receivers; 69 Am. Dec. 768, as to money in the custody of the law; 71 Am. Dec. 592, as to funds in the hands of a receiver; 87 Am. Dec. 568, to the same point; 26 Am. St. Rep. 783, as to attachment of property under control of receiver; 35 Am. St. Rep. 336, as to property in custodia legis; 49 Am. St. Rep. 497, as to receivers and attachment.

6 Cal. 119-123; 65 Am. Dec. 493. **CHENERY v. PALMER.**

Statute of Frauds.—A sale of personal property without immediate delivery is void as to creditors, even though delivery is made before levy, p. 122.

Cited, *Gilbert v. Decker*, 53 Conn. 404, where the possession of the vendee before rights of creditors had accrued by attachment or otherwise, was held valid, and the court said that the principal case had no application because controlled by special statute; *Autrey v. Bowen*, 7 Colo. App. 411, further holding constructive possession by buyer not shown; *First Nat. Bk. etc. v. Wittich*, 33 Fla. 694, a case of a mortgagor retaining possession and selling the property; *Franklin v. Gumer-sell*, 9 Mo. App. 89, affirming the rule of the principal case; *Edmondson v. Hyde*, 2 Sawy. 209; S. C. 7 National Bk. Reg. 4, in affirmance, and applied to a mortgage and bills of sale, no possession being taken of the goods at the time; *In re Morrill*, 2 Sawy. 359; S. C. 8 National Bk. Reg. 120, as stating the true rule; notes, 68 Am. Dec. 361; 72 Am. Dec. 634, 730; 82 Am. Dec. 556; 83 Am. Dec. 142; extended note, 97 Am. Dec. 345; note, 4 Am. St. Rep. 870.

Statute of Frauds.—If sale absolute in terms of personal property is by private agreement to operate as a mortgage, it is a secret trust and void as to creditors; and a contract void for fraud as to creditors is tainted with the fraud as to all subsequent acts, p. 122.

Cited in *Ruggles v. Cannedy*, 127 Cal. 295, construing section 2957, Civil Code; *Hodgkins v. Hook*, 23 Cal. 584, but that case was declared not within the rule, as there was no proof of a secret trust; *First Nat. Bk. etc. v. Comford*, 4 Dak. 172, a case of a chattel mortgage, without change of possession, upon a secret parol trust; *First Nat. Bk. etc. v. Wittich*, 33 Fla. 694, to the same effect as the principal case; *Fuller v. Griffith*, 91 Iowa, 636, a case of a fraudulent conveyance in taking an absolute deed as security, the grantee knowing the grantor to be in debt, but the question of intent was held material; *Dobyns v. Meyers*, 20 Mo. App. 69, to the point that a mortgage fraudulent and void as to creditors cannot be purged by taking possession thereunder; *Wells v. Langbein*, 20 Fed. Rep. 186, to the same point as the last citing case, which quotes the language of this case; *Newell v. Wagness*, 1 N. Dak. 69, a case of conveyance by an insolvent, and a secret trust which was declared void as to creditors; *Edmonson v. Hyde*, 2 Sawy. 209; 7 National Bk. Reg. 4, holding such mortgages and sales void as against the assignee in bankruptcy; *In re Morrill*, 2 Sawy. 359, 8 National Bk. Reg. 129, holding the same as the last citing case, and also declaring a subsequent taking of possession does not validate such mortgage or sale.

Question for Jury—Direction to Find.—Where the law declares a transaction fraudulent upon the undisputed facts, it is not a question for the jury, and the court may direct a finding and set aside a verdict to the contrary, p. 122.

Cited, *Martin v. Ward*, 69 Cal. 132, to the point that if "there is no conflict of evidence the court may properly direct a verdict;" *First Nat. Bk. etc. v. Comford*, 4 Dak. 172, where the court directed the

verdict, although the principal case was evidently not cited on this point; note, 56 Am. Dec. 322.

General citation: *Shanklin v. McCrocker*, 151 Mo. 595.

6 Cal. 123-126. **LEONARD v. DARLINGTON.**

Ejectment cannot be maintained upon any title arising from a sale of land in the city of San Francisco by a portion of the commissioners of the funded debt; such commissioners could not convey title by majority action unless board was duly assembled, pp. 125, 126.

Cited, *Welch v. Sullivan*, 8 Cal. 201, as affirming *Cohas v. Raisin*, 3 Cal. 443, but both this last case and the citing case relate principally to the title of the city of San Francisco to and its control over lands, and fully discuss the law of pueblo lands. The citing case also considers the question of execution sale of pueblo lands, and the right to maintain ejectment thereunder. We do not consider the citation in point.

6 Cal. 126-130; 65 Am. Dec. 496. **ADAMS v. HASTINGS.**

Interest.—A written contract to pay more than legal interest on past indebtedness, or a greater sum than is due, is void, but is good for future interest when time is extended, pp. 129, 130.

Cited, note 33 Am. St. Rep. 634, as to interest after maturity, etc.

6 Cal. 130-134. **DEWEY v. LATSON.**

Judgment Lien.—Appeal suspends running of until remittitur filed, p. 133.

Cited, *Chapin v. Broder*, 16 Cal. 420, where the principal case is declared to have "proceeded entirely upon the ground that the filing of a proper undertaking operated as a suspension of the right to enforce the judgment." The court also quotes from the principal case (p. 134), and adds, "These were the reasons given for the decision, and in our opinion, they are the only reasons upon which it can be maintained. To apply the same rule in all cases, without reference to the sufficiency of the undertaking, would be to ignore the provisions of the statute;" *Englund v. Lewis*, 25 Cal. 351, quoting at length from the principal case (p. 134), and declaring that it had "never been overruled"; *Solomon v. Maguire*, 29 Cal. 237, where the principal case is declared to be "of very doubtful logic," and followed "solely upon the ground of stare decisis, and we are not disposed to extend the doctrine of that case beyond the precise question there determined"; *Barroilhet v. Hathaway*, 31 Cal. 397, 89 Am. Dec. 194, 195, and declared not to conflict therewith nor to be in point. The court also said that the principal case was followed upon the ground of stare decisis; *Swift v. Conboy*, 12 Iowa, 445, by counsel, as to the discharge of a judgment lien by a new judgment in the supreme court against appellant and

his sureties on his supersedeas bond. Doubted in *Savings etc. Co. v. Irrigation Co.*, 89 Fed. 39, where stated to have been overruled by later cases, and holding lien not extended by receiver's possession; and to same effect, see *Smith v. Schwartz*, 21 Utah, 133, 134, 81 Am. St. Rep. 673, 674.

6 Cal. 134-138. **BENNETT v. SOLOMON.**

Parol Evidence is admissible to prove or vary the consideration of a promissory note or mortgage, p. 138.

Cited, *Shaver v. Bear River etc. Co.*, 10 Cal. 402, to the point that parol proof of the existence of a debt intended to be secured by mortgage is admissible; *Spear v. Ward*, 20 Cal. 676, to substantially the same point; *Coles v. Soulsby*, 21 Cal. 51, as to the consideration clause of a deed; *Peck v. Vandenberg*, 30 Cal. 57, upon the point of parol evidence to show that the consideration named in a deed did not pass; extended note, 30 Am. Dec. 117, as to parol evidence affecting consideration clause of deed.

6 Cal. 138-140. **GROSCHEN v. PAGE.**

Assignments by Insolvents are void unless made in conformity to insolvent act, p. 139.

Cited, *Dana v. Stanfords*, 10 Cal. 277, where substantially the same rule is declared.

6 Cal. 141-142. **RICH v. DAVIS.**

Negotiable Paper.—Bona fide purchaser before maturity without notice is free from defense of fraud, pp. 141, 142.

Cited, *Bedell v. Herring*, 77 Cal. 574, 11 Am. St. Rep. 309, to the same point.

6 Cal. 143-144. **PEOPLE v. NEVADA.**

Constitutional Law.—Act of 1850, conferring upon the county court the power of incorporating towns, is unconstitutional, p. 141.

Cited, *Colton v. Rossi*, 9 Cal. 599, in affirmance; *Stone v. Elkins*, 24 Cal. 127, in support of the point as to the constitutional construction of section 74 of the act to regulate elections, conferring upon the boards of supervisors of the several counties the power to try contests as to the office of county judge; *People v. City of Riverside*, 66 Cal. 289, in support of the point relative to the usurpation of a franchise by a municipal corporation, and the sufficiency of a complaint therefor showing that the defendant was exercising the same without legal incorporation; *People v. Stanford*, 77 Cal. 369, a case of usurpation of corporate franchise, and pleadings relating to corporate existence, quoting from the last citing case; *People ex rel. v. Bennett*, 29

Notes Cal. Rep.—16.

Mich. 460; 18 Am. Rep. 114, upon the point that direct legislative action is necessary to a compulsory municipal incorporation, and the validity of certain statutes for the incorporation of villages; In re Ridgefield Park, 54 N. J. L. 291, under a like constitution, to substantially the same effect as the principal case; Territory ex rel. v. Stewart, 1 Wash. St. 110, to substantially the same point; Forsyth v. City of Hammond, 63 Fed. Rep. 775; S. C. 71 Fed. Rep. 446, to substantially the same point.

Distinguished in *Young v. Salt Lake City*, 24 Utah, 333, upholding Revised Statutes, section 288 et seq., relating to changing of boundaries of cities.

Constitutional Law.—Legislative functions cannot be exercised by the judiciary, nor can the legislature delegate such power to a court, which is permitted only the performance of judicial acts, p. 144.

Cited in *Vernon v. Board*, 142 Cal. 515, on point that power of supervisors to fix boundaries of proposed town is legislative and not delegated; in the following cases, which are all to substantially the same effect: *Stone v. Elkins*, 24 Cal. 127; *People v. Sanderson*, 30 Cal. 167; *Ex parte Griffiths*, 118 Ind. 84; 10 Am. St. Rep. 108; *Ford v. The Town of North Des Moines*, 80 Iowa, 630; *People ex rel. v. Bennett*, 29 Mich. 460; 18 Am. Rep. 114; In re Ridgefield Park, 54 N. J. L. 291; Territory ex rel. v. Stewart, 1 Wash. St. 110; In re Incorporation of Village of North Milwaukee, 93 Wis. 624; *Forsyth v. City of Hammond*, 68 Fed. Rep. 775, S. C. 71 Fed. Rep. 446.

6 Cal. 144-147. SWEETLAND v. FROE.

To Recover Lands Under Possessory Act, it is necessary to comply with the provisions thereof, p. 147.

Cited, *Murphy v. Wallingford*, 6 Cal. 649, in affirmance; *Bird v. Denison*, 7 Cal. 311, to the same effect; *Wright v. Whitesides*, 15 Cal. 48, holding that compliance with the provisions of the act must be shown; *Hicks v. Whiteside*, 23 Cal. 408, to the same point; *Crowell v. Lanfranco*, 42 Cal. 656, in affirmance.

6 Cal. 148. MITCHELL v. HAGOOD.

That Aliens are in Possession of Mine and working it without a license affords no apology to trespassers; none but the state can object, p. 148.

Cited, note 63 Am. Dec. 107, as to the right of aliens to mine on public lands.

6 Cal. 149-154; 65 Am. Dec. 498. OSBORNE v. ENDICOTT.

Recitals in a Deed bind all parties and privies, but this does not extend to mere description or nonessential averments, p. 153.

Cited, *Simson v. Eckstein*, 22 Cal. 592, holding a recital of a material fact binding; *Moffatt v. Bulson*, 96 Cal. 110, 31 Am. St. Rep. 195, quoting from the principal case (p. 153) on this point; *Amba v. Chicago etc. Ry. Co.*, 44 Minn. 269, holding that an immaterial recital does not estop; notes 70 Am. Dec. 61; 78 Am. Dec. 271; 87 Am. Dec. 115; 42 Am. St. Rep. 265.

Pleadings.—Statute of frauds must be specially pleaded, p. 153.

Cited, *Broder v. Conklin*, 77 Cal. 336. This case and the principal case are both cited in *Feeney v. Howard*, 79 Cal. 534; 12 Am. St. Rep. 169, the principal case being criticised, and *Broder v. Conklin* being declared to have placed no reliance thereon. *Feeney v. Howard* holds that a denial of the contract raises the question of its validity under the statute; *Kraft v. Greathouse*, 1 Idaho, 259, holding that the statute must be pleaded; notes 68 Am. Dec. 201; 72 Am. Dec. 102; 83 Am. Dec. 483; extended note 86 Am. Dec. 684, 686; notes 87 Am. Dec. 146; 93 Am. Dec. 758; 12 Am. St. Rep. 171; 36 Am. St. Rep. 477; 42 Am. St. Rep. 921. See 3 Deering's Cal. Dig. 2614.

Resulting Trust arises from payment of consideration in money or other property, when deed is taken in name of another, p. 153.

Cited, *Bayles v. Baxter*, 22 Cal. 578, 593, to the same point; *Fulton v. Jansen*, 99 Cal. 591, holding that a resulting trust pro tanto arises from the advancement of part of the purchase money; *Murphy v. Clayton*, 113 Cal. 157, holding the same in effect as the last citing case; notes, 69 Am. Dec. 422; 72 Am. Dec. 102; 74 Am. Dec. 670; 76 Am. Dec. 629; 79 Am. Dec. 681; 29 Am. St. Rep. 328.

Resulting Trust.—Recital of a trust as to the whole of a lot does not estop to prove a resulting trust as to part, p. 153.

Cited, *Fulton v. Jansen*, 99 Cal. 591, where it is declared that "an allegation of such trust in a whole tract or parcel of land does not preclude proof of a trust in a part thereof."

Resulting Trust may be Proved by parol or by any note or memorandum in writing, p. 154.

Cited, *Peralta v. Castro*, 6 Cal. 358, holding that the admissibility of parol evidence to contradict an instrument under seal could only arise in a suit between trustee and cestui que trust upon a denial of the trust by the grantee; *Bayles v. Baxter*, 22 Cal. 579, to the same point as the principal case; notes, 77 Am. Dec. 668; 79 Am. Dec. 680; 87 Am. Dec. 115; 9 Am. St. Rep. 530; 33 Am. St. Rep. 233.

General citation: *Fernandez v. Tormey*, 121 Cal. 519.

6 Cal. 154-155. PEOPLE v. FISHER.

Change of Venue.—Order granting or refusing motion for, is discretionary, and will only be reviewed for abuse, p. 155.

Cited in affirmance in *Watson v. Whitney*, 23 Cal. 378; *People v.*

Congleton, 44 Cal. 95; *Avila v. Meherin*, 68 Cal. 479; *People v. Golden-son*, 76 Cal. 339; *People v. Elliott*, 80 Cal. 298.

6 Cal. 155-156. **EMERIC v. TAMS.**

Pleadings—Exhibits.—In an action of foreclosure reference may be made to a copy of a mortgage attached for description of land, p. 156.

Cited, *Ward v. Clay*, 82 Cal. 505, and applied to a copy of a note annexed to the complaint and referred to as an exhibit; *Whitby v. Rowell*, 82 Cal. 635, 636, in affirmance under like facts as the principal case; *Johnson v. McDuffee*, 83 Cal. 31, a case of foreclosure of a mortgage; *Stephen v. American F. Ins. Co.*, 14 Utah, 267, affirming the principle as applied to actions on written instruments.

Judgment.—Agreed interest may be computed to time of judgment, and added to the principal, and the judgment bears agreed rate for the whole amount, p. 156.

Cited, *McCann v. Lewis*, 9 Cal. 247; *Mount v. Chapman*, 9 Cal. 297; and *Corcoran v. Dole*, 32 Cal. 88, all being in affirmance. As to the effect, however, of the statute of 1868, etc., upon the prior rule, see 2 Deering's Cal. Dig., p. 1562, IX. 50, et seq.

6 Cal. 156-157. **STRONG v. PATTERSON.**

Evidence.—Exception for irrelevancy is sufficient if evidence does not conform to issues or is of facts not pleaded, p. 157.

Cited, *Davey v. Southern Pacific Co.*, 116 Cal. 332, in affirmance, quoting from the principal case.

6 Cal. 158-161. **CASTRO v. CASTRO.**

Wills.—By the custom of California, under the Mexican rule, two witnesses were sufficient to a will, pp. 160, 161.

Cited, *Tevis v. Pitcher*, 10 Cal. 477, in affirmance; *Donner v. Palmer*, 31 Cal. 522, specially concurring opinion, as to the effect of custom, especially Mexican custom in respect to grants, and record of same, of lots in San Francisco; *Emeric v. Alvarado*, 64 Cal. 565, in a case where the same will as in the principal case was before the court, the opinion stating that the law was properly declared in the principal case; *Adams v. Norris*, 23 How. (U. S.) 365, as to evidence of a custom relative to the manner of making wills, the Spanish law and the California decisions being considered; *Gildersleeve v. Mining Co.*, 6 N. Mex. 42, as to form of will under Mexican laws.

Probate of Wills was unknown in California under Mexican law. A will is regarded as a conveyance, and takes effect as a deed on proof of execution, in the absence of an express statute requiring probate, p. 161.

Cited, *Grimes' Estate v. Norris*, 6 Cal. 625, 65 Am. Dec. 546, and *Tevis v. Pitcher*, 10 Cal. 477, both to the same point; *Emeric v. Alvarado*, 64 Cal. 565, where it is said, "admitting, as argued, that the probate court had no jurisdiction of the probate of the will in *Castro v. Castro*, and that therefore the decision in 6 Cal. is not binding for want of jurisdiction, still we are of opinion that the law was properly declared in that case," namely, that the will was valid; it was the same will then before the court (in 1884); *Adams v. Norris*, 23 How. (U. S.) 363, quoting from the principal case (p. 161) as to a will being a conveyance, etc., and noting the change by statute; *Adams v. De Cook, McAllister*, 255, quoting from the principal case (p. 161) as to the nonexistence of a probate court, but adding the opinion that there was probably some interposition of judicial authority necessary to authenticate the execution of wills.

6 Cal. 161-162. **HART v. MOON.**

Jurisdiction.—Justices of Peace had no jurisdiction of claims exceeding two hundred dollars except in forcible entry and detainer, p. 162.

Approved in *Freeman v. Powers*, 7 Cal. 105, following rule; *Herkimer v. Keeler*, 109 Iowa, 685, discussing jurisdiction under local statutes.

Damages.—In forcible entry and detainer justice's court should award treble damages though not prayed for, p. 162.

Cited, *Watson v. Whitney*, 23 Cal. 378, to the same effect, though the complaint did not refer to the statute.

6 Cal. 162-163. **CHIPMAN v. HIBBERD.**

Measure of Damage for cutting down trees is not mere value of the wood, but injury to the land, including the purposes for which trees are used or designed, p. 162.

Cited, *White v. Stoner*, 18 Mo. App. 552, where the measure of damages is held not exclusively the value of the wood for cutting down shade trees, but the injury to the inheritance; *Lowery v. Rowland*, 104 Ala. 427, where the injury to the inheritance in reversion was declared the rule, and not the value of the wood; *Hoyt v. Southern etc. Co.*, 60 Conn. 393, where the rule was held to be the actual loss, but being an action for injury to land, the value of the wood was not enough to award, and that a probable injury to the sale of the land was not speculation; *Waters v. Stevenson*, 13 Nev. 181; 29 Am. Rep. 305; where it was held error to instruct the jury not to allow the defendant the necessary cost of mining ore in a case of trespass and conversion thereof; *Foote v. Merrill*, 54 N. H. 494; 20 Am. Rep. 156, where the rule of the principal case is stated, but the increased value of the trees by the defendant's labor in converting them into timber was excluded; *Dwight v. The Elmira etc. R. R. Co.*, 132 N. Y. 203; 28 Am. St. Rep. 566, in a case concerning the measure of damages

for fruit trees and forest trees when cut down or destroyed by fire or otherwise—an important case.

6 Cal. 163-164. **RICH v. DAVIS.**

Partnership.—Where a mining company forms a trading partnership with an individual, each member of the company is a member of the firm, p. 163.

Cited, *Smith v. Cooley*, 65 Cal. 48, where it is said, "The working of a mine under a bare 'mining right' has been uniformly considered by courts of equity as a species of trade. Hence the legal relations existing between two or more persons interested in such a right is that of a qualified partnership."

6 Cal. 165-167. **REYNOLDS v. PIXLEY.**

Homestead cannot be carved out of land held in joint tenancy, p. 167.

Cited in *Bishop v. Hubbard*, 23 Cal. 517; *S. C. 83 Am. Dec. 133*; *Elias v. Verdugo*, 27 Cal. 425; *Seaton v. Son*, 32 Cal. 483; *First National Bank of Santa Barbara v. Guerra*, 61 Cal. 112; *Fitzgerald v. Fernandez*, 71 Cal. 507; *Rosenthal v. Merced Bank*, 110 Cal. 203—all affirming the point as to both joint tenancy and tenancy in common; *Newton v. Summey*, 59 Ga. 400, a case of injunction refused against proceeding of the debtor's wife to have a homestead laid off out of premises belonging to a partnership of which her husband was a member; *Lindley v. Davis*, 6 Mont. 456, considering the California rulings, and holding that no homestead can be set apart by a partner out of partnership lands as against a firm creditor; *Smith v. Chenault*, 48 Tex. 462, where the court expresses no opinion as to the rule of the principal case except to say that it seems to be sustained by courts of high authority. The case was one of a homestead by a tenant in common, and the partnership use of a homestead; *In re Parks*, 9 Nat. Bk. Reg. 273, where the point as to whether there can be a homestead exemption of property owned by the occupant in common with others as partners or otherwise was declared to be unnecessary to that decision, and the court said that the authorities were conflicting, and merely cited certain authorities "for future reference"; *In re Blodgett*, 10 Nat. Bk. Reg. 147, as bearing upon the point that the uniform current of authorities is that there is no separate exemption to individual members of a firm out of undivided partnership property; extended note 63 *Am. Dec. 122, 123*. Contra, *Thorn v. Thorn*, 14 Iowa, 54; 81 *Am. Dec. 453*, where, in view of statutes it is held that a joint tenant or tenant in common may claim a homestead; *McClary v. Bixby*, 36 Vt. 259, 84 *Am. Dec. 688*, where the statute permits a homestead to be carved out of a tenancy in common.

Homestead upon land held in joint tenancy is not validated by subsequent partition and residence after debts incurred, pp. 166, 167.

Cited, *Rosenthal v. Merced Bk.*, 110 Cal. 203, to the same effect.

Homestead.—Actual family residence was essential.

Cited, *McQuade v. Whaley*, 31 Cal. 530, to the same effect.

Homestead.—Lack of provision for recording notice of homestead regretted (per *Murray, C. J.*), p. 167.

Cited, *Levins v. Rovegno*, 71 Cal. 280, in connection with the statute of 1851, and noting subsequent amendments.

General citation: *Lloyd v. Hoo Sue*, 3 Sawy. 74, Fed. Cas. No. 8432.

6 Cal. 167-169. **HICOX v. GRAHAM.**

Probate Law.—Executors and administrators are individually liable for costs, but they should be allowed in account unless action was prosecuted or resisted without just cause, p. 169.

Cited, *Henry v. Superior Court*, 93 Cal. 572, as to the allowance of costs and the question of good faith and reasonable cause; *Stevens v. Railroad Co.*, 103 Cal. 254, as to costs and individual liability of administratrix, secs. 1031 and 1059, Cal. Code Civ. Proc. being construed; *Lloyd v. Hoo Sue*, 5 Sawy. 77, to the point that the allowance of claims of creditors against a bankrupt operates as a judgment, the same as allowance of claims in probate proceedings—a citation not in point, except perhaps by implication.

6 Cal. 170-171. **PRIEST v. UNION CANAL COMPANY.**

Evidence.—Court may in its discretion allow a party, any time before the cause is submitted, to supply an omission occasioned by mistake or inadvertence, p. 171.

Cited, *Foote v. Richmond*, 42 Cal. 442, in affirmance.

Water Rights.—Allegation of prior appropriation, and of diversion to plaintiff's damage, sufficient, p. 171.

Cited, *Butte Canal etc. Co. v. Vaughn*, 11 Cal. 153, 70 Am. Dec. 773, which sustains the rule of prior appropriation, but the principal case is cited generally after the statement of illustrative facts substantially like those of the principal case, to the point that courts will entertain such questions and "endeavor to relieve them of their complication and embarrassment and to mete out justice to all parties."

6 Cal. 172-173. **BRADSHAW v. TREAT.**

Ejectment.—Defendant having a prior actual possession under inclosure need not show compliance with possessory act or pre-emption laws, p. 172.

Cited, *Dyson v. Bradshaw*, 23 Cal. 537, in affirmance, the land being a portion of the same premises as in the principal case; *Deemer v. Falkenburg*, 4 N. Mex. 59, on point that priority of possession will prevail where title not involved.

6 Cal. 173-175. HARLAN v. SMITH.

Default admits every issuable fact stated in complaint, p. 174.

Cited, *Weese v. Barker*, 7 Colo. 181, to the same point; *Russ v. Gilbert*, 19 Fla. 60, holding the same rule, and also that the amount of damages may be gone into upon inquest.

Default.—Affidavit of merits without any averment of mistake, surprise, or excusable neglect, is not sufficient to warrant setting aside default.

Cited, extended note, 58 Am. Dec. 395.

Redemption.—Lands sold under a decree of foreclosure of a mortgage are subject to redemption in the same manner as lands sold under ordinary execution.

Cited, *McMillan v. Richards*, 9 Cal. 412; 70 Am. Dec. 664; and *Stout v. Macy*, 22 Cal. 650, both cases in affirmance; *Parker v. Dacres*, 130 U. S. 47, holding that a statutory right of redemption is a rule of property in the state where it exists, which the equity courts of the United States will recognize.

6 Cal. 175, 176. OSBORN v. HENDRICKSON, S. C. 7 Cal. 282; 8 Cal. 31, but different points involved.

Appeal.—Dismissal of an appeal operates as an affirmance of the judgment below, and charges the sureties, p. 176.

Cited, *Karth v. Light*, 15 Cal. 327, where the rule as to dismissal is affirmed, subject to certain exceptions; *Chase v. Berand*, 29 Cal. 138, in affirmance; *State v. Bieseman*, 12 Mont. 18, in dissenting opinion but substantially the rule of the principal case was, however, sustained; *Casanova v. Kreusch*, 21 W. Va. 727, 728, where the court quotes from *Karth v. Light*, above noted, and says that case accords with the other California decisions; *Perry v. Horn*, 21 W. Va. 736, where the court says: "The general spirit which has pervaded the law of this country has been in opposition to the granting of a second appeal or writ of error when the first has been dismissed for want of prosecution."

6 Cal. 176-183. STEARNS v. AGUIRRE.

In Action Against Several who are sued as joint debtors, recovery must be against all or none. This was in conformity with the Practice Act, pp. 180-183.

Overruled, *Lewis v. Clarkin*, 18 Cal. 400, so far as being applicable to the Practice Act of California; also, overruled in *Shain v. Forbes*, 82 Cal. 584; section 578 of Cal. Code Civ. Proc., being declared to be but a re-enactment of section 145 of the Practice Act; *Evans v. Cook*, 11 Nev. 72, where it is also declared to have been overruled; *Sears v. McGrew*, 10 Oregon, 51, also so declares.

6 Cal. 183-186. ARMSTRONG v. HAYWARD.

Release of One Joint Debtor releases the others, but must be a technical release under seal, p. 186.

Cited, Griffith v. Grogan, 12 Cal. 324, to substantially the same effect; Prince v. Lynch, 38 Cal. 531, and in dissenting opinions 537; 99 Am. Dec. 429, to the same point.

6 Cal. 186-187. AIKEN v. MARIPOSA MINING CO.

Summons in a Suit Against a Corporation must be served on one of the officers or agents named in the statute, p. 186.

Cited, O'Brien v. Shaw's Flat etc. Co., 10 Cal. 344; Cairo etc. R. R. Co. v. Trout, 32 Ark. 23; Southern Building etc. Association v. Hallum, 59 Ark. 586; Great West etc. Co. v. Woodmas, 12 Colo. 51; 13 Am. St. Rep. 209; and Lonkey v. Keyes S. M. Co., 21 Nev. 317—all being to the same point and in affirmance.

6 Cal. 187-189. JACKSON v. NORTON.

Injunction does not lie to restrain suit for purchase money when plaintiff retains possession and contract is unrescinded, p. 189.

Cited, Fratt v. Fiske, 17 Cal. 385, and Hayes v. White, 55 Cal. 41, both cases to the same point in substantial affirmance.

6 Cal. 190-192. GAS COMPANY v. SAN FRANCISCO. S. C. 9 Cal. 453; 11 Cal. 42.

Municipal Corporations.—Contract authorized by ordinance may be confirmed by joint resolution of common council without requiring approval of mayor, p. 191.

Cited, Martindale v. Palmer, 52 Ind. 414; McGavock v. Omaha, 40 Neb. 82; City of Galveston v. Morton, 58 Tex. 415; and Atchison Board of Education v. De Kay, 148 U. S. 599—all being to the same effect and in affirmance; Illinois etc. Bank v. City of Arkansas, 76 Fed. Rep. 286, where the court says, "It is common learning that when a statute authorizes action by the legislative body of a city, and does not require such action to be taken by ordinance, it may be taken by a vote upon a motion or by the passage of a resolution"; extended note 34 Am. Dec. 632.

6 Cal. 192-195. GATES v. NASH.

Witness.—Defendant was not under the Practice Act a competent witness for his codefendants in trespass, pp. 194, 195.

Cited, Turner v. McIlhaney, 8 Cal. 579, where the court states a like rule, 44 Am. Dec. 144.

6 Cal. 195-196; 65 Am. Dec. 501. JOHNSON v. GORHAM.

Execution is Lien only after levy under the statute, p. 196.

Cited, notes, 68 Am. Dec. 187; 77 Am. Dec. 466; 78 Am. Dec. 332; 85 Am. Dec. 516; 86 Am. Dec. 782; 11 Am. St. Rep. 716.

Execution First Levied should be first satisfied, p. 196.

Cited, notes, 70 Am. Dec. 603, as to priority; 86 Am. Dec. 783, as to manner of levy according to priority of date and delivery.

Execution—Garnishment.—Service of copy of execution and notice of garnishment on a third party constitutes no lien on the debtor's property in his hands capable of manual delivery, p. 196.

Cited in *Wilson v. Harris*, 21 Mont. 397, sustaining rule (but see dissenting opinion, pages 437, 438); *Corning v. Records*, 69 N. H. 398, 76 Am. St. Rep. 187, holding creditor not entitled to vacate fraudulent conveyance by virtue of such garnishment; *Hulley v. Chedic*, 22 Nev. 140, where the authorities are said to conflict, but the case itself is in substantial accord with the above rule; *Hulley v. Chedic*, 22 Nev. 140, 58 Am. St. Rep. 732, to the same effect, but noting the conflict of authority.

Penalty Against Sheriff is only recoverable when money is admitted to have been collected and he refuses to pay it over, and not where his failure to pay arises from his liability to decide between conflicting claims, p. 196.

Cited, *Wilson v. Broder*, 10 Cal. 489; *Giffin v. Smith*, 2 Nev. 378, both citations in substantial affirmance; *Nash v. Muldoon*, 16 Nev. 414, as having been relied on by counsel, but the court declared it was not in point, although the construction of a statute as to penalties relating to sheriffs was involved in the citing case; note 91 Am. Dec. 333.

6 Cal. 197-201. **ANDERSON v. PARKER.**

Hearsay Information of Death, derived from the immediate family of deceased, *prima facie* establishes the fact, p. 200.

Cited, *Du Pont v. Davis*, 30 Wis. 178, holding the same doctrine; extended note 91 Am. Dec. 528.

Pleadings.—Averment in answer "that defendant has not sufficient knowledge to form a belief, and therefore neither admits nor denies," does not sufficiently controvert an allegation in a verified complaint of the death of the plaintiff's ancestor, p. 200.

Cited, extended note 70 Am. Dec. 632, as to denials on information and belief.

Instructions.—Where many and long instructions are asked, they should be submitted in time for examination, p. 201.

Cited, *People v. Williams*, 32 Cal. 289, as supporting the rule requiring instructions to be presented to the court before the argument to the jury; *Flint v. Nelson*, 10 Utah, 265, as in point upon the rule that

requests for instructions should be presented to the court before the charge to the jury.

Part of Judgment Valid.—Judgment may be corrected as to a mere clerical error, p. 201.

Cited, *Claudius v. Melvin*, 146 Cal. 260, and *Grannis v. Superior Court*, 146 Cal. 256, both holding final divorce decree entered without previous interlocutory decree may be modified after lapse of one year, by vacating award of divorce without affecting decree as to its determination of right to divorce; extended note 14 Am. Dec. 518.

6 Cal. 202-203. **PEOPLE v. LEFUENTE.**

Indictment.—Statement of Venue is sufficient if commission of crime shown within court's jurisdiction, p. 202.

Cited in *Buck v. State*, 61 N. J. L. 528, construing local statutes.

Indictment must state date of offense where time is of essence of the offense, p. 203.

Cited in *People v. Miller*, 137 Cal. 644, but holding information sufficient when stating commission "on or about" two days prior to its filing; *People v. Sheldon*, 68 Cal. 437, in affirmance; *State v. Thompson*, 10 Mont. 558, where a similar rule is declared, but it is apparent, however, that the court did not consider the principal case as directly in point.

6 Cal. 205-206. **PEOPLE v. LOCKWOOD.**

In an indictment for murder, an error in the middle name of deceased is immaterial, p. 206.

Cited, *People v. Ferris*, 56 Cal. 444, a case of forgery, holding the omission of the initial of the middle name immaterial; *People v. Smith*, 103 Cal. 568, a case of forgery, but the rule was held applicable to both civil and criminal cases, and also that a variance between pleading and proof in such case was immaterial; *People v. Faust*, 113 Cal. 175, a case of selling liquor to Indians, but not naming them; *Cox v. Durham*, 128 Fed. 874, omission of or mistake in initial letter of middle name in warrant of arrest is immaterial; *Choen v. The State*, 52 Ind. 348, 21 Am. Rep. 180, a criminal prosecution for assault and battery, holding the initial letter of the middle name to be surplusage; note 69 Am. Dec. 118.

Same.—In case of second prosecution for the same killing with the middle name correctly inserted, identity of person could be established by evidence aliunde, and former acquittal or conviction be pleaded in bar, p. 206.

Cited, *People v. Faust*, 113 Cal. 175, substantially in affirmance.

6 Cal. 206-207. PEOPLE v. WILLIAMS.

Criminal Law—Challenge.—The formation or expression of an unqualified opinion as to guilt or innocence was ground of challenge for implied bias, but juror could not be questioned as to what his opinion was, p. 207.

Cited, *People v. Hamilton*, 62 Cal. 379, 380, where the distinction between actual bias and implied bias, in respect to inquiries of a juror as to belief or nonbelief of guilt, is made. The rule, however, of the principal case is declared changed by section 1074 of Cal. Pen. Code, as amended in 1880; *State v. McClear*, 11 Nev. 61, in an exhaustive opinion as to the meaning of the terms "jury" and "trial by jury," and the question as to what expression or belief as to the guilt or innocence of a defendant will disqualify a juror.

6 Cal. 207-209; 65 Am. Dec. 503. PEOPLE v. ARO.

Indictment for Murder must charge the facts constituting the offense, must show that the wound was mortal and caused the death, and the time of the death must be stated, p. 209.

Cited, *People v. Hood*, 6 Cal. 238, where the charge for arson was laid in the alternative, and the facts and circumstances were not stated with sufficient certainty; *People v. Wallace*, 9 Cal. 31, as to the necessity of a statement of facts in an indictment for murder; *People v. Lloyd*, 9 Cal. 56, in affirmance; *People v. Steventon*, 9 Cal. 275, where felonious intent, the fact that the wound was mortal, and the time of death were declared necessary to constitute murder; *People v. Myers*, 29 Cal. 79, as holding that the facts and circumstances must be stated in a case of indictment for arson; *State v. Woolsey*, 19 Utah, 492, on point that precise time need not be stated in larceny indictment; *People v. Miller*, 137 Cal. 644, noted under *People v. Lafuente*, 6 Cal. 202; *State v. Blan*, 69 Mo. 322, quoting from the principal case (p. 209); *State v. Thompson*, 10 Mont. 559, in an indictment for rape, which was held sufficient under the Practice Act there, in charging the offense to have been committed "on or about" a certain day; *State v. Millain*, 3 Nev. 465, in an indictment for murder, where the court reviews the California cases and declares the principal case to have been partly overruled by the latter cases of *People v. Steventon*, 9 Cal. 274; *People v. Dolan*, 9 Cal. 576; *People v. Judd*, 10 Cal. 313; *People v. King*, 27 Cal. 507; and *People v. Cronin*, 34 Cal. 191. (See *People v. Murphy*, 39 Cal. 55, and Vol. 1 Deering's Cal. Dig. p. 725 et seq.) The principal case is also cited, notes 69 Am. Dec. 169, 433; 71 Am. Dec. 380; extended note 3 Am. St. Rep. 279, 280; note 32 Am. St. Rep. 155.

Cross-reference: See 6 Cal. 210-214, *People v. Kelly*.

6 Cal. 209-210. HALLOWER v. HENLEY.

Negligence.—Master is bound to use reasonable care to prevent injury

to servant, and where he neglects to provide a suitable and safe means to enable a workman to perform labor, and the latter, without knowledge of the defect, suffers an accident, the master is liable, p. 210.

Cited, *McGlynn v. Brodie*, 31 Cal. 382, holding that a servant takes the usual risks of employment if he works knowingly or with means of knowledge of hazard equal to that of his employer; *Railroad Co's v. Webb*, 12 Ohio St. 491, where substantially the same doctrine is declared; *Price v. Houston etc. Co.*, 46 Tex. 538, as sustaining the point of nonliability of master for negligence of fellow-servant; notes 38 Am. Dec. 346; extended note 77 Am. Dec. 219, as to master's liability, etc.; note 13 Am. Rep. 164.

6 Cal. 210-214. **PEOPLE v. KELLY.**

Indictment for Murder.—Time of commission need not be averred except as before finding of indictment and within a year and a day before death from the wounds, unless time is a material ingredient of the offense, p. 212.

Cited, *State v. Sammons*, 95 Ind. 24, to the same point, holding also the exception where time is of the essence of the offense; *State v. Harp*, 31 Kan. 498, in an indictment for murder, where the time was averred "on or about" a certain specified date, and the words "on or about" were rejected as surplusage, leaving the time certain under the statute; *State v. Cooper*, 31 Kan. 508, a case of assault with intent to kill, where the time was laid in the past tense, but at a subsequent date to that of the information, and an amendment was permitted; *State v. Thompson*, 10 Mont. 559, in an indictment for rape, where the averment was that the offense had been committed "on or about" a certain day and it was held sufficient. *Ketline v. State*, 59 N. J. L. 470, where the statute did not require an averment of time where time was not of the essence of the offense. *State v. Elliot*, 34 Tex. 151, an indictment relating to estray laws where "on or about" a certain day was held a sufficient averment.

Cross-reference; 6 Cal. 207-209; 65 Am. Dec. 503, *People v. Aro*.

Indictment.—Object of name is to identify accused, and there is no difference between a Christian name and a surname in this respect, p. 213.

Cited, *People v. Dick*, 37 Cal. 280, and followed in an indictment for murder, where the initial letters of the Christian names were stated; *Brazier v. State*, 44 Ala. 390, to the point that a person may be indicted by either of two Christian names; *State v. Burns*, 8 Nev. 256, to the point that if accused's true name is unknown he may be indicted by any name sufficient to identify him.

6 Cal. 214-218. **PEOPLE v. ROBERTS.**

Acts of Sheriff De Facto under a void appointment by county judge are valid, p. 215.

Cited, *People v. Sehorn*, 116 Cal. 508, to the point that the right of a de facto justice of the peace to exercise office cannot be questioned collaterally; *Fulton v. Town*, 70 Minn. 450, distinguishing de facto and de jure officers and sustaining municipal bonds issued by de facto board.

Grand Jury.—It is sufficient if twelve grand jurors concur in an indictment, without requiring the presence of seventeen, pp. 215, 216.

Cited in *People v. Simmons*, 119 Cal. 4, holding indictment not invalidated by absence of juror; *People v. Butler*, 8 Cal. 439, in affirmance, where an indictment was found by fourteen out of twenty-three, nine having been challenged and excluded; *People v. Gatewood*, 20 Cal. 148, where the indictment was found by thirteen out of sixteen, three having been challenged and excused; *People v. Hunter*, 54 Cal. 67, an indictment being found by twelve, and this even though through death or absence the jury was less than nineteen at the time; *State v. Brainerd*, 56 Vt. 536; 48 Am. Rep. 820, a case of an indictment by twelve, though one of the panel was disabled through sickness from acting and others were depositors in the trust company against the president of which the indictment was found.

Grand Jury—Challenges.—Where indictment is transferred to the district court, exceptions to the panel must be made in the court of sessions. Exceptions cannot be made to individual jurors, then to the whole panel, p. 216.

Cited, *People v. Coffman*, 24 Cal. 234, where it was held that objections to the manner of impaneling a trial jury in a criminal case are waived unless made at the time, and cannot be raised for the first time on a motion for new trial; *Reynolds v. The State*, 33 Fla. 307, and applied to waiver and a motion in arrest for incompetency of a grand juror; *State v. Wright*, 45 Kan. 137, where it is said, "We think that should a party make challenge to the polls for favor or prejudice, he will be held to have waived his right of challenge to the array"; *Dakota v. O'Hare*, 1 N. Dak. 41, where the opinion in *People v. Coffman* (above noted under this heading) is quoted from at length, and the rule affirmed; *Cooley v. State*, 38 Tex. 638, holding the same as *State v. Wright* (above noted under this heading); *Watson v. Commonwealth*, 87 Va. 613, upon the point of waiver for not objecting for irregularities, etc., relative to grand juries.

Instructions which are inapplicable, though technically correct, or which are impertinent or erroneous, should be refused, p. 217.

Cited, *People v. March*, 6 Cal. 547; *People v. Best*, 39 Cal. 691, and *People v. Williams*, 43 Cal. 351—all to the same effect.

6 Cal. 221-224; 65 Am. Dec. 506. **PEOPLE v. BENSON.**

Rape.—Evidence of acts of lewdness of prosecutrix with other men

is admissible, though proof of particular acts are preferable to general reputation. It is immaterial by whom such acts are proven; they are admissible without first questioning the prosecutrix; and where the prosecutrix is the sole witness, any evidence tending to show consent, or that there was not the utmost reluctance and resistance, is admissible, p. 222.

Cited in *People v. Shea*, 125 Cal. 152, and followed, although conceded to be against weight of authority. See dissenting opinion, pages 153, 154; *State v. Ogden*, 39 Or. 209, defendant, in prosecution for rape, cannot inquire as to previous intercourse of prosecutrix with others than defendant; *People v. Johnson*, 106 Cal. 293, where it is declared that while the principal case holds that "specific acts of unchastity may be proven, it does not hold that general reputation for unchastity may not be proven," and asserts that such general reputation of the prosecutrix may be shown; and the court adds: "But the present case is an exception to the general rule. The prosecuting witness is under the age of consent, and for this reason evidence either of a general reputation or specific acts would seem to be immaterial"; and concludes that such evidence goes to the question of consent only; *Rice v. State*, 35 Fla. 238, 48 Am. St. Rep. 246, as opposed to the rule of that case, which was that the impeachment of the character of the prosecutrix must be confined to evidence of her general reputation, except that she could be asked as to her previous intercourse with defendant, or as to promiscuous intercourse with men, or common prostitution, but not as to acts with other men than accused; *State v. Sutherland*, 30 Iowa, 573, holding that the prosecutrix might be asked whether she had had previous connection with other men; *Shartzer v. State*, 63 Md. 152, 52 Am. Rep. 503, where it is said that the weight of authority is against the rule that the prosecutrix may be asked as to connection with other persons, and also against the doctrine that evidence is admissible for the purpose of proving such intercourse as bearing on the question of consent; *Brown v. State*, 72 Miss. 1007, where the principal case is said to be an exceptional one, and evidence of the contraction of a venereal disease seven years before was excluded, but there was testimony that prosecutrix was a common prostitute, and evidence other than by cross-examination of separate acts of sexual intercourse with others to the time of the alleged offense was admitted; *State v. Patterson*, 88 Mo. 91, 57 Am. Rep. 375, where acts of lewdness and unchastity with other men were permitted to be shown. This was a case of seduction under promise of marriage; *Benstrin v. State*, 2 Lea (70 Tenn.) 175; 31 Am. Rep. 597, holding that particular acts of unchastity might be proven by the complainant or others, and that such acts bore upon the question of consent; *Watry v. Ferber*, 18 Wis. 502; 86 Am. Dec. 791, holding that general reputation for unchastity may be shown, and complainant may be asked as to intercourse with others; *Whittaker v. State*, 50

Wis. 524; 36 Am. Rep. 860, upon the sole point that there should be no doubt as to the real absence of assent. In this case, however, there was no absolute certainty as to want of final consent; notes 68 Am. Dec. 115, 77 Am. Dec. 339, 78 Am. Dec. 611, all to the point that force is essential; 79 Am. Dec. 523, as to admissibility of evidence showing assent; extended note 80 Am. Dec. 368, as to impeachment of prosecutrix by proof of bad character; note 86 Am. Dec. 793; extended note 53 Am. St. Rep. 482, as to impeachment and want of chastity.

Rape—Setting Aside Verdict.—If there is a failure to make an outcry, with no indications of violence, or corroborating evidence, improbable testimony of prosecutrix will not sustain a verdict, p. 222.

Cited in *People v. Kaiser*, 119 Cal. 458, but holding corroboration in incest case sufficient; *People v. Hamilton*, 46 Cal. 543, where the principal case was declared to be a very similar one in some respects, and the verdict was set aside; *People v. Ardaga*, 51 Cal. 372, where the prosecutrix was uncorroborated, her story improbable, and she admitted herself unchaste; *People v. Castro*, 60 Cal. 118, where the evidence was held unsufficient; *Lind v. Closs*, 88 Cal. 13, a case of uncorroborated testimony, and the circumstances rendered the story improbable; *Oleason v. State*, 11 Neb. 278, 38 Am. Rep. 367, quoting from the principal case (p. 222), as sustaining the point that the circumstances failed to show such resistance as to warrant a conviction; *Matthews v. State*, 19 Neb. 334, to the same point as the last citing case; *State v. Depoister*, 21 Nev. 119, in dissenting opinion, where it is said: "Other courts have often set aside verdicts in rape cases on similar grounds"; notes, 79 Am. Dec. 523; extended note, 80 Am. Dec. 370. See next heading herein.

Same.—Cases of such character should never go to the jury on the uncorroborated testimony of the prosecutrix, without the court warning them of the danger of conviction, p. 223.

Cited, *Matthews v. State*, 19 Neb. 334, although not to this point, yet a like point is noted immediately following; *Gazley v. State*, 17 Tex. App. 277, using nearly the same language; although the rule is adopted to the effect that the credibility of complainant's evidence must be left to the jury, to be determined according to concurring circumstances; extended note, 80 Am. Dec. 369. See last heading herein.

6 Cal. 224-225; 65 Am. Dec. 509. **WOLF v. FOGARTY.**

Certificate of Acknowledgment must show knowledge or sworn proof by a witness of the person acknowledging, and the record of a conveyance on a certificate not showing such knowledge or proof imparts no notice to third persons, p. 225.

Cited, *Kelsey v. Dunlap*, 7 Cal. 162; *Fogarty v. Finlay*, 10 Cal. 244; 70 Am. Dec. 715—both cases in affirmance; *Johnson v. Badger etc. Co.*, 13 Nev. 353, but the case was held not analogous, and holding that

the exact form of the statutory certificate need not be followed; *Cannon v. Deming*, 3 S. Dak. 428, to the same effect as the principal case; extended note 41 Am. Dec. 176; notes 68 Am. Dec. 345; 70 Am. Dec. 717; 26 Am. St. Rep. 837.

6 Cal. 225-227. **CAHOON v. ROBINSON.**

Lien—Vendor of real estate has lien thereon in the hands of the administrator of the vendee, for the unpaid purchase money, pp. 226, 227.

Cited, *Burt v. Wilson*, 28 Cal. 638, 87 Am. Dec. 145, in affirmance; *Reese v. Kinkead*, 18 Nev. 129, to the same effect, a case of sale of lands to the copartner, and his death before payment; note 56 Am. Dec. 326.

6 Cal. 227-228. **PEOPLE v. COTTLE.**

Trial Jury—Challenge—Formation or expression of unqualified opinion was ground of challenge, p. 228.

Cited, *People v. Gehr*, 8 Cal. 361, in affirmance, where the juror stated that it would require proof to change his opinion; *People v. Edwards*, 41 Cal. 642; *People v. Brotherton*, 43 Cal. 531, 532—both cases in affirmance; *People v. Murphy*, 45 Cal. 142, but the challenge was not upon the ground of unqualified opinion, the opinions being merely hypothetical, founded on hearsay and without malice or ill-will; *People v. Welch*, 49 Cal. 184, to substantially the same effect as the last citing case (sec. 1073 Penal Code); extended note 36 Am. Dec. 524. But as to implied bias in respect to the rule of the principal case, see section 1074 Penal Code, as amended 1874, omitting same (Penal Code, 1897, pony series, p. 344).

General citation: *Western etc. R. Co. v. Taylor*, 6 Heisk. 420.

6 Cal. 228-230. **TAYLOR v. CALIFORNIA STAGE COMPANY.**

New Trial—Surprise at testimony of witness for adverse party, who had made a previous contrary statement, is no ground if opposite party is not misled, pp. 229, 230.

Cited, *Klockenbaum v. Pierson*, 22 Cal. 163, holding that surprise at testimony of witness deemed incompetent, nor surprise at testimony of witness in stating a certain conversation incorrectly, are no ground; *Spencer v. Doane*, 23 Cal. 420, where the surprise was an alleged mistake by some of defendant's witnesses, but the court declared that the record did not disclose it; *Rodriguez v. Comstock*, 24 Cal. 89, as incidentally recognizing the rule in said case and holding that surprise at witness contradicting previous material statements to party calling him warrants new trial, where it is shown that testimony required will be supplied on new trial; *Brooks v. Douglass*, 32 Cal. 212, where it is held that the moving party must show not only

surprise but injury, and also what case he can establish if new trial is granted; *Case v. Coddington*, 38 Cal. 194, where it was said of the facts argued as a surprise that "The defendant knew that the plaintiff could not sustain the issue on his part without production of evidence of the character alluded to," and should have procured rebutting evidence; *O'Connor v. Duff*, 30 Mo. 600, declaring that there is no surprise if laches is imputable to a party in omitting to ascertain the facts he expects to prove by his own witnesses; *Snell v. Cislser*, 1 Utah, 301, where testimony which is pertinent and within the issue is declared not to be a ground or surprise in the absence of a trick or fraud.

New Trial—Remark of a Juror made during recess, and arising from ignorance or loquaciousness, but not tainted with fraud or willful misconduct, will not vitiate the verdict, especially when sustained by his own affidavit, p. 230.

Cited, *Lee v. McLeod*, 15 Nev. 163, in affirmance, where the remarks were immaterial and made during recess, and he subsequently apparently inattentive and indifferent; *Kaul v. Brown*, 17 R. I. 16, where a juror said to a fellow-juror, during the trial and while in a lunch-room, "that he was in favor of sustaining said will and would vote to sustain said will," in a positive and emphatic manner, and a new trial was refused, and the court said, "unless the misconduct is very gross or has been participated in by the successful party," courts will "exercise their discretion" in granting or refusing a new trial; *Clarke v. Town Council*, 18 R. I. 284, where the remark was, "No doubt the case would go against the town," made out of court during the trial, but a new trial was refused; extended note 35 Am. Dec. 256.

6 Cal. 230-231. KOHLMAN v. WRIGHT.

Insolvency.—Appeal lies from judgment in insolvency cases to supreme court (Prac. Act, sec. 336), p. 231.

Cited, *People v. Shepard*, 28 Cal. 117, in affirmance, holding also that such jurisdiction was not withdrawn by constitutional amendments.

Collateral Attack.—Insolvency judgment, if not reversed on appeal, is conclusive between the parties, and the objection that complaint was not verified cannot be raised in another proceeding, p. 231.

Cited, *Friedlander v. Loucks*, 34 Cal. 24, where it is declared that in a collateral attack no inquiry except as to jurisdiction can be entertained.

6 Cal. 232-233. THORNE v. THE CALIFORNIA STAGE COMPANY.

Common Carrier.—Proof that defendant's agent told the driver the destination of a passenger is proof of the contract of carriage, p. 233.

Cited, *Lemon v. Chanslor*, 68 Mo. 353, in support of the point that "The averments in the petition charge that defendants are common carriers, and that plaintiff was accepted by them as a passenger. In such cases the law implies a contract, that the passenger shall pay his fare for being carried, and that he shall be safely carried, and an express contract need not be averred." In the principal case, however, the contract and payment of consideration were averred, but the court refused a nonsuit moved for, on the ground that no contract or payment of fare was shown.

6 Cal. 234-236. **HOLDEN v. PINNEY.**

Homestead.—Actual residence of family with intent to dedicate was essential, but residence was prima facie evidence of intent to dedicate, subject, however, to rebuttal by facts and circumstances aliunde, pp. 235, 236.

Cited, *Brooks v. Hyde*, 37 Cal. 372, as formerly being the homestead law; *Richards v. Shear*, 70 Cal. 189, upon the point that there was in that case a homestead, and also that there was no presumption that it had been so used as to defeat it; *Levins v. Rovegno*, 71 Cal. 279; as to residence and intent to dedicate being essential under act of 1851 (acts of 1860, 1862 construed); *Christy v. Dyer*, 14 Iowa, 440; 81 Am. Dec. 494, to the point of actual family residence being essential; *Hale v. Heaslip*, 16 Iowa, 452, to the same point as the last citing case; *Campbell v. Adair*, 45 Miss. 178, to the point of actual residence, and not a constructive one, being necessary; extended note, 60 Am. Dec. 615.

Homestead.—Concurrence of husband and wife was necessary to destroy homestead, p. 236.

Cited, *Brennan v. Wallace*, 25 Cal. 114, as sustaining the point that homestead could not be abandoned except by joint action of husband and wife (acts of 1860 and 1862 construed).

6 Cal. 236-238. **PEOPLE v. HOOD.**

Indictment for Arson.—An allegation that defendant "burned or caused to be burned" is insufficient, p. 238.

Cited, *People v. Tomlinson*, 35 Cal. 509, to the point as to disjunctive or conjunctive averments, but holding that the rule does not apply to cases where the words of the statute are synonymous.

Same.—The facts and circumstances of the offense should be set forth so that accused may be prepared for defense, p. 238.

Overruled, *People v. Myers*, 20 Cal. 79, to the extent of holding that the indictment need not aver in terms that defendant "set fire" to the dwelling, and that an averment that he "did burn or cause to be burned" was sufficient.

6 Cal. 238-239. RYAN v. DALY.

Judgment Confessed to defeat an attachment is void as to attaching creditor, p. 239.

Cited, *Gladwin v. Garrison*, 13 Cal. 334, but declared to differ from that case, which was one where a note was given to enable plaintiff to secure himself by attaching property, in consideration of a liability incurred as indorser. The makers of the note did not defend, and judgment was rendered against them, and certain intervenors were held to take nothing. Judgment was affirmed; *Wilcoxson v. Burton*, 27 Cal. 233, 87 Am. Dec. 70, to the same effect as the principal case.

6 Cal. 239-240. EX PARTE PRADER.

Imprisonment for Debt.—A party cannot be imprisoned under a judgment in a civil action for assault and battery; such judgment is a debt, p. 240.

Cited, extended note, 37 Am. St. Rep. 762, and criticised as based upon a theory not to be reconciled with the doctrine that proceedings in tort are not within the purview of the constitution, etc.

6 Cal. 241-245. PAGE v. NAGLEE.

Trustee cannot purchase or deal with subject of the trust, p. 245.

Cited in *Savings etc. Soc. v. Davidson*, 97 Fed. 713, denying right to acquire and assert adverse outstanding titles.

6 Cal. 245-246. WELTON v. GARIBARDI.

Law that Notice of Appeal may be served on a party or his attorney governs justice's court cases, p. 246.

Cited, *In re Brown*, 32 Minn. 445, and applied to appeals from probate orders; *Neuberger v. Boyce*, 29 Or. 461, to the point that service may be made upon the party or his attorney. In this case service was made upon a record attorney in the county of the trial, but such attorney was a nonresident and the service was held good.

6 Cal. 246-247. PEOPLE v. BEELER.

Instructions in Criminal Cases.—Oral charge without express consent of defendant is error, as statute requiring written charge is mandatory, p. 247.

Cited, *People v. Payne*, 8 Cal. 344, and applied to a verbal modification of written instruction asked; *People v. Trim*, 37 Cal. 276; *People v. Sandford*, 43 Cal. 35; and *People v. Hersey*, 53 Cal. 575—all in affirmance; *State v. Preston*, 4 Idaho, 222, unless record affirmatively shows that court reporter failed to take down all oral instructions, presumption is that he did so; *Bradway v. Waddell*, 95 Ind. 175, in support of the point that the violation of a statute providing

for instructions "in writing if required," is error; *State v. Porter*, 35 La. Ann. 536, to the same effect as the last citing case. Referred to in *Swaggart v. Territory*, 6 Okl. 347.

6 Cal. 248-250. **PEOPLE v. DIAZ.**

Continuance.—In a criminal case accused has the right to have his witnesses in court, and on a motion for continuance for absence of a material witness, the district attorney, to prevent a continuance must admit the truth of the facts proposed. It is not sufficient to admit that witness would have deposed as averred, pp. 249, 250.

Cited, *Graham v. State*, 50 Ark. 167, to substantially the same effect, notwithstanding a statute permitting the admission that a witness would testify according to the statement in the application for continuance; *Newton v. State*, 21 Fla. 70, where the same rule as to admissions by the prosecutor was applied to the issuing of a commission to take testimony; *Pace v. Commonwealth*, 89 Ky. 208, which holds that a statute is not unconstitutional which denies the right to a continuance if the prosecutor will admit the truth of the facts stated in the affidavit as those which the absent witness would make; *People v. Savant*, 112 Mich. 299, but holding continuance obviated by admission of district attorney; *People v. Sligh*, 48 Mich. 57, as intimating that the constitutional rule forbids secondary evidence to supply the testimony of an absent witness in a criminal case; *State v. Jennings*, 81 Mo. 198, in dissenting opinion, in a case holding that a statute whereby a continuance might be prevented by the admission that the witness would testify as claimed, did not interfere in that case with the constitutional right of process to compel witness' attendance; *Territory v. Harding*, 6 Mont. 339, in dissenting opinion, as stating the true rule; the case holds contra, however. Contra, *Territory v. Guthrie*, 2 Idaho 403, to the extent of the admission that the witness would testify as claimed, and that when so admitted the affidavit becomes evidence, but not conclusive. See, also, the last two citing cases herein.

6 Cal. 250-254. **SIEMSEN v. BOFER.**

Ejectment.—Nonresident alien could not inherit or maintain ejectment by descent, pp. 252, 254.

Cited, *Norris v. Hoyt*, 18 Cal. 219, and explained as applying to nonresident aliens, only the court saying that "the act allowing nonresident aliens to take by inheritance had not been passed at the time" the principal case was decided. See 1 Deering's Cal. Dig., pp. 70, 72, III 1-3.

Aliens.—Acts and treaties removing disabilities of aliens to inherit does not extend to nonresident aliens, p. 252.

Cited, *Forbes v. Scannell*, 13 Cal. 283, where such acts and treaties are held valid.

6 Cal. 254-256. PRICE v. SACRAMENTO CO. 1 Notes, 245.

County can be Sued only after presentation and rejection of claim, p. 255.

Cited in *Nickeus v. Lewis Co.*, 23 Wash. 129, further admitting parol evidence as to rejection where records silent.

Corporations.—Counties are quasi corporations, and can sue and be sued (Act of 1854), p. 255.

Cited, *Placer County v. Austin*, 8 Cal. 305, in affirmance; *Commissioners v. Brewer*, 9 Kan. 319, to the same point; *Donalson v. San Miguel Co.*, 1 N. Mex. 265, holding the same doctrine; *Vincent v. Lincoln County*, 30 Fed. Rep. 750, holding that counties may be sued in state or United States courts; extended notes 68 Am. Dec. 296, 51 Am. St. Rep. 119, that they are quasi corporations, but not subject to garnishment.

Counties.—Right to sue is not limited to cases of tort, etc., but exists in every case of account after presentation to and rejection by the supervisors, pp. 255, 256.

Cited, *People v. Supervisors*, 28 Cal. 431, to the point that a claim must be presented to supervisors and rejected before suit; *Fulkerth v. County of Stanislaus*, 67 Cal. 336, but declared not to touch the question involved there; but it was held that the sheriff might sue the county if dissatisfied with the amount allowed him by the supervisors for meals furnished prisoners; *Colusa Co. v. Glenn Co.*, 117 Cal. 436, quoting from the principal case and holding that one county may sue another for money had and received, after presentation of its claim to the supervisors; *Commissioners v. Brewer*, 9 Kan. 319, to the point that after disallowance by the county commissioners an appeal or original suit will lie; *Brown v. Otoe*, 6 Neb. 118, as supporting the conclusion there reached that the jurisdiction of the district court is appellate and not original under the statute allowing an appeal from the commissioners, the account being required to be submitted to them; extended note, 68 Am. Dec. 297.

6 Cal. 256-258. PEOPLE v. TALMAGE.

Intervenor.—Though right to intervene be admitted, yet if petition is insufficient and referee's report shows no legal claim, action will be dismissed, p. 258.

Cited, *Sheldon v. Gunn*, 56 Cal. 587, in support of the point that an intervenor against whom no relief is prayed can dismiss his petition; extended note, 16 Am. Dec. 180.

State Cannot be Sued in the absence of a statute permitting it, p. 258.

Cited, *State ex rel. v. Burke*, 33 La. Ann. 504, to the same effect.

Contract of State Officers cannot bind state unless authorized, p. 258.

Cited in *Young v. State*, 19 Wash. 636, holding state not bound by governor's employment of accountant.

6 Cal. 258-263; 65 Am. Dec. 511. **CALIFORNIA NAVIGATION COMPANY v. WRIGHT.** S. C. 8 Cal. 585, 589.

Pleadings.—Allegation that plaintiff is a corporation under the laws of the state is sufficient to establish the right to sue, p. 261.

Cited, notes 29 Am. Dec. 376; 76 Am. Dec. 71; 79 Am. Dec. 437.

Assignment.—A contract not to run boats under a money forfeiture is assignable, p. 261.

Cited, *Swanson v. Kirby*, 98 Ga. 594, where a contract limited as to place but unlimited as to time, and being otherwise held valid, was held assignable; *Hedge v. Lowe*, 47 Iowa, 141, to the same point; *Webster v. Buss*, 61 N. H. 47, 60 Am. Rep. 320, to the same effect; *Hillman v. Shannahan*, 4 Oreg. 167; 18 Am. Rep. 283; distinguishing the principal case in that the contract therein contained the words, "liens and assigns," and that the defendant was notified of the assignment and received the consideration, and holding that in the case before it the bond was a personal one, and did not extend to the assignee (see comments on this citing case made in the last citing case at p. 167); *Erickson v. Brookings County*, 3 S. Dak. 438, upon the general subject of what things in action are assignable.

Contract in Restraint of Trade is not void, where there is a consideration therefor, a good reason for entering into it, where it imposes no restraint on one party not beneficial to the other and excludes only one individual, pp. 261, 262.

Approved in *Whitwell v. Continental Tobacco Co.*, 125 Fed. 458, restriction of own trade by defendants to those purchasers who decline to deal in goods of competitors is not violative of anti-trust act; *Webster v. Buss*, 61 N. H. 45, 60 Am. Rep. 318, where a contract limited as to place but unlimited as to time, and made upon an adequate consideration was held valid; notes 71 Am. Dec. 353; 85 Am. Dec. 617; 90 Am. Dec. 207; extended note 92 Am. Dec. 752, 758, 759; notes 95 Am. Dec. 193; 32 Am. St. Rep. 301.

Restraint of Trade—Damages.—A sum stated to be forfeited in a written contract not to run boats is not a penalty, but liquidated damages, p. 262.

Cited, *Nash v. Hermosilla*, 9 Cal. 587, 70 Am. Dec. 677, in connection with a case falling within the rule relating to building contracts, where the sum named was held a penalty and not liquidated damages; *Fisk v. Fowler*, 10 Cal. 517, applying the rule of the principal case to an action on a bond to secure the delivery of the title papers and register of a vessel; *Goldman v. Goldman*, 51 La. Ann. 775, similarly

construing stipulation on sale of goodwill; notes 69 Am. Dec. 718; 70 Am. Dec. 678; 71 Am. Dec. 353; 39 Am. St. Rep. 636.

Pleadings.—Allegation that plaintiff had fully performed all conditions of the contract was sufficient, p. 263.

Cited, *Moritz v. Lavelle*, 77 Cal. 12; 11 Am. St. Rep. 231, in affirmance in case where the allegation was "the plaintiff has performed all and singular his agreements and covenants with defendant."

General citation: *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 15.

6 Cal. 263-273. GUNN, ADMR., v. BATES.

Ejectment.—A conditional grant from Mexico conveys a good title without performance of conditions and sufficient to maintain ejectment, pp. 268-272.

Cited, *Ferris v. Coover*, 10 Cal. 621, to the same point; *Tobin v. Walkinshaw*, *McAll.* 164, where the point is considered in view of the principal case and the dissenting opinion therein, as also of other California decisions, and the adverse doctrine of *Vallejo v. Clarke* (3 Cal. 17) is declared of force, but the citing case and the principal case should be distinguished upon the facts.

Entry on Land under Grant.—Possession is constructive to the extent of its boundaries. It is not necessary that the whole tract be inclosed; it is sufficient that the grant calls for distinct boundaries, p. 272.

Cited, *Hicks v. Coleman*, 25 Cal. 137, 138; 85 Am. Dec. 116, 117, and *Walsh v. Hill*, 38 Cal. 487, in affirmance.

6 Cal. 273-276. ROBINSON v. GAAR.

Taxation—Exemption—Injunction.—The fact that title to land is in litigation between the United States and the plaintiffs, and that the latter are not in possession is no ground for exemption from taxation. If they are owners, they must pay taxes; if not, they cannot enjoin their collection in behalf of the United States, p. 275.

Cited, *Noble v. Indianapolis*, 16 Ind. 510, quoting from the court in the principal case (p. 275), on this point; *Puget Sound etc. Co. v. Pierce County*, 1 Wash. Ter. (U. S.) 168; quoting also on the same point from the principal case, p. 275.

Jurisdiction.—State taxes are fixed by law and not assessed by the court of sessions, and were not obnoxious for want of jurisdiction in that court, p. 275.

Cited, *Hardenburgh v. Kidd*, 10 Cal. 403, as so deciding, and not in conflict with the view that the court of sessions cannot assess taxes, as the latter is not a judicial act.

Taxes.—Injunction will not lie to restrain collection of taxes, where there is a perfect remedy at law or no cloud on title, p. 275.

Cited, *Palmer v. Boling*, 8 Cal. 388, where the court observed that a tax deed was *prima facie* evidence of its contents, and also of title, and being the only evidence necessary, would operate as a cloud upon title; and therefore the rule was changed as to the right to invoke equity where property was about to be illegally sold for taxes; *Hardenburgh v. Kidd*, 10 Cal. 403, but as not in conflict with that case (see last heading herein); *Trinity County v. McCammon*, 25 Cal. 120, to the point that equity will not relieve where there is no irreparable damage; *Bucknall v. Story*, 36 Cal. 71, to the same point as the principal case; note, 56 Am. Dec. 355; extended note 69 Am. Dec. 199.

6 Cal. 276-277. **CASE v. MAXEY.**

Counterclaim.—Claim for fraud in division of partnership stock cannot be counterclaimed to purchase-money of land, p. 277.

Cited, *Lane v. Turner*, 114 Cal. 399, and applied to a case of unadjusted partnership transactions and a counterclaim by an assignee of a partnership interest in a contract as security for furnishing certain merchandise.

6 Cal. 277-281. **LOW v. ADAMS.**

Attachment is not a proceeding in the nature of an action *in rem*; but is a mere auxiliary proceeding, pp. 280, 281.

Cited, *Myers v. Mott*, 29 Cal. 372, in dissenting opinion upon the point of dissolution of lien of attachment by death of defendant.

Judgment.—If record shows proceedings regular in all parts, defendant is bound; and if property is attached, one who has no ownership cannot complain against judgment, p. 281.

Cited, *Cloud v. Eldorado County*, 12 Cal. 133, 73 Am. Dec. 527, to the point that judgment cannot be attacked by a stranger where jurisdiction has attached; *Bacon v. Green*, 36 Fla. 323, to the point that until reversed a judgment binds the parties as to every directly decided question.

General citation: *Rosenthal v. Perkins*, 123 Cal. 244.

6 Cal. 281-283. **McCALL v. HARRIS.**

Warrants must be paid in order of registry. The act of 1855 did not create a fiscal year requiring the debts of each year to be paid first for that year, p. 282.

Cited, *Mason v. Purdy*, 11 Wash. 599, and noted as contrary to *Shaw v. Statler*, 74 Cal. 258, and *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641, and comments on *Schwartz v. Wilson*, 75 Cal. 502, as merely adhering to the doctrine therein because of the rule *stare decisis*, and

distinguishing between the constitution and laws of California and that state. The court says that, in each of the decisions contrary to the principal case, it was held that the funds derived from a certain tax could be used only in payment of the expenses for the ensuing year. Referred to in *Stewart v. Custer Co.*, 14 S. D. 160.

6 Cal. 287. **BRAY v. REDMAN.**

Fees.—Justice of the peace may refuse to send up the transcript until his fees are paid by appellant; but he may waive his right, and the nonpayment of fees is no ground for dismissal of appeal, p. 287.

Cited, *People v. Harris*, 9 Cal. 573, to the point that a justice may waive his fees; *Webster v. Hanna*, 102 Cal. 178, to the point that a justice may require his fees; *id.* 181 in dissenting opinion.

6 Cal. 288-290. **PEOPLE v. REID.**

Officer.—Where statute provides that the legislature shall elect an officer to hold office for a specified time and "until his successor is appointed and qualified," if the legislature fails to elect, the office becomes *de jure* vacant at the expiration of incumbent's term, the governor may fill vacancy, but from the day on which the term expires to the date of induction of his successor the incumbent is a mere *locum tenens*, authorized to act to prevent an interregnum, pp. 289, 290.

Cited, *People v. Langdon*, 8 Cal. 11, to the same effect; but the case held that the governor could not appoint for the full term and that an election by the legislature terminated the appointee's commission; *People v. Whitman*, 10 Cal. 49, to the point that incumbent might hold till his successor is elected and qualified, when his commission ceased; *id.* 49 in dissenting opinion; *People v. Stratton*, 28 Cal. 392, sustaining the right to hold office until a successor is elected or appointed, but denying the power of the governor to fill a vacancy where the law provides another mode; *People v. Tilton*, 37 Cal. 616, 618, 619, 620, 621, 625, 627, where the principal case is exhaustively considered in connection with other cases and it is declared that *People v. Whitman*, 10 Cal. 46, is directly in conflict with the principal case and overrules it, "and it was so regarded by the dissenting justice" (*id.* 49), and adds (p. 620), "Thus it appears that there is a conflict in the decisions in this state as to whether a vacancy occurs by the failure to elect a successor to an officer, within the meaning of section 8, article 5, of the constitution, which the governor is authorized to fill, the later cases being opposed to the earlier ones, or rather one for the case of Reid (the principal case) is the only one where it was provided that the officer should hold till his successor should be appointed and qualified, in which the question is discussed and the one upon which the appellant mainly relies. . . . The later

authorities and the weight of authority appear to us to be against the appellant. . . . It was manifestly the intent of the constitution that the governor should appoint only where there is no party authorized by law to discharge the duties of the office." Crockett, J., and Sprague, J., dissented. *People v. Parker*, 37 Cal. 642, 643, where the court says: "We shall assume that the rule in Reid's case (the principal case) is still the rule in this court for the purposes of the present case, not intending, however, to be concluded upon the question hereafter"; but under the statute of 1866, creating a board of directors in the insane asylum, and providing that said board might fill a vacancy till the next session of the legislature, it was held that the governor could not appoint; Sprague, J., and Crockett, J., dissenting. *State ex rel. v. Murphy*, 32 Fla. 150, 194, in exhaustive opinions it is said to be "unquestionably true, according to the great weight of authority in this country, that where by a constitution or an act of the legislature public officers are elected or selected for specified terms, and they are by the same authority authorized to hold their offices or continue in their offices until their successors are elected and qualified, or until their successors are duly qualified, no vacancies are created in said offices by the failure of the electing agency to select successors in the regular mode, that the appointing power alone can fill. . . . The cases cited by counsel for relator from the California decisions are clear and positive on this point. It is true that there were some conflicts in the earlier decisions in that state on such cases, but the doctrine was finally put to rest and the result is as above stated; *People v. Reed*, 6 Cal. 288, has been overruled." *State v. Howe*, 25 Ohio St. 599; 18 Am. Rep. 327, where the principal case is declared to have "ceased to be an authority, having been overruled by several subsequent cases in the same state"; *State v. Cocke*, 54 Tex. 485, to the point that there is a conflict of opinion as to what circumstances entitle an incumbent to hold over, and the case holds that the election of A, his failure to qualify, his resignation, and the appointment and qualification of B as his successor, ended the term of C, the old incumbent.

Construction—Constitution.—It is the duty of the court to adopt such construction as will carry out the plain intendments of the constitution in all its parts, p. 200.

Cited, *Cohen v. Wright*, 22 Cal. 312, a case of construction of the constitution and the right of the legislature concerning attorneys at law.

6 Cal. 291-293. **PEOPLE v. JEWETT.**

Officers—Removal.—Governor cannot remove a notary public before expiration of term. The right of the appointing power to remove at pleasure is limited to officers whose term is not fixed, pp. 291, 293.

Cited in *Territory v. Ashenfelter*, 4 N. Mex. 104, denying power of

removal under local statutes; *Ford v. Harbor Comm'rs*, 81 Cal. 26, but declared not in point, and said not to be a case "of removal, because the office itself was abolished"; *Brown v. Duffus*, 66 Iowa, 199, as relied on by counsel, but that case was one of suspension of elective state officer under sec. 760 of the code.

Officer.—Power that creates can abolish, p. 292.

Cited, *Oldham v. Mayor*, 102 Ala. 365, as a well-settled doctrine.

6 Cal. 294-295. PICO v. SUNOL.

Jurisdiction.—If service was in fact made, the court acquired jurisdiction and had control over subsequent proceedings, and judgment will not be enjoined. Remedy is by appeal on motion to vacate judgment, pp. 294, 295.

Cited, *Drake v. Duvenick*, 45 Cal. 464, to the point of service and jurisdiction, and also that the judgment could not be attacked collaterally; *Herman v. Santee*, 103 Cal. 523, 42 Am. St. Rep. 146, to the point of jurisdiction and service; *Cunningham v. Spokane etc. Co.* 20 Wash. 452, 72 Am. St. Rep. 115, quoting *Herman v. Santee*, 103 Cal. 519; *Gordon v. South Fork Canal Co.*, 1 McAll. 513, Fed. Cas. No. 5621; extended note 54 Am. St. Rep. 230, as to error of irregularities in service of process in connection with relief in equity as to judgments on decrees.

6 Cal. 295-297; 65 Am. Dec. 515. CAHOON v. LEVY.

Mechanics' Lien.—Contractor's lien dated from commencement of work, and the same was true of materialmen not employed by the contractors, but subcontractors, laborers and material men, not employed by the owner had a lien only from service of notice upon the owner, pp. 296, 297.

Cited, *Cahoon v. Levy*, 10 Cal. 216, the same case as deciding that a subcontractor's lien only attached from service of notice; *Lumber Co. v. Gottschalk*, 81 Cal. 648, where it was said that the former distinction as to liens of contractors and subcontractors had ceased to exist under the statute: "In such case the contract is by the terms of the statute deemed to be the contract of the owner, and the lien must be held to attach as in case of a direct contract"; *Cutler v. McCormick*, 48 Iowa, 416, holding that a lien of a subcontractor of of his materialmen depends upon notice to the owner or his agent, and covers only the balance due at the time of notice; *Pipe etc. Co. v. Howland*, 111 N. C. 630, in dissenting opinion, to the point that a subcontractor has no lien until service of notice, and then only to the extent of the unpaid balance; *Gordon v. South Fork etc. Co.*, McAll. 516, to the point of classification of contractors and subcontractors, and notice.

Mechanic's Lien.—Garnishment served on the owner in a suit against

the head contractor, after commencement of the building and before notice, prevails over a subcontractor's lien, p. 296.

Cited, *Cahoon v. Levy*, 10 Cal. 216, the same case in substantial affirmance; *Pipe etc. Co. v. Howland*, 111 N. C. 630, to the point that a lien of a subcontractor does not relate back so as to defeat intervening rights growing out of conveyances of land or attachment of the debt due the original contractor.

Mechanics' Lien.—Subcontractor's lien is in the nature of an attachment, without suit, but by notice, p. 297.

Cited, *Davis v. Livingston*, 29 Cal. 286, and *Gordon v. South Fork etc. Co.*, *McAll.* 516, both to the same point.

General Citations.—The principal case is affirmed in *Brennan v. Marsh*, 10 Cal. 435, in a very brief opinion, merely so stating; *Kellogg v. Howes*, 81 Cal. 175, where it is cited with others "more as showing the course of legislation and its judicial construction and interpretation on this subject, than because of their bearing on the question now presented."

6 Cal. 297-316. **MESICK v. SUNDERLAND.**

Deed containing a patent ambiguity in description is void and cannot be cured by parol evidence, pp. 311, 313.

Cited, *Norris v. Hunt*, 51 Tex. 615, to the point of patent ambiguity; *Keller v. Keller*, 80 Wis. 327, to the same point as the principal case.

Deed on condition precedent vests no title until performance, pp. 311-313, 314, 315.

Cited, *Brannan v. Mesick*, 10 Cal. 107, where the same deed was before the court, and the rule affirmed, but it was added that upon performance the title vests in the grantee without further act on the grantor's part.

Registration of executory contracts or deeds upon condition precedent was not authorized by act of 1850, and imparted no notice, p. 315.

Cited, *Brannan v. Mesick*, 10 Cal. 107, where the rule is stated, but it was there held that a deed upon condition precedent was entitled to record, and recordation put a subsequent purchaser on inquiry as to the performance of the conditions; *Oglesby v. Hollister*, 76 Cal. 140, 9 Am. St. Rep. 180, to the point that registry of a tax deed void on its face imparts no notice; *Moxon v. Wilkinson*, 2 Mont. 424, to the point that a record of discovery of a placer mining claim not being required by law to be recorded was not a legal notice and the record was incompetent evidence. This last case and the principal case are both cited in *Flick v. Gold Hill etc. Co.*, 8 Mont. 304, but it is noted that prior to 1883 there was no law requiring a record of placer locations, and the *Moxon* case was decided in 1876, but it was declared that the

statute as to certified copies of record being evidence did not extend to instruments the registration of which was not required by law, nor to extrinsic facts unnecessarily recited in a validly recorded instrument; note 14 Am. Dec. 512.

Same.—The recording act protected the purchaser of the legal title against latent equities or mere executory agreements, and abolished the presumption of notice from possession, and it was also the intent of such act to do away with all notice other than the statutory one, except probably actual notice coupled with fraud, pp. 315, 316.

Cited, *Bird v. Dennison*, 7 Cal. 303, 306, where Burnett, J., declared that possession under an unregistered deed and implied notice was a question of bad faith, and the actual notice, or such notice as amounted to a species of fraud, was a question for the jury; *Stafford v. Lick*, 7 Cal. 489, 490, where the court says that it expressly held in the principal case, "that the statute did not do away with notice in fact, but only constructive notice as to those instruments required to be recorded, so that the doctrine of notice of title arising from possession no longer obtained. But we nowhere said that possession together with another fact might not be admitted in evidence for the purpose of establishing fraud or notice in fact. Such on the other hand was our understanding of the case. . . . The fact of notice arising from possession was not a distinct ground relied on in the case. . . . So far as the opinion of the court in *Mesick v. Sunderland* (6 Cal. 297) militates against this position" (the doctrine of constructive notice arising from possession having been superseded or abrogated by statutory notice), "it is erroneous"; *Brophy Min. Co. v. Brophy etc. Co.*, 15 Nev. 110, holding substantially the same as the principal case.

6 Cal. 316-318; 65 Am. Dec. 517. **ADAMS v. HASKELL.**

Contempt.—Party should be discharged where affidavit shows that he has complied with order as far as it is possible, and that it is not in his power to comply further, p. 318.

Cited, *Ex parte Cohen*, 6 Cal. 319, holding to the same effect; *Hawthorne v. State*, 45 Neb. 876, to the same point under similar facts; in dissenting opinion, *In re Purvine*, 96 Fed. 197, construing section 41, Bankruptcy Act of 1898, main opinion sustaining commitment.

Same.—In such case the court exceeds jurisdiction in imprisoning, and the order will be reversed on certiorari, p. 318.

Cited, *People v. O'Neil*, 47 Cal. 110, to substantially the same effect; *Ex parte Wright*, 65 Ind. 511, holding that appeal lies from judgment in contempt; *Holman v. Mayor*, 34 Tex. 671, quoting from the principal case, and holding that such proceedings may be inquired into on habeas corpus; note 79 Am. Dec. 536.

General citations: *Lovett v. Taylor*, 54 N. J. Eq. 614; *Henrietta Min. etc. Co. v. Gardner*, 173 U. S. 129; *Ex parte Overend*, 122 Cal. 204.

6 Cal. 318-321. EX PARTE COHEN.

Contempt.—Commitment must set forth that it is in the power of a party to comply with order of court, p. 320.

Cited, *Galland v. Galland*, 44 Cal. 478, 13 Am. Rep. 169, to the point that inquiry may be had in such cases, whether it is in a party's power to do the thing ordered; *Ex parte Cottrel*, 59 Cal. 422, where the order of commitment contained a recital that it was in petitioner's power to have complied with the order; *State v. Rust*, 2 Coop. Ch. 188, where it is said, "The rule in such cases is that disability will excuse unless the party has voluntarily and contumaciously disabled himself."

Same.—Where court exceeds jurisdiction, prisoner will be discharged on habeas corpus, pp. 320, 321.

Cited, *People v. O'Neil*, 47 Cal. 110, where it is said the question of jurisdiction is always open to review; *Ex parte Hollis*, 59 Cal. 408, to the same point; *Huerstal v. Muir*, 62 Cal. 481, where it is held that the right to appeal is limited to the rule in *People v. O'Neil*, 47 Cal. 109; *Ex parte Wright*, 65 Ind. 511, holding that appeal lies from judgment in contempt; *Holman v. Mayor*, 34 Tex. 671, holding that proceedings may be inquired into on habeas corpus.

Jurisdiction.—Action must be properly instituted, and if there is no suit commenced or pending when order is issued it is void, pp. 320, 321.

Cited, *Low v. Henry*, 9 Cal. 552, and *Re Owens*, 63 Ark. 405, both to the same effect; cited in *Henrietta etc. Co. v. Gardner*, 173 U. S. 129, quoting *Low v. Henry*, 9 Cal. 552.

Contempt will not lie for noncompliance with order when not in respondent's power, p. 320.

Cited in *In re Cowden*, 139 Cal. 246, holding order for imprisonment for failure to pay alimony insufficient where not showing ability to make the payments.

6 Cal. 343-348. DAVIDSON v. GORHAM.

General Citation.—*Davidson v. Dallas*, 15 Cal. 79, where the facts occurring during the pending of appeal of the principal case are noted.

6 Cal. 348-354. CONNELLY v. PECK.

Notice to an Agent is notice to the principal, p. 354.

Cited, *Watson v. Sutro*, 86 Cal. 516; and *Wittenbrock v. Parker*, 102 Cal. 101, 41 Am. St. Rep. 176, both in affirmance.

6 Cal. 354-359. PERALTA v. CASTRO.

Will Witness.—On the trial of an issue of fact as to the validity of a will, a subscribing witness is not incompetent as a witness by

holding lands devised therein in trust for a devisee and without having any interest himself therein, p. 357.

Cited, *Stewart v. Harriman*, 56 N. H. 32, 22 Am. Rep. 413, as sustaining the point that an executor not otherwise interested in a will is a competent attesting witness.

Parol Trust.—Where a bill alleges a parol trust, it must be denied. A parol agreement in contradiction of the terms of a deed may not be established by the party's admission, pp. 358, 359.

Cited, note 65 Am. Dec. 501.

6 Cal. 359-361; 65 Am. Dec. 518. **JOHNSON v. FALL.**

Wagers are recoverable at common law except such as are prohibited by law or against public policy or calculated to affect the interest, character or feelings of third parties, p. 361.

Cited, *Gridley v. Dorn*, 57 Cal. 78; 40 Am. Rep. 111, where the rule is stated, but it is held that courts will restrict rather than enlarge the rule; notes 69 Am. Dec. 632; 74 Am. Dec. 102; 78 Am. Dec. 548; 81 Am. Dec. 232; extended note 37 Am. St. Rep. 701.

6 Cal. 361-365. **ROSS v. WHITMAN.**

Legislature.—All the duties or powers of any of the departments not disposed of or distributed to particular officers of that department are left to the disposal of the legislature, p. 364.

Cited, extended note 13 Am. St. Rep. 129.

6 Cal. 373-376. **JOHNSTON v. WRIGHT.**

Powers of Attorney are to be strictly interpreted, and authority is not to extend beyond express terms and necessary implication and a power to execute a release for the principal does not extend to debts due to principal jointly with others, pp. 375, 376.

Approved in *Muth v. Goddard*, 28 Mont. 249, under trust deed authorizing trustee to sell, convey and mortgage grantor's property trustee may execute trust deed conveying grantor's individual property as security for payment of debt due from firm of which he is partner; *Gilbert v. Howe*, 45 Minn. 123, 22 Am. St. Rep. 726, to substantially the same effect; note 22 Am. St. Rep. 726.

6 Cal. 376-380; 65 Am. Dec. 519. **HEYNEMAN v. DANNENBERG.**

Equity.—Implication lies in aid of a creditor's bill against a judgment obtained by fraud of an insolvent debtor, p. 380.

Cited, *Conroy v. Woods*, 13 Cal. 634, 73 Am. Dec. 610, at end of opinion, but not as a part thereof, to the general principle; *Speyer v. Ihmels*, 21 Cal. 287; 81 Am. Dec. 158, to the point of intervention by

creditor in connection with the law under the Practice Act; Cartwright v. Bamberger, 90 Ala. 409, to the same point as the principal case; Edson v. Cummings, 52 Mich. 55, to the point that complainants might proceed in equity; Lewis v. Harwood, 28 Minn. 435, as so deciding; Cogburn v. Pollock, 54 Miss. 640, in affirmance; Orr v. Moore, 1 Tex. App. Civ. Cases, 312, to the same effect; so also to a like effect in Kahn v. Salmon, 10 Sawy. 191; Hahn v. Salmon, 20 Fed. 806, where the rule is declared to be supported by the weight of authority; note, 72 Am. Dec. 384; extended note 90 Am. Dec. 289.

Equity—Insolvency.—Creditors need not await judgment at law and return of execution when it is admitted that the only effect would be a return nulla bona and the property attached would in the meantime have passed to the innocent purchasers on execution sale under the judgment, p. 380.

Cited, Walker v. Sedgwick, 8 Cal. 403, to the same point; Aigeltinger v. Einstein, 143 Cal. 611, 612, denying right of attaching creditor after alleged fraudulent conveyance to bring creditor's bill to set it aside; Scales v. Scott, 13 Cal. 78, in affirmance; Castle v. Bader, 23 Cal. 78, to the same effect; Edson v. Cummings, 52 Mich. 55, so holding; Lewis v. Harwood, 28 Minn. 438, as so deciding; Meacham Arms Co. v. Swarts, 2 Wash. Ter. 417, sustaining substantially the same rule; Nassauer v. Technor, 65 Wis. 392, holding, however, that the attaching creditor must in some way prove his claim, and noting that speedy action was necessary in the principal case; notes 66 Am. St. Rep. 273, 288; 69 Am. Dec. 419, 71 Am. Dec. 117, 82 Am. Dec. 444, 84 Am. Dec. 280; extended note, 90 Am. Dec. 288, 289.

Evidence erroneously admitted or rejected is not ground of reversal where the result would otherwise have been the same, p. 380.

Cited, notes, 70 Am. Dec. 544; 81 Am. Dec. 213; 5 Am. St. Rep. 58.

6 Cal. 381-383. BILLINGS v. HARVEY.

Statute.—Amendment repeals statute or section amended, p. 383.

Contra, Central Pac. R. R. Co. v. Shackelford, 63 Cal. 261; but the principal case is cited in dissenting opinion, p. 268. Cited, Huffman v. Hall, 102 Cal. 31, to substantially the same point; Fletcher v. Prather, 102 Cal. 419, where the point is fully considered, in view of section 325, Cal. Pol. Code. Referred to in Butte etc. Min. Co. v. Montana Ore Purchasing Co., 25 Mont. 45; Jacksonville etc. Ry. Co. v. Mitchell, 32 Fla. 80.

Statute of Limitations—Real Actions.—Amendatory act of 1855 repealed act of 1850, and period of limitation of ejectment extended five years from latter act, p. 383.

Cited, Billings v. Hall, 7 Cal. 3; Morton v. Folger, 15 Cal. 284; Clarke v. Huber, 25 Cal. 596—all in affirmance.

Notes Cal. Rep.—18

6 Cal. 383-385. HUTCHINSON v. BOURS.

Factors.—The lack of power in factors to pledge applies only to technical factors whose notorious employment is to sell goods of others consigned to them for that purpose. Possession by a factor who does not purchase on his own account is not evidence of ownership, p. 385.

Cited, *Glidden v. Lucas*, 7 Cal. 30, in affirmance; so, also, in *Horr v. Barker*, 11 Cal. 402, 70 Am. Dec. 794, *Weyse v. Crawford*, 85 Am. Dec. 202, as so deciding in case of a warehouseman; *Bragg v. Meyer*, 1 McAll. 408, Fed. Cas. No. 1801; *Morris v. Sellers*, 46 Tex. 396, to the same points.

Contra, *Wright v. Solomon*, 19 Cal. 73, 75, 76, 77; 79 Am. Dec. 199, 202, 203, where it was held that the rule that a factor authorized only to sell cannot pledge is unlimited and not confined to technical factors; *McCreary v. Gaines*, 55 Tex. 492, 40 Am. Rep. 823, holding that a factor has no power to pledge his principal's goods.

6 Cal. 386-394. ELLISSEN v. HALLECK.

Mortgage Claims Against an Estate must be presented for approval and rejected before action can be brought if mortgaged property is part of assets, pp. 392, 393.

Cited, *Falkner v. Folsom's Extrs.*, 6 Cal. 412, in approval, but distinguished as to the facts; *Willis v. Farley*, 24 Cal. 498, where the court says the language of the act seems imperative in its terms, although at p. 499 it said that the doctrine of the principal case has been disapproved; *Board v. Phye*, 27 Colo. 109, applying rule to claims against county.

Contra, *Fallon v. Butler*, 21 Cal. 29, 30; 81 Am. Dec. 141, 142; but see next head note herein.

Same—Probate Law.—The word "claims" in the statute includes every species of charge against the estate whether recorded or not, and a mortgage is a "claim," p. 393.

Cited, *Ellis v. Polhemus*, 27 Cal. 353, where the court says of *Fallon v. Butler*, 21 Cal. 29, 30, 81 Am. Dec. 141, 142, "whether that case states the law as correctly as" the principal case "which it overrules admits of serious doubt. The meaning of the word 'claim' is broad enough to embrace a mortgage or any other lien"; *Fretwell v. Mc-Lemore*, 52 Ala. 141, quoting the language of the principal case (p. 393); *Reid v. Sullivan*, 20 Colo. 501, where it is said that outside of the statutes a contrary rule prevails; *Bush v. Adams' Admr.*, 22 Fla. 190, where the pendency of a foreclosure suit was held not a presentation of a claim; *Corbett v. Rice*, 2 Nev. 337, 338, where in the dissenting opinion it is said of *Fallon v. Butler*, 21 Cal. 29, 30, 81 Am. Dec. 141, 142, that it has been very much weakened by the decision of *Ellis v. Polhemus*, 27 Cal. 353, and the court affirms the principal case.

Bill to Foreclose a Mortgage made by deceased should aver a presentation and rejection of the account or it is demurrable. The declaration should bring the case within the exception, since the right to sue the administrator is taken away, p. 393.

Cited, *McCann v. Sierra County*, 7 Cal. 124, to the same point; *Chase v. Evoy*, 58 Cal. 353, where it is said the correctness of the decision of the principal case, that such an objection may be raised by general demurrer, is doubted in *Heutsch v. Porter*, 10 Cal. 558, 562; *Wise v. Hogan*, 77 Cal. 188, where the principal case is doubted in view of the later decisions; *Kraft v. Greathouse*, 1 Idaho, 256, quoting from the principal case, and applying the rule to the statute of limitations, answer or demurrer thereto being requisite. See next heading herein.

Same.—General Demurrer is sufficient in such case, and need not distinctly specify grounds. In matters of practice involving no principle courts will follow rules of practice of inferior courts, pp. 393, 394.

Cited, *Williamson v. Blattan*, 9 Cal. 501, where the general demurrer was taken to a complaint in an action on an undertaking to release attached property; *Piercy v. Sabin*, 10 Cal. 30; 70 Am. Dec. 697, as to adhering to rules of established practice; *Brown v. Martin*, 25 Cal. 92, quoting from the principal case, as to matters of practice, in affirmance; *Wells v. Applegate*, 10 Oreg. 520, as to general demurrer.

6 Cal. 394-398. **BRYAN v. BEERY.**

Negotiable Paper.—Surety signing as joint maker is not liable to payee as principal, and suretyship may be inquired into, pp. 396-398.

Cited, *Sayre v. Nichols*, 7 Cal. 538; 68 Am. Dec. 282, to substantially the same point; *Kritzer v. Mills*, 9 Cal. 23, but that case was declared not within the doctrine of the principal case, although it holds contra; *Smith v. Freyler*, 4 Mont. 492, holding that suretyship may be proved by parol, but that the proof does not change the contract; note, 56 Am. Dec. 359.

Overruled, *And v. Magruder*, 10 Cal. 289, 291; this case is also cited in the last citing case herein.

General Citation.—Ex parte Newman, 9 Cal. 505, 526, where in dissenting opinion it is said, "I do not assent to the proposition announced in *Bryan v. Berry*, 6 Cal. 398, that the decisions of other courts are authority and to be respected only from the reasoning on which they are based."

6 Cal. 399-400. **ROBINSON v. KELLUM.**

Action on the Case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of the court through malice and without probable cause. If the act

complained of is destitute of these elements, remedy is on the appeal bond, p. 400.

Cited, *Asevado v. Orr*, 100 Cal. 297, quoting from the principal case; *Harless v. The Consumers' Gas Co.*, 14 Ind. App. 548, holding that a person enjoined may maintain an action for malicious prosecution; *Keber v. Mercantile Bk.*, 4 Mo. App. 196; *Campbell v. Carroll*, 35 Mo. App. 644; *Ruble v. Coyote etc. Co.*, 10 Oreg. 40; *Mitchell v. Silver Lake Lodge*, 29 Oreg. 302, all to the same effect; *Hess v. German etc. Co.*, 37 Or. 299, holding action not maintainable unless malice and want of probable cause alleged and proved; extended note, 14 Am. Dec. 601.

6 Cal. 402-404. FERGUSON v. MILLER.

Mortgagee in possession holds legal title subject to the mortgagor's rights, and holder of mechanic's lien for cost of building subsequently erected cannot object to the legality of a mortgage in the face of which he contracted, p. 404.

Cited, *Union W. Co. v. Murphy's F. F. Co.*, 22 Cal. 631, to the point that a mortgage upon a flume in the nature of real estate includes all improvements or fixtures then or thereafter put thereon; *Tibbetts v. Moore*, 23 Cal. 217, upon the point of priority of liens of mortgage on a steam engine and boiler affixed to the realty and a mortgage on a quartz mill, both executed by the owner of the mill.

6 Cal. 405-412. PEOPLE v. STONECIPHER.

Instruction "that if defendant had reason to believe, and did believe, that he was in great danger of losing his life, and, under that belief, killed the deceased, he was justified," is properly refused where the evidence shows that the prisoner commenced the affray, p. 410.

Cited, *State v. Neeley*, 20 Iowa, 116; *State v. Hensley*, 94 N. C. 1037—both cases involving the same principle as to self-defense.

Criminal Law.—Preponderating Proof will establish a fact in defendant's favor, p. 410.

Cited, *People v. Coffman*, 24 Cal. 236, and *People v. Hong Ah Duck*, 61 Cal. 395, both in affirmance; *People v. Rodrigo*, 69 Cal. 605, as deciding nothing in conflict with the views declared in that case which was one as to reasonable doubt and refusal to instruct; *People v. Knapp*, 71 Cal. 9, quoting at length from the last citing case, but the rule of preponderance of evidence was affirmed; *People v. Schryver*, 42 N. Y. 7, 1 Am. Rep. 484, to the point of burden of proof of defense resting on the preponderance of evidence; *People v. Dillon*, 8 Utah, 96, holding burden of proof of insanity on defendant.

Juror.—Affidavits to the incompetency of a juror must be embodied in a bill of exceptions or they will not be examined by the appellate court, p. 411.

Cited, *People v. Honshell*, 10 Cal. 86, to the same point; *People v. Martin*, 32 Cal. 92, to the same effect; *Brown v. State*, 52 Ala. 348, to substantially the same point; *United States v. Cannon*, 4 Utah, 140, so holding.

Criminal Law.—A party who accepts a juror knowing him to be disqualified is estopped from thereafter availing himself of such disqualification, p. 411.

Cited, *People v. Sanford*, 43 Cal. 32; *Brown v. State*, 52 Ala. 348, and *Territory v. Abetta*, 1 N. Mex. 547, all holding to the same effect. General citation: *State v. Yokum*, 11 S. D. 558.

6 Cal. 412-413. **FALKNER v. FOLSOM'S EXECUTORS.**

Probate Law.—Mortgage debt due by estate of deceased stands the same as any other debt, and, being allowed, has the effect of a judgment against executors, and in such case a bill for a foreclosure will be dismissed, pp. 412, 413.

Commented on and overruled, *Fallon v. Butler*, 21 Cal. 29, 30; 81 Am. Dec. 141, 142. So, also, in *Willis v. Farley*, 24 Cal. 499.

Cited, *Ellis v. Polhemus*, 27 Cal. 354, as to the meaning of the word "claim" where the court expresses a doubt whether the principal case does not express the law more correctly than the overruling case of *Fallon v. Butler*, above noted herein; *Corbett v. Rice*, 2 Nev. 332, which case, in effect, holds contra as to the right to sue on allowed claims; *Id.* 338, in dissenting opinion where the authority of *Fallon v. Butler* is declared to have been weakened by *Ellis v. Polhemus*, 27 Cal. 350; *Lloyd v. Hoo Sue*, 5 Sawy. 77, as to allowing claims having the force and effect of a judgment.

Cross-reference: See *Ellissen v. Halleck*, 6 Cal. 386.

6 Cal. 413-414. **GRASS VALLEY ETC. CO. v. STACKHOUSE.**

Practice.—Party may strike out a claim for damages, p. 414.

Cited, *Armstrong v. Paul*, 1 Nev. 141, to the same point.

Evidence.—Party may testify on his own behalf as to loss of original documents as a predicate for the introduction of secondary evidence to prove their contents, p. 414.

Cited, *Bagley v. Eaton*, 10 Cal. 148, to the same effect, saying that in this state the testimony may be given orally or offered by affidavit.

6 Cal. 415-416. **SUTTER v. COX.**

Objection to Form of Complaint comes too late if made for the first time in the supreme court, p. 415.

Cited, *Wilkins v. Stidger*, 22 Cal. 235, 83 Am. Dec. 65, where it is declared that objection comes too late after verdict. "It should be made by demurrer."

Misnomer.—Where name differs in complaint, return of service, and judgment, it is error unless the record shows the identity of the person served and sued, pp. 415, 416.

Cited in *Houghton v. Tibbetts*, 126 Cal. 58, vacating default of W. T. C. on service of W. F. C.; *Ford v. Doyle*, 37 Cal. 348, holding that record must show that party was a defendant; *Casper v. Klippen*, 61 Minn. 355, 52 Am. St. Rep. 606, a case of misnomer of defendant and amendment of judgment, and the judgment held not absolutely void.

6 Cal. 416-418. GIBLIN v. JORDAN.

Homestead could not be carved out of estate held by joint tenancy or tenancy in common, pp. 417, 418.

Cited, *Bishop v. Hubbard*, 23 Cal. 517, 83 Am. Dec. 133; *Elias v. Verdugo*, 27 Cal. 425; *Seaton v. Son*, 32 Cal. 483—all in affirmance; *Fitzgerald v. Fernandez*, 71 Cal. 507, in affirmance of the law as it existed prior to 1868, and that act is construed as to a tenant in common not in exclusive occupancy; *In re Carriger*, 107 Cal. 619, where the principal case and other affirming cases are noted, and it is held that an undivided interest in land of a deceased cotenant cannot be set aside as a probate homestead; *Rosenthal v. Merced Bk.*, 110 Cal. 202, where the principal case and later decisions are noted and the rule affirmed; *McGuire v. Van Pelt*, 55 Ala. 357, the chief justice dissenting in conformity with the rule of the principal case, it being held contra; *Greenwood v. Maddox*, 27 Ark. 660, holding that a tenant in common may apply for partition and become entitled to a homestead; *Newton v. Summey*, 59 Ga. 400, a case of injunction against proceedings by the debtor's wife to have a homestead set aside out of partnership land, her husband having become a firm member, but which injunction was not granted; *Johnson v. Kessler*, 87 Ky. 459, as deciding as above stated in this headnote, but it is held that the husband and wife being joint owners of homestead property, the husband might have an exemption of his interest against his debt; *Lindley v. Davis*, 6 Mont. 456, holding against the right of setting apart homestead by a partner out of partnership land as against a firm creditor; *Smith v. Chenault*, 48 Tex. 462, distinguishing the point in the principal case, and expressing no opinion; that case, however, is to substantially the same effect as the last citing case herein; *West v. Ward*, 26 Wis. 581, to the same point as the principal case in affirmance; extended note, 63 Am. Dec. 122, 123.

Stare Decisis.—A rule once established and firmly adhered to may work apparent hardship in a few cases, but in the end will prove more successful than if constantly deviated from, p. 418.

Cited, *The Atchison etc. R. R. Co. v. Atchison*, 47 Kan. 721, quoting from the principal case; extended note, 27 Am. Dec. 632.

General Citation.—*Jordan v. Giblin*, 12 Cal. 102, where certain executions in the principal case and want of service were noted.

6 Cal. 419-422; 65 Am. Dec. 521-522. **RICHARDS v. McMILLAN**. S. C. 6 Cal. 422, but on another point.

Judgment by Confession.—Omission to set forth facts and circumstances of indebtedness as required by statute does not ipso facto avoid the judgment. It is prima facie evidence of fraud against other creditors throwing burden on judgment creditor to prove fairness, p. 422.

Cited, *Cordier v. Schloss*, 12 Cal. 147, in affirmance; *Cordier v. Schloss*, 18 Cal. 580, adhering to the ruling on the ground of stare decisis, but intimating a doubt as to its correctness; *Wilcoxson v. Burton*, 27 Cal. 235, 237, 87 Am. Dec. 72, 73, where substantially the same doctrine was held, although it was said by the court that the principal case had no bearing upon the exact point before it, since the statement in said case was defective because too general, and the judgment was prima facie fraudulent for that reason, "and it was further considered that the party might supply the omitted details by testimony to be produced at the trial"; *Lee v. Figg*, 37 Cal. 336, 90 Am. Dec. 274, to the same effect, but adding as to the rule, "This necessarily assumes that the judgment is valid till vacated upon a direct proceeding"; *Pond v. Davenport*, 44 Cal. 487, to the same point as the principal case; *Brown v. Miller*, 11 Colo. 434, where it was said that if the rule of the principal case should be adopted it would not aid the plaintiffs in error, as the strong preponderance of evidence was in favor of the bona fides of the transaction upon which the confession of judgment was based; *Puget etc. Bk. v. Levy*, 10 Wash. 505; 45 Am. St. Rep. 808, where the doubt expressed in *Cordier v. Schloss*, 18 Cal. 580 (above noted), is stated, and the better rule was expressed to be that the proper way to sustain such a judgment attacked for such deficiency was to amend it, but no amendment could be made affecting creditors' rights fixed by attachment, but the citing case held the confessions there void because not verified as required by statute; notes 72 Am. Dec. 415; 73 Am. Dec. 528; 79 Am. Dec. 218; 88 Am. Dec. 704; extended note 99 Am. Dec. 275.

6 Cal. 425-429. **WESTON v. BEAR RIVER ETC. CO.** S. C. 5 Cal. 186.

Corporations.—Transfer of stocks, though not on books of company, is good as against a purchaser at sheriff's sale with knowledge of the hypothecation of such stock. Neither the incorporation law of 1850 or of 1853 covered such a case, but applied only to transfers and purchases in good faith without notice, p. 429.

Cited in *Barse etc. Co. v. Range etc. Co.*, 16 Utah, 69, holding transferee not affected by subsequent sale by creditor with notice; *West Coast etc. Co. v. Wulff*, 133 Cal. 317, 318; cited under *Weston v. Bear*

River etc. Co., 5 Cal. 186; Naglee v. Pacific Wharf Co., 20 Cal. 533, holding that such assignment was invalid without a transfer on the company's books as to such purchaser without notice of the assignment; People v. Elmore, 35 Cal. 655, in affirmance on the principle of stare decisis so far as the case decides that a transfer, though not entered on the company's books, is valid except as to subsequent purchasers in good faith without notice; Parrott v. Byers, 40 Cal. 625, affirming the same doctrine; Winter v. Belmont Mining Co., 53 Cal. 430, affirming the rule on the ground of stare decisis alone; Farmers' Nat. Gold Bk. v. Wilson, 58 Cal. 604, affirming the rule as well as the point that such purchaser at an execution sale without notice would take the stock discharged of the lien of the assignee; Spreckels v. Nevada Bk., 113 Cal. 276, 54 Am. St. Rep. 350, where the doctrine of the principal and subsequent affirming cases are said to declare the unquestionable rule in California. This case was one of entry upon the company's books for the pledgor's protection under section 324 of Cal. Civ. Code; note, 63 Am. Dec. 120, 121.

6 Cal. 430-433. **NELSON v. NELSON.**

Statutes of Limitation do not act retrospectively and cannot be pleaded until the period fixed by them has fully run since their passage, p. 433.

Cited, Lehmaier v. King, 10 Cal. 374, in brief note of affirmance; Vrooman v. Li Po Tai, 113 Cal. 305, as so deciding, and applicable to a case of dismissal of action for failure to return summons under section 581 of Cal. Code Civ. Proc.; Gillette v. Hibbard, 3 Mont. 415, in affirmance.

6 Cal. 433-435. **FAIRBANKS v. WOODHOUSE.**

Mining Laws introduced in evidence are to be construed by the court, and the question of forfeiture thereunder is one of law, p. 435.

Cited in Lockhart v. Willis, 9 N. Mex. 358, further holding forfeiture shown; extended notes, 63 Am. Dec. 93, covering cases as to mining rights, etc.; 69 Am. Dec. 455, upon questions for court and jury.

6 Cal. 435-439. **VANCE v. COLLINS.**

Notice and Demand of Nonpayment of note should be personally served on indorser residing in the same city where the note is held, p. 439.

Cited, extended note 38 Am. Dec. 608, to the same point.

6 Cal. 439-440. **JUAN v. INGOLDSBY.**

Appeals from Interlocutory Orders are the creations of statute, and cannot be extended by implication; and an order for change of venue is not appealable, p. 440.

Cited, *Baker v. Baker*, 10 Cal. 528, to the same point in affirmance of the principle; *Mercer etc. v. Glass, Exctr.*, 89 Ky. 202, applying the same principle in a case where an order of transfer to another court was held not appealable; extended note 60 Am. Dec. 432.

6 Cal. 440-443. **TUOLUMNE COUNTY v. STANISLAUS COUNTY.**

Constitutional Law.—Powers of a judicial character may be authorized by the legislature to be performed by county court judges, such as the appointment of commissioners to ascertain and settle the amount of indebtedness of a county, p. 442.

Cited and declared overruled in *People v. Provines*, 34 Cal. 527, 531, in so far as it conflicts with the rule that the legislature may authorize a judge to exercise functions not judicial if they do not pertain to executive or legislative departments of state.

Mandamus—Costs.—Cited in *Power v. May*, 123 Cal. 153, as instance of award of costs in such cases.

6 Cal. 443-446. **AMERICAN WATER COMPANY v. AMSDEN.**

If Statute Declares a River Navigable to a certain point by implication it is declared non-navigable above that place, p. 446.

Cited, *Cardwell v. County of Sacramento*, 79 Cal. 350, concerning the same river, but by successive amendments the point was placed lower and lower down until the stream was omitted from navigable waters.

Stream is not Navigable because it can float logs, p. 446.

Cited in *Griffith v. Holman*, 23 Wash. 355, holding stream unnavigable under facts stated; note 5 Am. Rep. 108.

6 Cal. 447-449. **SMALL v. GWINN.**

Jurisdiction of Justices of the Peace in forcible entry and detainer arises from the nature of those cases being quasi criminal and the legislature had power to dispose of the jurisdiction in those cases, as they were special cases, p. 449.

Cited in *Herkeimer v. Keeler*, 109 Iowa, 685, and *Armstrong v. Mayer*, 60 Neb. 429, construing local constitution and statutes; *Armstrong v. Paul*, 1 Nev. 140, to the same point, and also as sustaining the right of justices to award in such cases damages commensurate with the injury.

6 Cal. 449-452. **CRANDALL v. WOODS.**

Injunction.—County Judge has power to grant an injunction on a bill filed in the district court, pp. 451, 452.

Cited, *Creanor v. Nelson*, 23 Cal. 468, in affirmance, and holding that such judge may also dissolve or modify the same; *People v. County*

Judge, 27 Cal. 152, in affirmance, but holding also that the effect of the order is the same as if made by the district court in the first instance.

6 Cal. 452-453. **LORRAINE v. LONG.**

Equitable Defense to action at law does not confine remedy to that proceeding. The party may let the judgment go at law and file bill in equity for relief. Practice act enlarges the field of remedy, but does not take away pre-existing remedies by implication, p. 453.

Cited, *Hough v. Waters*, 30 Cal. 311, as settled law; *Hills v. Sherwood*, 48 Cal. 392, as the rule; *Golson v. Dunlap*, 73 Cal. 165, in affirmance; *Witte v. Lockwood*, 39 Ohio St. 144, to the same effect, holding the right to plead an equitable title as a counterclaim or defense or reserve it for a separate action; *Hill v. Cooper*, 6 Oreg. 187, sustaining the same doctrine as the principal case; extended note 54 Am. St. Rep. 225.

6 Cal. 456-457. **OLIVER v. WALSH.**

Assignment.—Cause of action arising out of tort was not assignable under act of 1855. The term "thing in action not arising out of contract" had reference to express contracts, pp. 456, 457.

Cited, *Wilkins v. Stidger*, 22 Cal. 236, 83 Am. Dec. 66, and applying such construction to the point of competency of witnesses; *More v. Massini*, 32 Cal. 592, where the case was identical with the principal case except in this, that the act of 1855 had been superseded by legislation, and a claim for damages for trespass on land was held assignable; *Snyder v. The Wabash etc. Ry. Co.*, 86 Mo. 622, in dissenting opinion, the case holding that a cause of action arising from tort was assignable.

6 Cal. 457-459. **GARY v. EASTBROOK.**

Homestead—Sheriff's Sale.—It is the duty of appraisers to ascertain and report value of the land and sheriff's deed conveying an interest exceeding \$5,000 without appraisal is invalid, p. 459.

Cited, *McDonald v. Badger*, 23 Cal. 400, 83 Am. Dec. 128, where it is said that the rule applies to a single lot or tract of land, but not to two or more on only one of which is the dwelling of the debtor; *Barrett v. Sims*, 59 Cal. 619, in approval under sections 1241, 1245, and 1259, Cal. Civ. Code; *Fogg v. Fogg*, 40 N. H. 290; 77 Am. Dec. 720, to the same effect; note, 84 Am. Dec. 572, extended note 87 Am. Dec. 275, 276.

6 Cal. 460-462. **FOLSOM'S EXECUTORS v. SCOTT.**

Secondary Evidence of a written instrument cannot be admitted if original is unaccounted for by proof of exhaustion in a reasonable degree of all means of search, p. 461.

Cited, *Macy v. Goodwin*, 6 Cal. 581, holding that a record or certified copy of a recorded instrument was not admissible without proof of loss of original, or that it was not in the control of the party under act of 1851; *Caulfield v. Saunders*, 17 Cal. 573, where the rule was stated, and it was held that laying a predicate was waived if no objection was taken to secondary evidence; *Succession of Edwards*, 34 La. Ann. 228, in dissenting opinion, as to the nature of evidence required to prove agency of a party to acknowledge and promise to pay notes of a deceased person prescribed on their face, and that the construction of statutes is extended to cases within the reason and rule of them.

6 Cal. 462-471; 65 Am. Dec. 523. **WHITE v. STEAM TUG MARY ANN.**

Remedial Statute must be construed liberally where its meaning is doubtful, and so construed as to extend the remedy, p. 470.

Cited, *Cullerton v. Mead*, 22 Cal. 98, in affirmance; dissenting opinion, *Ede v. Cuneo*, 126 Cal. 173, construing street law of 1889; *Cormerais v. Genella*, 22 Cal. 125, and applied to an amendment; *Kahn v. Salmon*, 10 Sawy. 199, 20 Fed. Rep. 811, to the same point as the principal case; extended note, 74 Am. Dec. 535; notes 13 Am. St. Rep. 234; 14 Am. St. Rep. 318; 31 Am. St. Rep. 374.

Damages for Loss of Vessel being towed out to sea are not precluded by partial insurance on said vessel and an abandonment. The owner is the real party in interest in an action for damages, p. 471.

Cited, *Bernstein v. Downs*, 112 Cal. 206; a case of assignment of an assessment, an action by the assignee, and a defense as to the point of interest in plaintiff and protection of the assignor by the bar of the suit. Note 94 Am. Dec. 62, as to damages.

Common Carrier.—Whether a towboat is a common carrier was not decided, though the court intimated that it was such carrier, p. 471.

Cited, *Varble v. Bigley*, 14 Bush. 702, 29 Am. Rep. 437, as so intimating, but it was held that owners of towboats on the Ohio river were not common carriers; *Brown v. Clegg*, 63 Pa. St. 58, 3 Am. Rep. 529, holding that such boats are not common carriers as to their vessels, etc., in tow; note to *Knapp v. McCaffery*, 69 Am. St. Rep. 300, on general subject; note 55 Am. Dec. 535.

6 Cal. 471-473. **TISSOT v. THROCKMORTON.**

Cited, *Tissot v. Darling*, 9 Cal. 285, a case merely of an undertaking on appeal executed by defendants, in the principal case.

6 Cal. 475-477. **ADAMS v. HASKELL.**

Receiver.—Disbursements will be allowed when necessary and proper, p. 477.

Cited in *Olson v. Bank*, 72 Minn. 327, disallowing payment for legal services rendered by receiver.

6 Cal. 477-478. **PEOPLE v. MARTIN.**

Criminal Law—Appeal.—That bill of exceptions was not signed until more than ten days after trial cannot defeat a party's right of appeal, p. 478.

Cited, *People v. Woppner*, 14 Cal. 437, in affirmance.

Same.—In the absence of anything appearing to the contrary, the presumption arises from the fact of the bill being signed by the judge that it was done regularly, p. 478.

Cited, *People v. Robinson*, 17 Cal. 371, to support the point that the regularity of proceedings of district courts, after jurisdiction has attached, is presumed; *Sullivan v. Wallace*, 73 Cal. 309, in affirmance.

6 Cal. 478-483. **PHELAN v. OLNEY.**

Mortgage is a mere security and incident to indebtedness, p. 483.

Cited, *McMillan v. Richards*, 9 Cal. 410; 70 Am. Dec. 663, to the same point.

Same.—Where several notes are secured by a single mortgage, the indorsement and delivery of one of the notes carries with it a pro rata security, and a purchaser of a second note and assignee of the mortgage takes with notice of the equity of the first holder, p. 483.

Cited, *Grattan v. Wiggins*, 23 Cal. 30, holding the point of a pro rata share in the absence of a special agreement with the mortgagee; *Studebaker Mfg. Co. v. McCargur*, 20 Neb. 503, where the assignment of one of the notes is a pro tanto assignment, and the holders entitled to share equally in the common fund; *Nashville Trust Co. v. Smythe*, 94 Tenn. 525, 532; 45 Am. St. Rep. 755, 759, where numerous cases pro and con are collected, but the rule of the principal case is followed, subject to an agreement or evident intention custom; *Wooters v. Hollingsworth*, 58 Tex. 374, holding against the right to priority of payment under an assignment of one of several notes constituting a vendor's lien on land; *Gest v. Packwood*, 14 Sawy. 142, 39 Fed. Rep. 533, a case of an agreement, which was in effect a mortgage, declared to have been intended for the payment of the notes in whosoever's hands they might come; note 38 Am. Dec. 440, citing numerous cases pro and con.

6 Cal. 483-487. **BAKER v. BARTOL.**

Creditor's Bill will lie in favor of attaching creditors and to set aside fraudulent suit or judgment against an insolvent, p. 486.

Cited, *Riddle v. Baker*, 13 Cal. 362, where the facts of the principal

case are stated, also its subsequent appeal (7 Cal. 551), followed by the bill in the citing case praying for an injunction against enforcing the judgment in *Baker v. Riddle*, and new trial in *Baker v. Bartol*; *Feldenheimer v. Tressel*, 6 Dak. 272, as not supporting respondent's contention therein, since creditor's bills have always been maintainable in California; extended note, 90 Am. Dec. 290, 296, 298, concerning creditor's bills, the parties thereto, the object thereof, etc.

Supplemental Bill may pray for different relief from the original bill, p. 486.

Cited, *Jacob v. Lorenz*, 98 Cal. 338, and *Roush v. Fort*, 3 Mont. 182, both to substantially this same point.

6 Cal. 487-488. PEOPLE v. PARSONS.

Indictment.—“Feloniously” need not be used when offense is fully set forth. It is sufficient if the language of the statute is substantially followed, p. 488.

Cited, *People v. Olivera*, 7 Cal. 404, in affirmance, although as to “feloniously,” the court expressed its dissent; *People v. Winkler*, 9 Cal. 236, in affirmance as to following the language of the statute. So, also, in *People v. Dolan*, 9 Cal. 584; *People v. Garcia*, 25 Cal. 533; *People v. Shaber*, 32 Cal. 38; *People v. Ross*, 103 Cal. 427. In the last case, however, one of subornation of perjury, the statute used the word “willfully,” and it was declared that that word, or one of like import, must be used; *People v. Ward*, 110 Cal. 372, where the rule is said to be “true generally, but not universally. It is not true of a case where ‘the particular circumstances . . . are necessary to constitute a complete offense.’ The rule especially applies to purely statutory offenses,” and the indictment there for bribery was declared not to be alleged in the language of the statute. “It does not allege the acts and facts which the legislature has said shall constitute the offense.” *People v. Ah Choy*, 1 Idaho, 319, to the point that the charge is in the language of the statute; *State v. Ah Lee*, 18 Oreg. 546, to the same effect, in a case where the indictment followed the form in the appendix to the criminal code; *People v. Gough*, 2 Utah, 71, to the effect that the general rule of following the statute governs.

6 Cal. 489-497. HERR v. BARKER. S. C. 8 Cal. 603-610; S. C. 11 Cal. 393.

Sales.—Where goods are sold by quantity with segregation, subsequent segregation arises by a sale and removal of the remainder and more, and title passes without further delivery, pp. 496, 497.

Cited, *McLaughlin v. Piatti*, 27 Cal. 463, as sustaining (with 8 Cal. 603, which latter case does so declare in effect at p. 608) the point that if mingled goods are sold by number, etc., title does not pass

until segregation and identification; *Young v. Miles*, 20 Wis. 624, holding substantially the same as the principal case.

Sales.—Delivery by accepted orders upon warehouseman passes title without segregation, p. 496. See, also, S. C. 8 Cal. at p. 607.

Cited, *Newhall v. Langdon*, 39 Ohio St. 95; 48 Am. Rep. 429, where the presentation and acceptance of an order was held to complete the sale and cause a subsequent loss to fall on the purchaser.

6 Cal. 497-498. **McKUNE v. McGARVEY.**

Married Woman—Misjoinder.—Under act of 1852, in an action against a married woman alleged to be a sole trader, her husband could not be joined, p. 498.

Cited, *Trieber v. Stover*, 30 Ark. 731, holding the husband not liable under a similar statute, with his wife, upon her contract as sole trader; *Granger v. Lewis Bros.*, 2 Wyo. 246, in dissenting opinion, but the case held that a statute in the same words did not apply, as it did not appear that she was married when the goods were sold.

Married Woman.—Statute of 1852 made her a feme sole as to the particular business in which she was engaged, p. 498.

Cited, *Guttman v. Scannell*, 7 Cal. 458, to the same point. So, also, in *Camden v. Mullen*, 29 Cal. 566.

6 Cal. 499-506. **PEOPLE v. JOHNSON.**

Constitutional Law.—Article VIII. prohibited legislature from creating debt of more than \$300,000 without vote of the people, pp. 500-506.

Cited, *Nougues v. Douglass*, 7 Cal. 66, in affirmance; *Bickerdike v. State*, 144 Cal. 696, but holding coyote bounty acts of 1891 and 1901 valid under present constitution; *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 642, in connection with the construction of section 18, article XI, of the constitution; *Miller v. Dunn*, 72 Cal. 468, 1 Am. St. Rep. 71, where it is said there is no doubt of the correctness of the decision in the principal case, but it is held, nevertheless, that under article IV., section 32 of the constitution, the legislature is not prohibited from making appropriation for a debt incurred under a void statute; *Bradford v. San Francisco*, 112 Cal. 544, where the court said it took much the same view of section 18, article XI., as was taken of the old constitution in the principal case, and the object of the section before it was to confine municipal expenditures for each year to the income and revenue of such, except where two-thirds of the electors should determine as in the section specified; *In re Appropriations*, 13 Colo. 323, in support of a rule limiting the legislature in incurring debts to the amount and in the manner provided by the constitution.

Constitutional Law.—A debt or liability may be created in other ways than by borrowing money, as by appropriation when there is

no money to meet it, or by drawing on a fund when there is no cash in the treasury or incoming revenue, p. 503.

Cited, *State v. Hickman*, 11 Mont. 552, where this language of the court is quoted upon the point as to what constituted a "public debt" under the constitution of that state.

6 Cal. 506-509; 65 Am. Dec. 525. **NIGHTINGALE v. SCANNELL.**

Joint Right of Action cannot be divided into several actions, p. 509.

Cited, *Metzler v. James*, 12 Colo. 329, to the same point; notes, 78 Am. Dec. 762; 32 Am. St. Rep. 497.

Witness.—Where partner recovering is liable to account to his co-partner whom he has made defendant, the latter is interested and not a competent witness for plaintiff, p. 509.

Cited, notes, 72 Am. Dec. 323; 73 Am. Dec. 454.

6 Cal. 509-510. **PEOPLE v. BAINE.**

Officer.—Where legislature fails to elect to a vacancy, the governor has the power of appointment, p. 510.

Cited, *People v. Stratton*, 28 Cal. 392, but distinguished that case, holding that the governor has no power to appoint where the law provides another mode of filling a vacancy. Approved in *State v. Bacon*, 14 S. Dak. 291, on expiration of term of office of the members of board of charities, office becomes vacant unless successor appointed; *People v. Tilton*, 37 Cal. 618, criticised, holding that the failure of the legislature to elect at the expiration of the term does not create a vacancy which the governor may fill, but the incumbent holds until a successor is elected and qualified; *State ex rel. v. Sheldon*, 8 S. Dak. 527, as sustaining the point that upon the expiration of an officer's term unless he is authorized by law to hold over, his rights, duties and authority ipso facto cease.

6 Cal. 510-512. **DAVIS v. BUTLER.**

Abandonment of Mining Claim exists where one leaves possession without an intention to repossess, p. 511.

Approved in *Oviatt v. Big Four Min. Co.*, 39 Or. 123, abandonment established where owner of mining right left premises, sold movables, allowed property to be sold for taxes, and made no attempt to claim or use it for eighteen years; *Inez Min. Co. v. Kinney*, 46 Fed. Rep. 835, where it is said: "The common law of the land defines it as a relinquishment, the absolute forsaking of a right. It is a question of intention, and occurs the instant the intention is formed." *Harkrader v. Carroll*, 76 Fed. Rep. 475, giving substantially the same definition as the principal case; extended note, 40 Am. Dec. 465.

6 Cal. 512-514. TAYLOR v. SEYMOUR.

In Action for Damages against officer levying attachment he is not liable in absence of notice of claim of third party and demand, p. 514.

Cited, *Boulware v. Craddock*, 30 Cal. 191, the court saying that it preferred to follow *Ledley v. Hayes*, 1 Cal. 160, if it stated a different rule, and a demand on the sheriff before commencing suit in such case was held unnecessary; *Vose v. Stickney*, 8 Minn. 79, in substantial affirmance of the principal case; *Perkins v. Barnes*, 3 Nev. 563, in dissenting opinion, but the case holds that in replevin a demand is not indispensably necessary.

6 Cal. 519-528. HOLLIDAY v. WEST.

Alcaldes' Grants.—Denouncement for forfeiture does not apply, pp. 525-528.

Cited, *Norris v. Moody*, 84 Cal. 147, 149, 150, 151, where the principal case is considered at length and declared not overruled on this point. So, also, of *Touchard v. Touchard*, 5 Cal. 307.

Courts of this State will judicially notice the Mexican civil law, pp. 525, 526.

Cited, extended note, 89 Am. Dec. 675.

6 Cal. 528-531; 65 Am. Dec. 526. JAMES v. SAN FRANCISCO.

Municipal Corporation's obligation to keep streets in repair is suspended while actually undergoing such alterations as make them dangerous for the time, and the city is not liable for negligence of contractor in grading streets, when it is compelled by law to give out the contract, pp. 530, 531.

Cited, *O'Hale v. Sacramento*, 48 Cal. 214, in affirmance of nonliability for contractor's negligence; *City of Lincoln v. Calvert*, 39 Neb. 309, to the point that the city's obligation is suspended during the time occupied in repairs or improvements, provided the unsafe condition was reasonably necessary and maintained only for a time reasonably required; *City of Guthrie v. Swan*, 3 Okla. 120, quoting from the last cited case and to the same effect; *Williams v. Thacker etc. Co.*, 44 W. Va. 603, on point that employer is not liable for acts of employee whom he is bound by statute to employ; see note to *Circleville v. Sohn*, 69 Am. St. Rep. 780, and *Covington etc. Co. v. Steinbrock*, 76 Am. St. Rep. 417, on general subject. *Wilson v. Wheeling*, 19 W. Va. 335, 42 Am. Rep. 795, as so deciding, but in that case the city was held liable for the contractor's negligence; also in *Guthrie v. Swan*, 6 Okla. 427; notes, 70 Am. Dec. 570, as to liability for neglect to repair streets; 79 Am. Dec. 579, as to liability from defective sidewalks and streets; 80 Am. Dec. 83, as to liability for negligence of contractor; 86 Am. Dec. 346, 347, 87 Am. Dec. 399, 28 Am. St. Rep. 563, as to liability for con-

tractor's acts: 30 Am. St. Rep. 312, 48 Am. St. Rep. 858, as to liability for injuries caused by excavations in streets; 51 Am. St. Rep. 744.

6 Cal. 531-541. **PHELAN v. SAN FRANCISCO.** S. C. 9 Cal. 15-16, S. C. 20 Cal. 39.

Courts.—Legislature could not confer other than judicial functions on court of sessions, p. 540.

Cited, *Argenti v. San Francisco*, 16 Cal. 272, as so deciding, and in S. C. 20 Cal. 43, in affirmance. Contra, *People v. Provines*, 34 Cal. 527, 531, to the extent that that case holds that the legislature may authorize a judge to exercise local functions not judicial if they do not pertain to the executive or legislative department of the state.

Ratification.—A void contract inhibited by the constitution cannot be ratified by a municipal board, and where property is purchased under such void contract and is in possession of the city, the caring for and preservation thereof by said board is not a ratification, p. 540.

Cited, *Holland v. San Francisco*, 7 Cal. 380, as so deciding in a case where, under an invalid ordinance, city property was sold, and a subsequent ordinance was passed appropriating a portion of the proceeds of the sale, and it was held valid; *Id.* p. 388, in dissenting opinion; *Argenti v. San Francisco*, 16 Cal. 272, where the court says that "no such rule exists in reference to the private transactions of a municipal corporation"; note, 1 Am. St. Rep. 75, that claims invalid under unconstitutional statute cannot be validated by subsequent statute.

6 Cal. 541-543. **GOODWIN v. SCANNELL.**

Warehouseman's Receipt estops him from setting up a want of segregation of the goods receipted for from other goods, p. 543.

Cited in *Fletcher v. Elevator Co.*, 12 S. Dak. 650, as to attempt to deny actual receipt of the property; note, 100 Am. Dec. 243, where the point of conclusiveness of such receipt is considered.

6 Cal. 543-547. **PEOPLE v. MARCH.**

Conviction of Murder.—On appeal a new trial was ordered on the ground of objection to a juror, p. 546.

Cited, *People v. Stonecipher*, 6 Cal. 411, where the court declares that the principal case "held that a party on trial charged with a capital offense could not waive an objection to the incompetency of a juror, even if the fact were personally known to him. The decision was made without any argument upon the points, and upon examination does not appear to be supported by the authorities."

Criminal Law—Jeopardy.—New trial for same offense for error does not place defendant twice in jeopardy, pp. 546, 547.

Cited, *People v. Howell*, 28 Cal. 461, to the same point; *Ex parte*

Bradley, 48 Ind. 552, holding the same doctrine; *State v. Thompson*, 10 Mont. 562, and applied to a new trial obtained on defendant's own motion.

Verdict of Guilty under indictment for murder imports a conviction on every material allegation, and therefore is a conviction of murder, p. 547.

Cited, *Ex parte Brown*, 68 Cal. 180, as to the meaning of conviction"; *People v. West*, 73 Cal. 346, where the rule was applied to a case of an assault with intent to commit murder; *Smith v. People*, 1 Colo. 135, to the same point as the principal case; *Territory v. Miller*, 4 Dak. 180, holding the same rule as to a plea of guilty; *Territory v. Perkins*, 2 Mont. 473, to the same point; *Cook v. Territory*, 3 Wyo. 116, holding the same doctrine.

6 Cal. 548-559; 65 Am. Dec. 528. **CONGER v. WEAVER.**

Public Lands.—A license from the government to occupy public lands is presumed, and the right to mine and appropriate water is protected not by express but by general legislation, pp. 555-558.

Cited, *Merced Min. Co. v. Fremont*, 7 Cal. 327, 68 Am. Dec. 272, to the same effect; *Katz v. Walkinshaw*, 141 Cal. 135, holding common-law rules modified in California; *Hill v. King*, 8 Cal. 338, applied to the right to ditches and appropriation of water; *Lux v. Haggin*, 69 Cal. 355, quoting at length from the principal case (at pp. 556, 557), as to adverse claims on public lands; a presumption of grant of flowing water, and the applicability of decisions to persons claiming by possession; *Id.* 446, 447, in dissenting opinion; *Gold Hill Q. M. Co. v. Ish*, 5 Oreg. 106, as so holding in a case recognizing a right of occupancy of mining claims.

Judicial Notice.—Courts are bound to know the history of the country, its extent, the settlement of public lands, the mining thereon and the adjuncts thereof and necessary thereto, pp. 556, 557.

Cited, *State ex rel. v. Gramelspacher*, 126 Ind. 403, a case in regard to judicial notice of the acts of Congress relating to lands for the Indiana University; extended note 89 Am. Dec. 681; note, 28 Am. St. Rep. 926.

Possession and acts of ownership indicate rights of property; so, in constructing canals under license of the state, the survey of the grounds, planting stakes, giving public notice, and actually commencing and pursuing the work, are acts of possession and ownership conclusive of the right, p. 558.

Cited, *Thompson v. Lee*, 8 Cal. 278, 280, and applied to a notice of intention to appropriate water when taken with other acts; *Weaver v. Conger*, 10 Cal. 238, where it was said that the right to priority of appropriation was fully settled in the principal case between the

same parties; notes 68 Am. Dec. 331, that priority of appropriation is rule of property in water; 85 Am. Dec. 150, 90 Am. Dec. 541; 39 Am. St. Rep. 54, as to adverse possession; 45 Am. St. Rep. 780, as to appropriation of waters on public lands.

6 Cal. 559-562. **WILLIAMS v. CHADBOURNE.**

Deposition.—When certificate is insufficient in failing to set out an actual compliance with all the statutory requirements, it is properly excluded, p. 561.

Cited, *People v. Morine*, 54 Cal. 578, to the same point; *People v. Mitchell*, 64 Cal. 87, where it is said that any real departure from the course prescribed for the taking of a deposition renders it objectionable; *Lucas v. Richardson*, 68 Cal. 620, where it is said all the essential requirements of the statute must be complied with; *Darby v. Heagerty*, 2 Idaho, 261, to the point that all statutory requirements must be complied with. See, also, next heading herein.

Deposition.—Where notice of time and place are given, it is immaterial who takes the deposition, p. 561.

Cited, *Lucas v. Richardson*, 68 Cal. 620, to the point that the statute requires notice of time and place.

Deposition.—Certificate should state that deposition was read to the witness before signing, p. 561.

Cited, *People v. Morine*, 54 Cal. 578, where the deposition was not certified by the magistrate, and the principal case is also cited to the point stated in the headnote.

6 Cal. 562-563. **PEOPLE v. VANARD.**

Verdict.—Under an indictment for an "assault with intent to commit murder," a verdict of "guilty of an assault with intent to do bodily injury," does not find a felony, but merely an assault, pp. 563, 564.

Cited in *People v. Arnett*, 126 Cal. 681, holding conviction of assault with deadly weapon unjustified under such indictment where use of such weapon not alleged; *People v. Wilson*, 9 Cal. 260, where the indictment was for assault with a deadly weapon with intent to inflict great bodily injury, and the verdict was "guilty of an assault with a deadly weapon," and a sentence of two years to state's prison was reversed; *People v. English*, 30 Cal. 218, a case of a trial for an assault with intent to commit murder, and a verdict of "guilty of an assault with a deadly weapon with intent to inflict a bodily injury," and a sentence to state's prison was affirmed; *Ex parte Ah Cha*, 40 Cal. 427, affirming the principal case; *Ex parte Max*, 44 Cal. 581, also in affirmance, but a distinction was made as to the manner in which the question came before the appeal court; *People v. Murat*, 45 Cal. 283, where the principal case is commented on, and it is held that under a like indictment

a conviction of an assault made with a deadly weapon to do bodily harm cannot be supported except the indictment shows that it was made with a deadly weapon; *People v. Martin*, 47 Cal. 112, holding that an indictment only charges a simple assault, which avers the "crime of assault with intent to do bodily harm upon the person of another"; *People v. Holland*, 59 Cal. 364, holding that a judgment could be rendered for assault under an indictment for assault with a deadly weapon; *People v. Helbing*, 61 Cal. 622, where it was held that a battery includes an assault, but assault does not include battery; *People v. Turner*, 65 Cal. 541, holding that under section 245 of the Penal Code a verdict for assault with a deadly weapon under an indictment for an assault with intent to commit murder will support a judgment for two years in state's prison, without stating that the assault was made with intent to commit great bodily injury; *Territory v. Conrad*, 1 Dak. Ter. 355, as sustaining a like principle in a similar case; *People v. Cozad*, 1 Idaho, 167, holding that under an indictment for assault with intent to commit murder, the character of a lesser grade of offense if found must be stated; *State v. Johnson*, 3 N. Dak. 153, where the charge was assault and battery with a deadly weapon with intent to kill, and the character of the verdict only warranted a conviction for assault and battery, although found "as charged in the information"; *State v. Robey*, 8 Nev. 319, 321, where the indictment alleged an assault with intent to commit murder, and the defendant was convicted of an assault with a deadly weapon with intent to inflict bodily injury, and the judgment was affirmed; *State v. Collyer*, 17 Nev. 289, where the principal case was distinguished in that the verdict in the citing case found that the assault was with a "deadly weapon"; *Sullivan v. The State*, 44 Wis. 596, where the indictment was for assault with intent to commit murder, and the verdict found defendant "guilty of assault with intent to do great bodily harm," and it was held a verdict for assault merely.

6 Cal. 563-565. KELLERSBERGER v. KOPP.

Homestead cannot be carved out of property held in joint tenancy or tenancy in common, p. 565.

Cited, *Bishop v. Hubbard*, 23 Cal. 517; 83 Am. Dec. 133; *Elias v. Verdugo*, 27 Cal. 425; *Seaton v. Son*, 32 Cal. 483; and *Carroll v. Ellis*, 63 Cal. 442—all in affirmance; *Fitzgerald v. Fernandez*, 71 Cal. 507, where it is said the rule applied prior to act of 1868, and that act is construed; *In re Carriger*, 107 Cal. 620, holding that an undivided interest in land of a deceased cotenant cannot be set aside as a probate homestead; *Dallemand v. Mannon*, 4 Colo. App. 267, to substantially the same effect as the principal case; *Newton v. Summey*, 59 Ga. 400, holding that injunction would not lie against proceedings of the debtor's wife to carve homestead out of premises of partnership; *Lindley v. Davis*, 6 Mont. 456, as so deciding, but that case holds that

homestead cannot be set apart by a partner out of partnership lands against a firm creditor; *Lindley v. Davis*, 7 Mont. 214, as so deciding, and overruling *Lindley v. Davis* (the last citing case); *Smith v. Chenault*, 48 Tex. 462, where the court says the question before it differs from that of the principal case, concerning which it declined to express any opinion; extended note 63 Am. Dec. 122, 123, 125.

6 Cal. 566-574. **BROWN v. COVILLAUD.**

Specific Performance—Equity.—Time is not of the essence of a contract for the sale of real estate, except made so by express agreement, or arising from implication from the nature of the property or the avowed objects of the seller or purchaser, and it devolves upon one seeking relief to account for his delay, p. 571.

Cited, *Green v. Covillaud*, 10 Cal. 322, 323, 325, 337, 70 Am. Dec. 727, 728, 729, 730, 738, to the same effect, where it is said that other circumstances of culpable neglect, the greatly enhanced value of the property, or abandonment of the property, will also be considered; *Farley v. Vaughn*, 11 Cal. 237, where the principal case and the last citing case are distinguished under the facts, and as showing suspicious circumstances, and the vendor was held estopped by matter in pais; *Weber v. Marshall*, 19 Cal. 460, in affirmance; *Steele v. Branch*, 40 Cal. 11, where the general rule is stated and qualified to the extent that each case must be decided on its own circumstances; *Hicks v. Lovell*, 64 Cal. 20; 49 Am. Rep. 682, to substantially the same effect; *O'Donnell v. Jackson*, 69 Cal. 624, where laches precluded the defendant; *Swain v. Burnette*, 76 Cal. 303, where an averment which went to excuse slight delay was declared wrongfully stricken out; *Requa v. Snow*, 76 Cal. 593, where the doctrine is relied on and specific performance refused for an unexplained delay of upwards of three years in respect to payment of the purchase price; *Waterman v. Banks*, 144 U. S. 403, where the rule that time is of the essence of the contract was declared applicable peculiarly to cases where property is of such a character that it will likely undergo sudden, frequent, and great fluctuations in value, and especially applicable to mineral property.

Covenant.—"Good and sufficient deed" in a covenant imports only a conveyance good in form, and does not refer to the interest intended to be conveyed, p. 573.

Cited, *Green v. Covillaud*, 10 Cal. 322, 70 Am. Dec. 727, in affirmance; *Thompson v. Hawley*, 14 Oreg. 206, where the decisions are said to be in conflict; citing 11 Am. Dec. 30, and note as expressing the rule declared by the later authorities; extended note 11 Am. Dec. 35; note 26 Am. Dec. 626.

6 Cal. 574-576. **GARR v. REDMAN.**

Bill for Account is the proper remedy for the settlement of the

proceeds of a joint adventure, where the character of the contract set out in the bill makes an account necessary, p. 576.

Cited, *Quackenbush v. Sawyer*, 54 Cal. 441, a case of joint ownership in personal property; *Petrie v. Torrent*, 88 Mich. 58, where it is said "we take it to be the well-established rule that the existence of fiduciary relations between the parties is sufficient to confer jurisdiction upon a court of equity whenever the duty rests upon the defendant to render an account"; *Mitchell v. O'Neale*, 4 Nev. 523, a case of accounting between tenants in common of a mill; extended note 58 Am. Rep. 106, as to right to sue for accounting.

6 Cal. 577-579; 65 Am. Dec. 534. **FISHER v. DENNIS.**

Promissory Note.—Filling blank for rate of interest by payee is not an alteration of note so as to vitiate it, but only legal rate can be recovered in absence of agreement contra, except that an innocent holder could recover the specified rate, p. 579.

Cited, *Visher v. Webster*, 8 Cal. 112, holding to the same effect; *Holmes v. Trumper*, 22 Mich. 430, 7 Am. Rep. 663, where the rate of interest was filled in and the note was held void as to the maker in the hands of a bona fide holder before maturity; *First Nat. Bk. v. Carson*, 69 Mich. 437, where the rate inserted did not increase the interest called for in the note as originally drawn and it was held an immaterial alteration; extended note 10 Am. Dec. 272; notes 71 Am. Dec. 369; 78 Am. Dec. 486; 3 Am. St. Rep. 567.

6 Cal. 579-582. **MACY v. GOODWIN.**

Secondary Evidence.—Act of 1851 does not dispense with the rule as to best evidence, nor with the production of the originals if objectionable, p. 582.

Cited, *Fallon v. Dougherty*, 12 Cal. 105, to the point that a record copy of a lost deed is insufficient upon proof only of search by plaintiff's agent, it not appearing that she herself had not possession or control of the original; *Reading v. Mullen*, 31 Cal. 107, holding that proof of declaration of a sole trader certified by the recorder does not prove either the contents or existence of the original. But see 2 *Deering's Cal. Dig.*, pp. 1150 et seq.

6 Cal. 582-590. **MEYER v. KALKMANN.**

Jurisdiction.—Superior court of city of San Francisco was of inferior jurisdiction, confined to the municipal territory, with no authority to send its process beyond its territory, p. 590.

Cited, *Hickman v. O'Neal*, 10 Cal. 294, 295, where a contra doctrine as to the power to extend its process was held; also that it was no less "an inferior court" for that reason; *Chipman v. Bowman*, 14 Cal. 158, holding in accord with the last citing case; *Courtwright v. Bear*

R. W. & M. Co., 30 Cal. 579, in connection with the constitutionality of the act organizing that court and the jurisdiction of the district courts to abate nuisances; but it was said that the court in the principal case "waived that question" and decided the case on the point of the power to extend process beyond its territory; "but in *Hickman v. O'Neal*, 10 Cal. 292, the question was fully met and it was held that it had been put to rest on the doctrine of *stare decisis*"; Ex parte *Stratman*, 39 Cal. 519, where the question of constitutionality is again discussed, and the *Hickman* case again noted to the same effect as last stated, and the municipal criminal court of the city and county of San Francisco was declared an inferior court under section 1, article VI. of the constitution; also, that the amendment of 1862 was to limit the power conferred on the legislature by said article VI.; *Grand Rapids etc. Co. v. Gray*, 38 Mich. 466, where the distinction between the principal case and *Hickman v. O'Neal* (above noted) is concurred in to the extent that after the court has acted, the mere process by which it is to enforce its judgments is within the legislative power.

General Citations.—*Seligman v. Kalkman*, 17 Cal. 162, where the facts rather than the law of the principal case is considered, and on the strength thereof it was held in substance that a judgment for dissolution and for an accounting was not a personal judgment; *Kenyon v. Welty*, 20 Cal. 640, 641, 642, 643, 81 Am. Dec. 138, 139, 140, where the fact that the principal case had been overruled was held not to justify setting aside a contract made under the belief that the law was in accordance with the previous decision.

6 Cal. 590-599; 65 Am. Dec. 535. **NORRIS v. FARMERS' ETC. COMPANY.**

Ferry.—Injunction lies to prevent establishing a free bridge or ferry without a license within one mile of another which is licensed. The privilege is created by statute, pp. 595, 597.

Cited, *Ward v. Severance*, 7 Cal. 129, holding the same doctrines; *Cal. State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 423, to the same effect in substance; *Prosser v. Wapello Co.*, 18 Iowa, 335, to the effect that a party cannot set up a public ferry franchise even on his own land without the consent of the state; notes 44 Am. Dec. 92; 89 Am. Dec. 497.

Ferry.—Validity of license cannot be attacked collaterally, p. 599.

Cited, *Waugh v. Chauncy*, 13 Cal. 12, 13, in affirmance.

6 Cal. 605-606. **SMILEY v. VAN WINKLE.**

Assignment of Lease.—Conveyance of an unexpired term is an assignment and not an underletting, though it contains a reservation of rent and a right of re-entry upon condition broken, p. 606.

Cited, *Jeffers v. Easton, Eldridge & Co.*, 113 Cal. 352, holding that

where the whole term of a leasehold estate is assigned there is no relation of landlord and tenant, but only that of seller and purchaser; *Sexton v. Chicago Storage Co.*, 129 Ill. 328, 16 Am. St. Rep. 276, to substantially the same effect, holding also, however, that such an assignee is in priority of estate with the original landlord and liable as assignee of the term; *Stewart v. Long Island R. R. Co.*, 102 N. Y. 612; 55 Am. Rep. 851, holding substantially the same as the principal case and the last citing case.

6 Cal. 607-609. **HIRSCHFIELD v. FRANKLIN.**

Evidence.—Cognovit is good as an admission in pais after answer is filed, p. 609.

Cited, *Bloomington v. Du Rell*, 1 Idaho, 40, to the same effect.

6 Cal. 617-621; 65 Am. Dec. 543. **PEARIS v. COVILLAUD.**

Specific Performance.—Vendee forfeits right thereto by refusing to pay at maturity on demand and tender of a conveyance a note given for the purchase money of land, p. 621.

Cited, *Hicks v. Lovell*, 64 Cal. 20, 49 Am. Rep. 682, to the same point, holding also that the vendee cannot avail himself of the benefit of the contract as a defense to ejectment by his vendor; note 71 Am. Dec. 734.

Evidence.—One tenant in common cannot bind his cotenant by his acts or admissions, p. 621.

Cited in *Wagoner v. Silva*, 139 Cal. 562, holding settlement with one for damages for trespass not binding on cotenants; note 40 Am. Dec. 354.

Limitation of Action.—Specific performance of contract to convey is barred in four years after maturity of purchase money note, where agreement is to convey on payment, p. 621.

Cited, *Lord v. Morris*, 18 Cal. 487, and applied to the construction of the statute; the case holding that if the note is barred, so also is the mortgage, and that the statute applies equally in suits at law or equity; *Grattan v. Wiggins*, 23 Cal. 34, holding that the statute applies equally in suits at law or equity.

6 Cal. 621-625; 65 Am. Dec. 545. **GRIMES' ESTATE v. NORRIS.**

Probate.—Will executed before statute of wills in California did not require probate, the testator having died before the passage of the act, p. 625.

Cited, *Tevis v. Pitcher*, 10 Cal. 477, in affirmance in relation to the same will; *Ingoldsby v. Juan*, 12 Cal. 579, to the point that no retrospective operation was intended to be given the sixth section of the

act; *Dooner v. Smith*, 24 Cal. 123, in affirmance as to probate courts having no right to administer on estates of deceased persons prior to the constitution; *People v. Senter*, 28 Cal. 506, distinguishing the principal case and those affirming the same, in that in those cases the owners of the estates died before the organization of the state government, while in the case at bar the death was subsequent to that event and while the act of 1850 was in operation, but that act was held retroactive as to persons dying prior thereto and subsequent to the adoption of the common law; *Coppinger v. Rice*, 33 Cal. 422, 423, in affirmance of the principal case; *Ryder v. Cohn*, 37 Cal. 89, where the case is declared to decide a different point from the one before that court, which held that courts of first instance exercised jurisdiction in matters of administration on estates of deceased persons prior to 1850; *Id.* 91, in dissenting opinion, to the point that it was settled doctrine prior to 1850 that the estate of a deceased person vested immediately in his heirs or devisees, and they became personally responsible for his debts; *McNeil v. Congregational Soc.*, 66 Cal. 108, in affirmance, but declaring that *Ryder v. Cohn* (last noted herein), is not in conflict; *Hardy v. Harbin*, 4 Sawy. 541, to the same point as in principal case; *Adams v. Norris*, 23 How. (U. S.) 363; in substantial approval in connection with the admissibility as testimony of a codicil which had never been admitted to probate, and the attesting witnesses never examined; *Seaverns v. Gerke*, 3 Saw. 363, on point that probate act of 1850 was not retrospective; *Hardy v. Harbin*, 1 Sawy. 199, where it is said the doctrine of the principal case is not denied; the case, however, was one of an invalid title derived under a probate court sale made by a court without jurisdiction; also cited in *Nagle v. Robins*, 9 Wyo. 253, extended note, 33 Am. Dec. 239, as to probate, when void for want of jurisdiction; notes 65 Am. Dec. 547, on probate of will, what law governs; 68 Am. Dec. 701, that will is ambulatory till death of testator; *Id.* 702, as to what law governs probate of will; 70 Am. Dec. 207, that will is ambulatory; 82 Am. Dec. 698, as to retrospective operation of statute; 7 Am. St. Rep. 817, as to conflict of laws on probate of wills; 30 Am. St. Rep. 78, as to retroactive statutes.

Probate Court can only take and administer jurisdiction in manner prescribed by statute, p. 625.

Cited, extended note 33 Am. Dec. 239, as to when probate void for want of jurisdiction; notes 68 Am. Dec. 101, as to whether probate court is of general or limited jurisdiction; 68 Am. Dec. 257; 70 Am. Dec. 709, as to character of jurisdiction; 71 Am. Dec. 118, 595; 73 Am. Dec. 366, 560; 75 Am. Dec. 219; extended note 41 Am. St. Rep. 140, as to jurisdiction of probate court being statutory.

Will Does Not Take Effect till the death of the testator, p. 625.

Cited, note 55 Am. St. Rep. 310.

6 Cal. 625-630. CARY v. TICE.

Homestead.—Actual family residence is necessary to constitute a homestead, p. 630.

Cited, *Rix v. McHenry*, 7 Cal. 91; *Benedict v. Bunnell*, 7 Cal. 246, both in affirmance; *Gambette v. Brock*, 41 Cal. 83, as being the law under the homestead act as it then stood, but that the act of 1860 materially modified the rule; *Loring v. Wittich*, 16 Fla. 509, but distinguished as to the facts in that in the citing case the man and his family were in possession; *Hale v. Heaslip*, 16 Iowa, 452, in affirmance.

Homestead.—Legislature may determine how far and in what manner a homestead should be protected from forced sale. The constitution is itself imperative, p. 630.

Cited, *Pfeiffer v. Riehn*, 13 Cal. 649, in affirmance.

General Citation as to homestead rights, extended note, 60 Am. Dec. 613.

6 Cal. 630-632. WHIPLEY v. FLOWER.

Presumptions.—Of two equally reasonable presumptions arising upon the face of the record, the court will adopt that which maintains the judgment below, p. 632.

Cited, *Brittan v. Oakland Bank of Savings*, 112 Cal. 4, quoting from the principal case on this point, declaring that "in the present case all the material allegations of the complaint were denied in the answer and it is consistent with the judgment to assume that at the trial the defendant withdrew its special defense."

6 Cal. 632-636; 65 Am. Dec. 547. TEVIS v. RANDALL.

Official Bond to "people of state of California" is sufficient, though statute requires it to be payable to the "state of California." Both terms import the same obligee, p. 635.

Cited, *People v. Love*, 19 Cal. 681, to exactly the same point in approval; *People v. Myers*, 1 Idaho, 357, under substantially like facts in approval; *Bay County v. Brock*, 44 Mich. 51, as so deciding, but on the ground "of there being no difference in effect, the essence of the ruling being that either name denoted the same governmental agency or sovereignty, but the case was one of a sheriff's bond, being informal and the surety liable; *Custer County v. Albion*, 7 S. Dak. 486, to the same effect, where the official bond of a county commissioner complied with the statute, but run to the county commissioners and their successors instead of to the county; extended note 82 Am. Dec. 762, as to effect of defects in official bonds; note 67 Am. St. Rep. 200, on general subject.

Promissory Notes are protestable securities by statute, p. 635.

Cited, extended note, 43 Am. Dec. 219.

Promissory Notes.—Recital of notice in protest is evidence of that fact, p. 636.

Cited, note, 82 Am. Dec. 108; extended note, 92 Am. Dec. 609.

General citation: *Perry v. Woodberry*, 26 Fla. 87.

6 Cal. 636. PEOPLE v. TOCK CHEW.

Rules of Court may be established in the discretion of the court, limiting counsel to a certain time for argument, and if no injustice is done no appeal lies, p. 636.

Cited, *People v. Williams*, 32 Cal. 289, in support of the point that the court may require counsel to present requested instructions before argument to the jury; *State v. Hugh*, 47 Conn. 537, 36 Am. Rep. 93, where a limitation of argument to four hours on a side in a capital case was sustained; *St. Croix Lumber Co. v. Pennington*, 2 Dak. Ter. 481, in support of the point that rules must be reasonable and cannot contravene the constitution or law of the land; extended note 46 Am. St. Rep. 24.

6 Cal. 637-638. PEOPLE v. GILL.

Murder is committed when the fatal blow is struck, p. 638.

Cited, *Green v. State*, 66 Ala. 46, 41 Am. Rep. 747, where the change in the statute and its effect in the principal case are noted, and it was held that a statute authorizing a prosecution for murder to be had in the county where the fatal blow was struck was valid; *Archer v. State*, 106 Ind. 428, in regard to jurisdiction, whether in the county where the death occurred or where the fatal blow was struck; and the crime having been commenced in one county and consummated in another, either could, it was held, maintain jurisdiction; *State v. Bowen*, 16 Kan. 479, as so deciding, but the principle applied to venue being that where the fatal blow was struck; *Stout v. State*, 76 Md. 327, as deciding as stated in the above headline, but the case decided that the case should be tried where the fatal blow was given or the poison administered, even though the party die out of the state; *State v. Garrison*, 147 Mo. 555, holding venue properly laid in state of assault, not of death; *Moore v. State*, 37 Tex. Cr. App. 564, 565, quoting *State v. Gessert*, 21 Minn. 370. Approved in *White v. Rio Grande etc. Ry.*, 25 Utah, 364, where person injured in one county died in another county from effects of injury, action for death maintainable in either county; *State v. Gessert*, 21 Minn. 370, to the same effect as the principal case; *Debney v. State*, 45 Neb. 864, where the principal case is quoted from and declared directly in point as well also as to the point that the laws in force at the time the injurious act is done govern the trial; *Ex parte McNeeley*, 36 W. Va. 80, 32 Am. St. Rep. 835, holding the same as the principal case; extended note 44 Am. St. Rep. 80, "criminal law—place where crime is committed."

6 Cal. 642-643. MAY v. HANSON.

Administrator cannot be joined with survivor in actions upon joint and several contracts or obligations because one is joined *de bonis testatoris* and the other *de bonis propriis*, p. 643.

Cited, *Mattison v. Childs*, 5 Colo. 79, in approval; cited in *Briggs v. Breen*, 123 Cal. 661, as instance of rule before section 379, Code of Civil Procedure.

6 Cal. 643-648. ST. LOSKY v. DAVIDSON.

Pledge.—Rights and liabilities of parties to a pledge may be modified by special contract between them, p. 647.

Cited, *Bank of British Columbia v. Marshall*, 8 Sawy. 38, 11 Fed. Rep. 26, holding the same rule; extended note 49 Am. Dec. 735.

6 Cal. 648-649. MURPHY v. WALLINGFORD.

Ejectment.—A mere survey and marking boundaries is not a possession unless there is a compliance with the statute as to possessory actions, p. 649.

Cited, *Bird v. Dennison*, 7 Cal. 302, 309, in affirmance; *Robinson v. The Imperial etc. Co.*, 5 Nev. 66, in approval; also in approval of the like point that there must be an actual *bona fide* occupation, a *pedis possessio*; *Valcalda v. Mines*, 86 Fed. 94, 56 U. S. App. 674, but holding actual possession shown under facts stated.

6 Cal. 650-651. LAFORGE v. MAGEE.

County Warrant.—When right of holder of warrant has been fixed by presentation, payment may be compelled if there is sufficient money, and legislature cannot take away right, pp. 650, 651.

Cited, *Von Schmidt v. Widber*, 105 Cal. 154, as so deciding in a case as to the power of supervisors in purchasing and the ability of a subsequent board to repeal an allowance for the money if the former board could have legally appropriated it in payment for a valid sale; *Lawson v. Jeffries*, 47 Miss. 706, upon the general principle as to the power of the legislature to divest vested rights; *Humboldt Co. v. Churchill County*, 6 Nev. 37, where the rule is approved but no such state of facts declared to exist as in the principal case, as no warrants were outstanding.

6 Cal. 651-652. PALMER v. MELVIN.

Pleadings.—Action on attachment bond—release of property attached is a condition to liability on the bond and must be stated, p. 652.

Cited, *Nickerson v. Chatterton*, 7 Cal. 570, in affirmance; *Curtis v. Richards*, 9 Cal. 37, a case within the principle; *Williamson v. Blattan*, 9 Cal. 501, so holding; *Jenner v. Stroh*, 52 Cal. 506, in approval; *Coburn v. Pearson*, 57 Cal. 307, where the complaint was held defective upon an

undertaking in not stating that the sheriff did not complete the levy, or that he proceeded no further therewith.

6 Cal. 652-654. **SMITH v. ANDREWS.**

Pleading—Jurisdiction.—Probate courts are of inferior and limited jurisdiction, and in pleading their judgments the facts which give jurisdiction should be set out, p. 654.

Cited, *Beckett v. Selover*, 7 Cal. 240, 68 Am. Dec. 254, as applied to what a petition for letters of administration must allege, and how far the decision of the probate court upon these jurisdictional facts is conclusive; *Townsend v. Gordon*, 19 Cal. 205, to the point that prior to 1858 probate courts were of inferior and limited jurisdiction, also deciding what jurisdictional facts in petition for sale of property must be set out; *Mallett v. Uncle Sam Mining Co.*, 1 Nev. 198, in affirmance as to the point that jurisdiction must be affirmatively shown when rights are claimed under judgments of courts of special or inferior jurisdiction; *Harmon v. Comstock etc. Co.*, 9 Mont. 247, to the same point as the last citing case, but declaring that the rule is modified in that state by the code.

6 Cal. 659-660. **PEOPLE v. WHITMAN.**

Constitutional Law.—Sundays are not excepted from the ten days allowed for governor's veto in case the last day should fall on Sunday, any other Sunday occurring excepted, p. 660.

Contra, *Price v. Whitman*, 8 Cal. 415, the word "Sunday" in the singular having been used by mistake in the printed copy of the constitution.

Mandamus lies to command controller to draw warrants on state treasurer for compensation due the relator as supreme court reporter, pp. 659, 660.

Cited, *McCauley v. Brooks*, 16 Cal. 47, 63, as so holding, in connection with a question as to mandamus to enforce issuance of state warrants; *Tilden v. Sacramento County*, 41 Cal. 77, in dissenting opinion, the court holding that mandamus would not be issued to control or review the judgment of supervisors in acting on a claim.

6 Cal. 660-664. **BOURS v. WEBSTER.**

Statute of Frauds.—Growing crops are not goods or chattels within the statute, and pass by deeds of conveyance, p. 664.

Cited, *Bernal v. Hovious*, 17 Cal. 545; 79 Am. Dec. 149; *Davis v. McFarlane*, 37 Cal. 638, 99 Am. Dec. 343—both in affirmance.

6 Cal. 664-665. **HOPKINS v. BEARD.**

Fraud may be alleged in the execution or obtaining a deed, p. 665.

Cited, notes 13 Am. Dec. 222; 55 Am. Dec. 412; 93 Am. Dec. 598.

6 Cal. 666. IMLEY v. BEARD.

Appeal from Nonsuit entered on motion of plaintiff does not lie in his favor, p. 666.

Cited, *Sleeper v. Kelly*, 22 Cal. 456, in affirmance; *San Francisco v. Certain Real Estate*, 42 Cal. 518, to the point that judgments or orders entered by consent will not be reviewed; cited in *Allard v. Smith*, 97 Wis. 536, on point that consent judgments or orders are not appealable.

6 Cal. 666-669. DECK'S ESTATE v. GHERKE.

Administrator may be Removed by probate judge for the statutory reasons, p. 669.

Cited, *In re Ming*, 15 Mont. 92, in dissenting opinion, but under the facts of that case the executrix was held wrongfully removed; *Deegan v. Deegan*, 22 Nev. 197, 58 Am. St. Rep. 745, upon the right of the court to remove a guardian under the statute of that state.

Removal of Administrator is within discretion of court in causes enumerated by statute, p. 669.

Cited in *Estate of Rathgeb*, 125 Cal. 307, sustaining removal for failure to inventory property because of claim of ownership.

Power of a Probate Judge to remove an administrator will be interfered with by the appellate court only where there has been a gross abuse of discretion, p. 669.

Cited, *In re Moore*, 83 Cal. 587, in affirmance; *In re Ming*, 15 Mont. 92, in dissenting opinion; that case, however, came up on certiorari and not appeal, and it was held that under the facts the executrix was wrongfully removed.

Constitutional Law.—Act of 1855 for the transfer to district courts of issues of fact already decided in the probate court is unconstitutional and void, p. 669.

Cited, *Paul v. Armstrong*, 1 Nev. 96, where it is said: "The probate court can only try the issues that have been tried in the court below."

Probate.—Allowance of claims gives them the force and effect of a judgment, but this rule applies only to debts against deceased and not to expenses or disbursements in the management of the estate, p. 669.

Cited, *Matter of Estate of Hidden*, 23 Cal. 363, to the point that the allowance of a claim has the force of a judgment; *Magraw v. McGlynn*, 26 Cal. 430, to this same point; *Gurnee v. Maloney*, 38 Cal. 88; 99 Am. Dec. 353, to the same points as the principal case in connection with jurisdiction of an action against an administrator seeking to charge the estate with the expenses of administration; *Estate of Glenn*, 74 Cal. 568, to the point that being a judgment the claim draws interest from the time of its allowance; *In re Couts*, 87 Cal. 483, to the point

that such allowance concludes every one interested except those laboring under disability; *Dodson v. Nevitt*, 5 Mont. 522, upon the point as to what constitutes claims allowable, and quoting from the principal case; *Yeatman v. Yeatman*, to the point that allowance of such claims gives them the force and effect of judgments and constitutes final orders not subject to collateral attack; extended note, 65 Am. Dec. 122, 123.

General citation: *Schulte v. Kelly*, 124 Mich. 334.

6 Cal. 670-673. **DENNIS v. BURRITT.**

Registry.—Effect of notice is limited to subsequent purchasers and mortgagees, pp. 672, 673.

Cited, *McCabe v. Grey*, 20 Cal. 516, to the same effect, although it is declared, however, that in the principal case “no definite conclusion upon the subject was arrived at.”

Registry.—Record cannot charge a prior mortgagee with notice of fraud. It requires actual notice in fact to constitute fraud, p. 673.

Cited, *Bird v. Dennison*, 7 Cal. 306, to substantially this effect in regard to notice from possession of a party holding under an unregistered deed.

6 Cal. 673-674. **PEOPLE v. JOHNSTON.**

Statute speaks from the time it goes into effect, and an election thereunder one day prior to the statute going into effect is a nullity, p. 674.

Cited, *Miller v. Kister*, 68 Cal. 145, where it is said a law speaks from the time it goes into effect; *Santa Cruz Water Co. v. Kron*, 74 Cal. 223, in affirmance and applied to a premature election authorizing bonds to issue for the purchase of waterworks; *Henderson v. State ex rel. Stout*, 137 Ind. 579, in dissenting opinion, to the point that a law speaks from the time it goes into effect, but the act there was held not unconstitutional in that it did not include certain persons elected to office prior to its going into effect; *Keane v. Cushing*, 15 Mo. App. 101, where the principles of the principal case were applied to proceedings under a municipal ordinance; *State ex rel. v. Simon*, 20 Oreg. 371, and applied to the point that an election must be held in pursuance of the provisions of some law authorizing it and in force at the time.

6 Cal. 674-676. **KYBURG v. PERKINS.**

Alcalde's Grants.—Entry in alcalde's record book is primary evidence of grant upon proof of execution, p. 676.

Cited, *Donner v. Palmer*, 31 Cal. 519, to the same point in affirmance; cited in *State v. Donovan*, 10 N. Dak. 209, holding druggist's record of sales, kept under local statute, admissible as official records; *Brown v. Warren*, 16 Nev. 241, as to a certificate of register of the land office being evidence of a conveyance of land.

Book may be Official Register, though not required by express statute to be kept, nor need the nature of the office render the book indispensable. It is sufficient that it be directed by the proper authority to be kept, p. 676.

Cited, *Mumford v. Wardwell*, 6 Wall. 430, where copies of the deeds on folded, unbound, and unfastened sheets, kept in separate bundles according to classes, and properly indorsed, were held "books." They were subsequently bound, however, in accordance with the classes as bundled together.

6 Cal. 676-677. GILMAN v. COUNTY OF CONTRA COSTA.

Counties.—Act of 1854, prescribing the manner of commencing and maintaining suits by or against counties, applies to claims existing prior and subsequent to its passage, p. 67.

Cited, *Placer County v. Astin*, 8 Cal. 305, to the point that under said act counties may prosecute and defend actions the same as individuals; *Gilman v. Contra Costa County*, 10 Cal. 508, in merely a line of affirmance; *Waltz v. Ormsby County*, 1 Nev. 376, in express approval in relation to the act of 1864 of that state.

6 Cal. 677-679. ARGENTI v. CITY OF SAN FRANCISCO.

Fraud.—Great inadequacy of consideration is sufficient to give notice to a purchaser at a sheriff's sale of fraud by his vendor, p. 679.

Cited, *Hart v. Burnett*, 15 Cal. 608, in affirmance in relation to the city's title to pueblo lands, and sheriff's deeds being a caveat to a purchaser, of defects in title.

6 Cal. 679-681. PEOPLE v. HESTER.

Supervisors are not judicial officers, but a quasi political corporation, pp. 680, 681.

Contra, *People v. Supervisors of El Dorado County*, 8 Cal. 61, 62, which holds that they exercise judicial, legislative and executive functions; cited in *State v. Commissioners*, 23 Nev. 249, as overruled by *People v. Supervisors*, 8 Cal. 61.

Certiorari.—Supervisors not being judicial officers or exercising judicial functions, certiorari does not lie to review their action, pp. 680, 681.

Cited, *Chard v. Harrison*, 7 Cal. 116, holding that the power to grant a ferry license is not judicial and its exercise belongs to the supervisors, and certiorari lies to review the exercise of such power by the county judge; *People v. Supervisors of El Dorado County*, 8 Cal. 61, 62, overruling the principal case on the general proposition; *Whitney v. The Board etc. S. F. F. D.*, 14 Cal. 491, which holds that certiorari tries only the jurisdiction, and never extends to the merits, that upon

this action of the inferior tribunal is final; that the statute confirms the common law, and the principal case is overruled to this extent; *People v. Provines*, 34 Cal. 527, 528, 531, where the principal case is declared to have been properly overruled in *People v. El Dorado County*, 8 Cal. 61, but the court disagreed in a measure with the construction of section 5, article XI, of the constitution, in connection with the power of the legislature to confer under article III mixed functions upon boards of supervisors; *Spring Valley W. W. v. Bryant*, 52 Cal. 135, where the principal cases are reviewed, and it is held that certiorari does not lie to review the action of the board of supervisors when such action is legislative in character; *State of Nevada v. Ormsby County*, 7 Nev. 396, where the principal case is noted as overruled and the court declares that the duties of supervisors are sometimes judicial and at others legislative and executive.

6 Cal. 681-685. **WEAVER v. PAGE.**

Damages for Malicious Prosecution.—Verdict will not be set aside for excessive damages, where no misconduct is shown and it does not appear that it was given under the influence of passion or prejudice, p. 685.

Cited, *Kinsey v. Wallace*, 36 Cal. 484, in dissenting opinion, but the case held that greatly disproportionate damages would evidence the influence of prejudice or passion; note 26 Am. St. Rep. 164.

Malicious Prosecution.—Action lies for damages for willfully suing for greater amount than due, and wrongfully attaching property, p. 685.

Cited, *Spaids v. Barrett*, 57 Ill. 294; 11 Am. Rep. 13, to the same effect; extended note 14 Am. Dec. 606.

Same—Damages.—Jury may consider the character and position of the parties in determining damages, p. 685.

Cited, *Sexton v. Hoover*, 1 Ind. App. 68, to the effect that evidence of the defendant's financial condition is admissible; and to the same effect is *Bailey v. Dodge*, 28 Kan. 74.

General citation: *Clark v. Nordholt*, 121 Cal. 28.

6 Cal. 685-688. **CLARY v. HOAGLAND.**

Appeal—Law of the Case.—A judgment in the appellate courts on the points of law involved becomes, however erroneous, the law of the case, and cannot on a second appeal be altered or changed; and this applies also to questions of jurisdiction, pp. 687, 688.

Cited, *Hastings v. Halleck*, 13 Cal. 211, holding that in such a case counsel cannot be held negligent in acting upon that decision as the law of the case; *Davidson v. Dallas*, 15 Cal. 82, in affirmance; *Leese v. Clark*, 20 Cal. 417, as a settled doctrine no longer open to discussion;

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Reclamation Dist. No. 3 v. Goldman, 65 Cal. 636, in affirmance; Sharon v. Sharon, 79 Cal. 686, in an extended discussion upon the point as to what constitutes the law of the case where there are two appeals, one from the judgment and the other from the order denying a new trial and the right to modify a former decision; Dodge v. Gaylord, 53 Ind. 372, with approval and to substantially the same effect; Davenport v. Kleinschmidt, 8 Mont. 480, to the same effect as the principal case; City of Hastings v. Foxworthy, 45 Neb. 686, reviewing the principal case, but modifying the rule in cases where the same questions are after appeal presented on a new trial; Brimm v. Jones, 13 Utah, 442, holding to the same effect as the principal case; Silva v. Pickard, 14 Utah, 249, as an established doctrine; Haley v. Kirkpatrick, 104 Fed. 648, quoting Leese v. Clark, 20 Cal. 417; see, also, Bank v. Ward, 118 Mich. 102; Wilkes v. Davies, 8 Wash. 118, holding the same doctrine, although the case at bar was not brought up directly as a matter of record the second time, and the construction of a statute was held the law of the case between the same parties upon the same subject matter; Renick v. Ludington, 20 W. Va. 537, the rule of the principal case is well settled, but modified as to those not parties.

Jurisdiction.—Presumption is that court decided that it had jurisdiction, although it may not have done so in terms, and the point not having been raised at the time is not subject to collateral attack after appeal, p. 688.

Cited, M'Connel v. Day, 61 Ark. 476, to the same effect where the record is silent; Huber v. Beck, 6 Ind. App. 50, to the same point as the principal case; Graff v. Louis, 71 Fed. Rep. 596, and applied to the question of collateral attack as to courts of general jurisdiction.

General Citation.—Coulter v. Stark, 7 Cal. 245, where the facts of the principal case are stated as sustaining the point concerning when certiorari lies.

VOLUME VII.

By CHARLES T. BOONE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

7 Cal. 1-26. BILLINGS v. HALL.

Statute of Limitations.—The statute of 1850 is repealed by the amendatory act of 1855, and the five years allowed by the latter for the commencement of real actions, only begins to run from the date of its passage, p. 3.

Affirmed in *Clarke v. Huber*, 25 Cal. 596; and approved and applied as a rule of construction in determining the effect of amendatory acts of a similar character in *Huffman v. Hall*, 102 Cal. 31; *Gillette v. Hibbard*, 3 Mont. 415; and *Palairot's Appeal*, 67 Pa. St. 494; S. C. 5 Am. Rep. 462; *C. P. etc. Co. v. Shackelford*, 63 Cal. 268, construing amendment of 1878 to Code of Civil Procedure, 325. Cited in 50 Am. Dec. 392, note; 11 Am. Dec. 534, note.

Same.—Such amendatory act does not divest rights vested under the old law, for statutes of limitation affect the remedy, and not the right, p. 4.

Approved in *Kraft v. Greathouse*, 1 Idaho, 257, in which case it is held that the statute must be taken advantage of in the court below, by answer or demurrer. Cited in *Water Co. v. Richardson*, 72 Cal. 600, as to distinction between statutes of limitation, and the law of prescription.

Constitutional Law.—The right of each citizen to acquire, possess, and protect property, is one which cannot be impaired by legislation, pp. 6, 16.

Adhered to in *Ex parte Newman*, 9 Cal. 510, on principle of stare decisis. Cited in *Bensley v. Water Co.*, 13 Cal. 316, case of condemnation of lands for public use; also, in argument of counsel, in *Stanley v. Colt*, 5 Wall. 133, where it was held, however, that the legislature of Connecticut had power to direct a sale of real estate devised to charitable purposes, although it was provided by the devise, that the estate should never be sold. So, in 36 Am. Dec. 145, note; 40 Am. Dec. 231, note.

Same.—"Settlers' Act" of 1856, requiring the successful party in ejectment to pay the defendant the value of his improvements, but not discriminating between an innocent and a tortious possession, and, by its terms, applying to past as well as present cases, is in violation of the letter and spirit of the state constitution, and is void, p. 6, et seq.

Cited in *Anderson v. Fisk*, 36 Cal. 633, holding that, in ejectment, a plea of the statute of limitations of two years, under the "Settlers' Act," is no defense. Cited, also, in *Van Valkenburg v. Ruby*, 68 Tex. 143, upholding a statute under which a possessor in good faith is entitled to recompense for valuable improvements; so, in *Lawson v. Jeffries*, 47 Miss. 706; S. C. 12 Am. Rep. 354, as authority for sustaining vested rights and the obligation of contracts.

General citations: *Butte etc. Min. Co. v. Montana Ore Purchasing Co.*, 25 Mont. 45.

7 Cal. 26-30. GLIDDEN v. LUCAS.

Bill of Lading.—When purposely so drawn as to conceal the names of the owners of the goods, and to give the possessor of the bill exclusive control of the property, the owners will be held responsible for all consequences flowing from their own act, pp. 29, 30.

Cited in *Garden Grove Bank v. Railroad Co.*, 67 Iowa, 533, discussing effect of assignment of bill of lading; *Neimeyer etc. Co. v. Burlington etc. Co.*, 54 Neb. 334, on point that terms of bill of lading are not conclusive on question of reservation of *jus disponendi*. *Chandler v. Sprague*, 38 Am. Dec. 420, 421, note on subject.

Factors.—There being nothing in the business of consignees to make them technical factors, third parties are not bound to know that they acted as factors in a particular case, p. 30.

Overruled in *Wright v. Solomon*, 19 Cal. 73; S. C. 79 Am. Dec. 199, applying the rule "that a factor cannot pledge, as security for his individual debt, the goods of his principal consigned to him for sale," not only to a "technical factor," but also to a factor who at the same time does business on his own account.

7 Cal. 32-35. HAZELTINE v. LARCO.

Guaranty.—A guaranty indorsed on a charter party at the same time with its execution, the consideration of the one being in fact the consideration of the other, and being in these words: "I hereby guarantee the fulfillment of the within charter on the part of the charterer," is good, p. 34.

Approved and applied in the like case of *Otis v. Haseltine*, 27 Cal. 83. Cited in *Bagley v. Cohen*, 121 Cal. 606, holding that such contract and guaranty should be construed together. Cited as authority in

support of the rule that the promise of a guarantor is not within the statute of frauds, if made before the delivery of the note, in *Ford v. Hendricks*, 34 Cal. 675; and *Howland v. Aitch*, 38 Cal. 135, 136; and also referred to in the latter case as stating the test as to whether the guaranty is an original contract or not; and so, in *Reeves v. Howe*, 16 Cal. 153. Cited in *Siemers v. Siemers*, 60 Am. St. Rep. 434, 437, note, discussing the subject at length.

7 Cal. 35-38. COUNTY OF YUBA v. ADAMS.

Intervention.—Under section 659 of the Practice Act a county may upon proper application, be permitted to intervene in an action for the protection of its rights in litigation, p. 37.

Approved in *Davis v. Eppinger*, 18 Cal. 381; S. C. 79 Am. Dec. 185, holding that judgment creditors of the defendant in an attachment suit may intervene to set aside the attachment because void as to them. Approved also, in *Stingley v. Nichols*, 131 Ind. 218, case of intervention by county. Referred to in *Ex parte Chamberlain*, 55 Fed. Rep. 707, as showing that the court entertained jurisdiction of a claim of a county for taxes. Examined in *Lewis v. Harwood*, 28 Minn. 436, discussing the interest requisite to entitle a party to intervene in an action under the Minnesota statute, and disapproving the broad rule of construction founded on the decision in the principal case. Cited in *Brown v. Saul*, 16 Am. Dec. 182, note, discussing right of intervention.

Taxation.—Levy of tax for county purposes on general deposit in bank, is legal, p. 37.

Cited in *People v. Lardner*, 30 Cal. 24, sustaining taxation of money in county treasurer's hands pending litigation; *People v. National Bank*, 123 Cal. 61, 69 Am. St. Rep. 38, as to taxation of general and special bank deposits; *Attorney General v. Supervisors*, 71 Mich. 22, holding it competent for the legislature to assess and tax securities representing values.

Attachment.—Property in the custody of the law is not liable to seizure without an order from the court, p. 37.

Cited as authority, in *In re Tyler*, 149 U. S. 185, in which case the property was in the possession of a receiver by virtue of his appointment as such by a circuit court of the United States. So, to same effect, in *Ledoux v. La Bea*, 83 Fed. Rep. 764. Cited to the rule stated in *Hardy v. Tilton*, 28 Am. Rep. 36, note.

General citation: *In re Cunningham*, Fed. Cas. No. 3478.

7 Cal. 38-40. COVILLAUD v. TANNER.

Appeal.—Objections to the introduction of evidence must be taken on the trial, and, if not so taken, cannot be assigned as error, on appeal, p. 39.

Approved and applied to instructions given or refused, in *Letter v. Putney*, 7 Cal. 423. So, in *Lobbell v. Hall*, 3 Nev. 520. And cited as authority for the rule, that an objection to the admission of evidence must be particularly stated, in *Kiler v. Kimbal*, 10 Cal. 268; *Martin v. Travers*, 12 Cal. 245; *Payne v. Treadwell*, 16 Cal. 248; and *Rush v. French*, 1 Ariz. Ter. 123.

7 Cal. 40-42. LIVE YANKEE CO. v. OREGON CO.

New Trial.—Will not be granted because of the discovery of new evidence which is merely cumulative, p. 42.

Affirmed in *Klockenbaum v. Pierson*, 22 Cal. 163; and approved in *Lander v. Miles*, 3 Oreg. 43.

Same.—Mere surprise at the evidence is not sufficient ground for granting the plaintiff a new trial, if he can relieve himself by a non-suit, or in some other way, p. 42.

Cited as authority to this effect, in *Schellhous v. Ball*, 29 Cal. 609.

7 Cal. 43-46. REYNOLDS v. LATHROP.

Execution Sale.—Purchaser of land at execution sale is entitled to collect the rents, before the time for redemption has expired, and as often as the rent becomes due under the terms of the lease existing when he purchased, p. 46.

Rule affirmed in *McDevitt v. Sullivan*, 8 Cal. 597; *Walker v. McCusker*, 71 Cal. 596. Cited in *Clarke v. Cain*, 121 Cal. 599, holding execution purchasers entitled only to apportionment of annual rent; cf. dissenting opinion, page 601; *Whithed v. Elevator Co.*, 9 N. Dak. 226, construing similar local statute as to foreclosure purchaser. Approved and applied in favor of a purchaser of land under statutory foreclosure of mortgage, in *Clement v. Shipley*, 2 N. Dak. 432, 433. So, in *Otis v. McMillan*, 70 Ala. 55, in favor of purchaser of lands sold under a power contained in a mortgage, or deed of trust in nature of a mortgage.

7 Cal. 46-50. HOFFMAN v. STONE.

Waters.—It is not an abandonment by a ditch company of artificial waters, to mingle them with the water of a natural watercourse, for the purpose of conducting them to the point where they are to be used, p. 49.

Approved in *Merced Min. Co. v. Fremont*, 7 Cal. 325; S. C. 68 Am. Dec. 270, as being in accord with the sentiment that "Courts are bound to take notice of the political and social condition of the country which they judicially rule." Affirmed in the similar case of *Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 150, 151, 152; S. C. 70 Am. Dec. 770, 771, 772. Cited in *Nevada County etc. Canal Co. v. Kidd*, 37 Cal. 315, as authority for the rule that a party's right is limited to the general object for

which it is acquired, and that another party may acquire another right for similar or other objects not in conflict with the prior right. Also cited as authority in *Page v. Rocky Ford Canal etc. Co.*, 83 Cal. 94, holding that water brought into a stream from another source, by artificial means, so as to increase the flow of the stream for the uses of a riparian owner upon his land, is held by an entirely different claim from that which entitles such owner to the natural flow; but that this would not affect the character of the stream, or the right to the water naturally flowing therein. Distinguished in *Schulz v. Sweeny*, 19 Nev. 302; S. C. 3 Am. St. Rep. 890, in which case the water was discharged into the stream as a matter of convenience, and without intention of recapturing it. Referred to in *Concord Co. v. Robertson*, 66 N. H. 6, as a new doctrine, extended where the English riparian rule has been considered inapplicable, or applicable only to a limited extent to local conditions. Also referred to in *Druley v. Adam*, 102 Ill. 198, 201, 202, as holding, contrary to Illinois law, that there may be an ownership in the water of a flowing stream. Cited in *Wyman v. Hurlburt*, 40 Am. Dec. 468, note, discussing subject of water rights. So, in *Heath v. Williams*, 43 Am. Dec. 279, 282, note; and *Eddy v. Simpson*, 58 Am. Dec. 411, note.

7 Cal. 50-53. **PHELPS v. PEABODY.**

Equitable Relief.—Courts of equity will only interfere to enjoin a judgment at law, rendered against a party by reason of fraud or accident, unmixed with any fault or negligence of himself or his agents, p. 52.

Cited as authority for the granting of equitable relief in cases of fraud, accident, or mistake, in *Dunlap v. Steere*, 92 Cal. 355; S. C. 27 Am. St. Rep. 148, case of judgment by default, fraudulently obtained; in *Hart v. Gould*, 62 Mich. 270, held applicable in cases of fraudulent settlement and compromises; in *Lyme v. Allen*, 51 N. H. 245, describing the character of a fraud which will justify the interposition of a court of equity; and cited as authority for the ruling stated, in *Harrison v. Crumb*, 1 Tex. App. Civ. 554.

7 Cal. 53. **PEABODY v. PHELPS.**

Judgment.—Entered in vacation is void, p. 53.

Following *Smith v. Chichester*, 1 Cal. 409; *Coffinberry v. Horrill*, 5 Cal. 493. Approved in *Sedgwick v. Dawkins*, 16 Fla. 203. So, in *Forcheimer v. Tarble*, 23 Fla. 103, denying the power of circuit judge to undo in vacation the final disposition made of a case in term time. Cited as authority that an appeal will lie from a void judgment, in *People v. Lindsay*, 1 Idaho, 400; and in *Skinner v. Beshoar*, 2 Colo. 387, holding that if a record carries upon its face an adjudication between the parties, writ of error will lie.

7 Cal. 54-65. **WHITWELL v. BARBIER.**

Judgment.—Personal judgment of court of general jurisdiction is void, it appearing affirmatively upon the face of the record that the court had no jurisdiction of the person, p. 63.

Affirmed in *Gray v. Hawes*, 8 Cal. 568; *Sharp v. Daugney*, 33 Cal. 512.

Same.—Judgment can be attacked in any form, directly or collaterally, for want of jurisdiction. But in case of irregularity in procuring jurisdiction, the remedy is by a direct proceeding in the court which rendered the judgment, or in an appellate court upon appeal therefrom, p. 64.

Cited as authority in *Alderdsen v. Bell*, 9 Cal. 321, holding that a decree cannot be impeached collaterally because entered prematurely; in *Gregory v. Ford*, 14 Cal. 143; S. C. 73 Am. Dec. 643, that equity will not interfere with judgments at law to correct errors and irregularities; in *Rock v. Strauss*, 33 Cal. 685, that a judgment by default cannot be attacked collaterally for a mere irregularity; in *Emeric v. Alvarado*, 64 Cal. 599, that an appearance for a minor by a guardian ad litem, without an order of court, is an irregularity, and may be redressed on motion; in *Ducheneau v. Ireland*, 5 Utah, 110, that after regular service of the summons, a justice of the peace has jurisdiction of the defendant, and the subsequent proceedings are not void, although they may have been erroneous; in *Woodward v. Baker*, 10 Or. 493, that from the time of the service of summons, the court is deemed to have acquired jurisdiction, and to have control of the subsequent proceedings; in *Swain v. Chase*, 12 Cal. 286; *Keybers v. McComber*, 67 Cal. 397; and *Rowley v. Howard*, 23 Cal. 403, that a party who asserts a right, under the judgment of a justice of the peace, must affirmatively show every fact necessary to confer such jurisdiction; in *Schloss v. White*, 16 Cal. 68, that on appeal, a judgment by default will be reversed, unless the record show service on the defendant, or appearance; in *McDonald v. Katz*, 31 Cal. 169, that proceedings in insolvency are special, and no intendments can be made in favor of the jurisdiction; and cited as to the distinction stated in *Adams v. Adams*, 154 Mass. 296, a case involving the validity of a subsequent marriage, and the legitimacy of offspring; 61 Am. St. Rep. 486, 488, 496, extended note on subject.

Same.—True test is, whether the omission be of the form or of the substance of the act required to be performed, p. 64.

Cited in *Town of Lyons v. Cooledge*, 89 Ill. 534, holding that the fact that a town is not given all the time allowed by law to plead to the action after proper service, does not render the judgment taken too soon a nullity, however erroneous and irregular it may be.

7 Cal. 65-81. NOUGUES v. DOUGLASS.

Constitutional Law.—State debt cannot exceed amount of constitutional limitations, p. 66.

Cited in *Bickerdike v. State*, 144 Cal. 696, noted under *People v. Johnson*, 6 Cal. 499.

Constitutional Law.—Act of 1856, providing for the construction of a state capitol, at a cost not to exceed \$300,000, declared to be unconstitutional and void, the state being at the time indebted to the amount limited by the constitution, without a vote of the people, p. 66.

Distinguished in *Koppikus v. Commissioners*, 16 Cal. 253, sustaining the constitutionality of the act of 1860, providing for the construction of a state capitol. Cited in *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 642, construing constitutional provision (Const. Art. 11, sec. 18), that no indebtedness or liability can be incurred by a municipality, except in the manner therein stated, exceeding in any year the income and revenue actually received by it. Cited as authority in *Miller v. Dunn*, 72 Cal. 473; S. C. 1 Am. St. Rep. 74, that even without an express prohibition, the legislature cannot authorize the payment of a claim created in violation of the constitution; and explained and distinguished in the same case, construing section 32 of article 4 of the state constitution.

Same.—Issue of mandamus against ministerial officers, considered, p. 71, et seq.

Cited in *McCauley v. Brooks*, 16 Cal. 43, 64, holding that mandamus will issue to the governor in certain cases.

General citation: *Hubbard v. Brush*, 61 Ohio St. 217.

7 Cal. 81-84. PHILLIPS v. MAYER.

Agency.—When plaintiff employs an agent to collect a note due from defendant, and the defendant employs the same agent to collect other notes due him, and apply the same on plaintiff's note, and the agent fails, after collecting money on defendant's account, the loss thereby occasioned falls on the defendant, unless the appropriation was actually made, p. 83.

Principle of the decision approved, in *Security Co. v. Graybeal*, 85 Iowa, 548; S. C. 39 Am. St. Rep. 313.

7 Cal. 87-89. BUTLER v. HOWES.

Slander.—Where slanderous words are charged to have been spoken of and concerning the plaintiff, as a clerk or tradesman, special damages need not be alleged, p. 89.

Approved as authority in *Frolich v. McKiernan*, 84 Cal. 180. Cited in *Jarman v. Rea*, 137 Cal. 343, quoting *Frolich v. McKiernan*, 84 Cal. 180.

7 Cal. 89-92. **RIX v. McHENRY.**

Homestead.—Where husband buys land during his wife's absence from the state, and mortgages it, and subsequently his wife returns, and resides on it, it cannot be claimed as a homestead against the mortgagee, p. 91.

Cited in *Campbell v. Adair*, 45 Miss. 178, holding that the premises do not become impressed with the legal character of a homestead until actual residence and occupation by the family as a home. So, to the same effect, in *Gibson v. Mundell*, 29 Ohio St. 528. Distinguished in *Loring v. Wittich*, 16 Fla. 509, in which case the proof was that the man and his family were in possession.

Same.—Right to exemption cannot be created after the rights of creditors have vested, p. 92.

Approved in case of homestead exemptions, in *Smith v. Richards*, 2 Idaho, 468. But denied, construing the Indiana exemption statute, in *Robinson v. Hughes*, 117 Ind. 295; S. C. 10 Am. St. Rep. 47.

Insolvency.—Proceedings in, do not affect liens or mortgages on the insolvent's estate, created before the application in insolvency, p. 92.

Cited as authority, in *Isaac v. Swift*, 10 Cal. 83; 70 Am. Dec. 703.

7 Cal. 92-97. **LUCAS v. PAYNE.**

Witnesses.—A plaintiff or defendant cannot be permitted to testify in behalf of his co-plaintiff or defendant, p. 96.

Affirmed in *Domingo v. Getman*, 9 Cal. 103. Cited as authority bearing on competency of witnesses, in *Perlberg v. Gorham*, 10 Cal. 124; *Turner v. McIlhaney*, 8 Cal. 579.

Statutes.—In construction of, the rule is that a general provision must be controlled by one that is special, p. 96.

Affirmed in *People v. Wells*, 11 Cal. 339, and also holding that statutes upon the same subject matter must be construed together.

7 Cal. 97-104. **PEOPLE v. HILL.**

Office and Officers.—Power to remove from office is incident to the power to appoint thereto, p. 102.

Cited in *Patton v. Board*, 127 Cal. 399, 78 Am. St. Rep. 74, holding tenure of health inspectors to be at pleasure of appointing power where no term specified; *Sponogle v. Curnow*, 136 Cal. 582, applying rule to medical superintendent of state hospital; *Ledville v. Bishop*, 14 Colo. Ap. 521, holding policeman removable arbitrarily under local statutes; *Peters v. Bell*, 51 La. Ann. 1628, as to removal of assistant city engineer; *Smith v. Brown*, 59 Cal. 673, case of removal of police officer by board of police commissioners. Approved in *McDougal v. Guigon*, 27 Gratt. 136, and applied in removal of judge of elections for malfeasance in

office. Approved also in dissenting opinion of Fox, J., in *People v. Freese*, 83 Cal. 456, case of removal of pilot commissioner by governor. Cited in *Territory v. Cox*, 6 Dak. Tr. 511, holding that the power of removal from office is not judicial. Rule unqualifiedly approved in *State v. Archibald*, 5 N. Dak. 377.

Same.—The only way in which this power of removal can be limited is by first fixing the duration or term of office, and then providing the mode by which the officer may be removed during the term, p. 102.

Distinguished in *Ford v. Harbor Commissioners*, 81 Cal. 26, and held to be inapplicable in cases of removal because the office itself was abolished. Approved in *Lease v. Freeborn*, 52 Kan. 754, an attempted removal by the governor of a member of the board of trustees of the charitable institutions of the state.

Municipal Corporations.—There is no constitutional inhibition against incorporating a portion of the inhabitants of a county as a city, or creating a county out of the territory of a city, p. 103.

Principle approved in *Wells v. Cole*, 27 Ark. 612. Cited, treating of control over property by dividing or destroying municipalities, in *Mount Hope Cemetery v. City of Boston*, 35 Am. St. Rep. 539, note.

Constitutional Law.—Unconstitutional provisions in a statute will not vitiate the whole act, unless it would be impossible to maintain it, without such obnoxious provisions, p. 103.

Cited in *Ex parte Gerino*, 143 Cal. 420, discussing statutes of 1901, page 56, as to practice of medicine; *Robinson v. Bidwell*, 22 Cal. 386, construing act providing for municipal subscription to capital stock of railroad company; in *Reed v. Omnibus R. R. Co.*, 33 Cal. 219, construing act requiring certain actions to be brought in justices' courts; in *McGowan v. McDonald*, 111 Cal. 64; S. C. 52 Am. St. Rep. 153, construing act of 1862 for the formation of banking companies; in *McCready v. Sexton*, 29 Iowa, 399; S. C. 4 Am. Rep. 236, construing Iowa revenue act; in *Commonwealth v. Gagne*, 153 Mass. 206, construing statute prohibiting sale of intoxicating liquors; and so, in *State v. Wiley*, 4 Oreg. 188, construing statute conferring power upon police judge of city.

7 Cal. 105-110. **ABELL v. COONS.** 68 Am. Dec. 229.

Mortgages.—A mortgage upon an undivided interest is not extended over the whole land by the assumption of payment of it by the grantee of all tenants in common, p. 109.

Cited, on subject of liability of grantee, who assumes payment of the mortgage debt, in *Durham v. Craig*, 79 Ind. 122; and *Burr v. Beers*, 80 Am. Dec. 329, note; and cited, also, in *Klapworth v. Dressler*, 78 Am. Dec. 80, note, as authority that, under code practice, the grantor may maintain a bill to have the mortgage satisfied out of the land.

Same.—Mortgagor who conveys to one who assumes payment of the mortgage debt may, after debt becomes due, and without first paying it, bring suit to compel foreclosure and payment, p. 109.

Approved and the principle applied in *Kreling v. Kreling*, 118 Cal. 419, action by surety to enforce payment by principal.

7 Cal. 110-113. **NIMS v. JOHNSON.** S. C. before, entitled *Nims v. Palmer*, 6 Cal. 8.

Lost Record.—Where a record is partly destroyed or lost the part remaining should be introduced, p. 113.

Cited as authority to this ruling, in *Addis v. Graham*, 88 Mo. 202.

7 Cal. 113-116. **CHARD v. HARRISON.**

Certiorari, writ of, may issue from a district court to a county judge, p. 116.

Cited, as an illustration of the jurisdiction of courts to issue writs of certiorari, in *Spring Valley Water Co. v. Bryant*, 52 Cal. 135, holding that the writ does not lie to review the action of the board of supervisors when their action is legislative in its character.

Grant of Franchise is a legislative power, p. 116.

Cited in *People v. Dean*, 122 Cal. 423, denying right of review by certiorari.

7 Cal. 117. **CHARD v. STONE.**

Ferries.—Injunction will lie to restrain one who, without authority of law is running a ferry to the injury of another, who is a ferry owner, p. 117.

Cited, in *Cal. State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 423, holding that the courts have always protected parties in the enjoyment of exclusive ferry privileges. Approved in *Patterson v. Wollman*, 5 N. Dak. 611.

7 Cal. 117-118. **PEOPLE v. STILLMAN.**

Appeal.—None lies from an order refusing to issue a commission to take testimony, nor from an order refusing to change the place of trial, until after final judgment, p. 118.

Cited as to this ruling in *Gilman v. County of Contra Costa*, 8 Cal. 57; S. C. 68 Am. Dec. 291, holding that an appeal will lie from an order refusing to quash an execution. Cited as authority in *People v. Sexton*, 24 Cal. 84, holding that mandamus will not lie to compel a court to proceed with the trial after an order made changing the place of trial, and that the remedy, if injury results, is by an appeal from the final judgment.

7 Cal. 118-121. **WARDROBE v. CALIFORNIA STAGE COMPANY.**
68 Am. Dec. 231.

Damages.—Exemplary or punitive damages cannot be imposed upon the principal for the tortious act of his servant or agent, p. 120.

Approved in *Warner v. Southern Pac. Co.*, 113 Cal. 115; S. C. 54 Am. St. Rep. 334, holding that a railroad company is not liable to exemplary damages for the wanton or malicious behavior of its conductor towards a passenger, which the company has in no way authorized or ratified. And so, in *Lake Shore etc. Railroad Co. v. Prentice*, 147 U. S. 109. Referred to in *Lienkauf v. Morris*, 66 Ala. 414, asserting the rule that exemplary damages cannot be recovered in any case, on anything less than "gross negligence" within the strictest signification of the phrase. Approved in dissenting opinion of Tapley, J., in *Goddard v. Grand Trunk Railway*, 57 Me. 256, in which case a common carrier of passengers is held responsible for the willful misconduct of its servant toward a passenger, and is held liable in exemplary damages, if the offending servant is retained in service after knowledge of his misconduct. Rule approved in *New Orleans etc. R. R. Co. v. Statham*, 42 Miss. 620; S. C. 97 Am. Dec. 489, construing statute for the protection of railroad passengers. Cited in *Taylor v. Grand Trunk Railroad Co.*, 48 N. H. 320; S. C. 2 Am. Rep. 240, holding it to be settled law in New Hampshire, that exemplary damages may be awarded for gross negligence merely, though not of such a character as to evince a wanton disregard of human life and safety, equivalent to malice. Also cited in *Hagan v. Providence etc. R. R. Co.*, 62 Am. Dec. 385, note, where the subject is discussed at length; 72 Am. Dec. 295, note; 90 Am. Dec. 343, note; and 59 Am. St. Rep. 595, note.

7 Cal. 121-124. **CAMM v. SIERRA COUNTY.**

Eminent Domain.—Private property cannot be taken for public use, unless ample means of remuneration are provided, p. 123.

Affirmed in *Colton v. Rossi*, 9 Cal. 599; and *McCauley v. Weller*, 12 Cal. 528, 531; and approved in *Martin v. Tyler*, 4 N. Dak. 293, construing section 14, article I, of the constitution of North Dakota, which section was copied from the constitution of California adopted in 1879.

Same.—Without such provision for remuneration, the act of taking is illegal, and may be enjoined, p. 123.

Approved in *San Francisco etc. R. R. Co. v. Mahoney*, 29 Cal. 117. Ruling approved but the case distinguished in *Leach v. Day*, 27 Cal. 647, holding that an order of a board of supervisors laying out a road, which is unconstitutional and void upon its face, does not affect or cloud the title to the land over which it passes, and an injunction will not lie to restrain the carrying of the order into effect, but the party will be left to his legal remedy. Criticised in *Fox v. Western etc. R. R. Co.*, 31 Cal. 546, the court holding that the constitution does

not prohibit the legislature from authorizing private lands to be entered on and taken possession of for public use while proceedings for condemnation are pending and before the compensation is paid, upon security being given for the payment of the damages when ascertained. But see *Davis v. San Lorenzo R. R. Co.*, 47 Cal. 517; and *Sanborn v. Belden*, 51 Cal. 266, dissenting from this doctrine.

Counties.—County cannot be sued for any demand, unless the claim be first presented to the board of supervisors, and is by them rejected, p. 124.

Cited in *Board v. Phye*, 27 Colo. 109, further holding that nonpresentation can be first raised on appeal; *Hoexter v. Judson*, 21 Wash. 650, applying rule to action against county treasurer to recover taxes paid under duress; *Nickeus v. Lewis Co.*, 23 Wash. 129, holding failure of board to act not equivalent to rejection; *Bigelow v. Los Angeles*, 141 Cal. 507, applying rule to claim for damages by opening of street; *People v. Supervisors*, 28 Cal. 431, case of mandamus against board of supervisors for refusal to act on claim against county. Cited, in *Gilman v. Contra Costa County*, 68 Am. Dec. 296, 297, extended note on subject.

7 Cal. 124-126. **GATES v. KIEFF.**

Pleading.—Complaint setting out a cause of action in trespass, concluding with a prayer for an injunction, is not demurrable on that ground, p. 125.

Principle approved in *Marius v. Bicknell*, 10 Cal. 224; *Weaver v. Conger*, 10 Cal. 237; *More v. Massini*, 32 Cal. 594, 596; *Hughes v. Dunlap*, 91 Cal. 390; and *Houghtaling v. Ellis*, 1 Ariz. Tr. 387, dissenting opinion of Silent, J.

Evidence.—A map made by one having the requisite knowledge and properly authenticated is competent evidence to go to jury, p. 126.

Cited as authority in *Story v. Maclay*, 3 Mont. 484.

7 Cal. 126-129. **WARD v. SEVERANCE.**

Ferries.—For a violation of the act of 1855, making it a misdemeanor to run a ferry for pay, without a license, the party complaining is confined to his statutory remedy, so far as a court of common law is concerned, though he may be entitled to relief in equity, p. 129.

Distinguished in *Carroll v. Campbell*, 110 Mo. 567, the complainant in such case having a right of action by virtue of the Missouri statute. Cited, 65 Am. Dec. 543, note; and 12 Am. Dec. 296, note.

Remedies.—Remedy provided by statute for the infringement of a right existing at common law, is merely cumulative, p. 129.

Cited, 56 Am. Dec. 332, note.

7 Cal. 129-130. PEOPLE v. JOSEPHS.

Evidence of good character, relative to a particular crime charged, is only admissible in doubtful cases, p. 130.

Overruled as to this point, in *People v. Stewart*, 28 Cal. 396, trial on indictment for crime of murder.

Same.—Evidence of good character, as defense in criminal cases, is restricted to the trait of character in issue, p. 130.

Cited as authority in *Fahey v. Crotty*, 63 Mich. 388; S. C. 6 Am. St. Rep. 309, holding that evidence of the reputation of the defendant as a peaceable citizen is inadmissible in a civil action for damages for an assault and battery. Also cited in 20 Am. Dec. 620, note; and 53 Am. Dec. 134, note.

7 Cal. 130-133. MERCED MINING CO. v. FREMONT.

Injunction is not dissolved or superseded by an appeal taken from the order granting it, p. 132.

Affirmed in *Swift v. Shepard*, 64 Cal. 425; *Rogers v. Superior Court*, 126 Cal. 187, as to injunction contained in judgment; *Vosburg v. Voeburg*, 137 Cal. 496, quoting *Schwarz v. Superior Court*, 111 Cal. 113; *Heinken v. Cross*, 63 Cal. 45; *Estate of Crozier*, 65 Cal. 334. Approved in *Slaughter House Cases*, 10 Wall. 297. Cited as to effect of mandatory injunction, in *Elliott v. Whitmore*, 10 Utah, 243, 245.

Stay of proceedings operates only upon orders or judgments permitted or commanding some act to be done, p. 132.

Approved in *State v. Superior Court*, 28 Wash. 408, on appeal from temporary mandatory injunction commanding corporate officer to deliver property belonging to office to another, order may be superseded in that respect. Affirmed in *Hicks v. Michael*, 15 Cal. 110; *Bliss v. Superior Court*, 62 Cal. 544; *Dewey v. Superior Court*, 81 Cal. 68; and *Stewart v. Superior Court*, 100 Cal. 547, case of mandatory injunction stayed by appeal. Approved in *State v. Dillon*, 96 Mo. 62. So, in *State v. Stallcup*, 15 Wash. 265, 269, holding that a stay of proceedings does not reach a case of injunction. Cited as authority as to effect of stay of proceedings, in *Schwarz v. Superior Court*, 111 Cal. 113; and *Green v. Griffin*, 95 N. C. 54.

Mandamus lies when remedy by appeal is inadequate, p. 133.

Cited in *State v. Johnson*, 103 Wis. 622, granting writ under facts stated; *Crocker v. Conrey*, 140 Cal. 218, granting writ to compel trial judge to order witness to answer on deposition; *Cahill v. Superior Court*, 145 Cal. 46, granting mandamus to compel superior court to hear motion to modify order setting apart probate homestead; *Careaga v. Fernald*, 66 Cal. 353, holding that writ of mandate lies to compel a referee to settle a statement on motion for a new trial in an action tried by him. Approved in *Wood v. Strother*, 76 Cal. 550; S. C.

9 Am. St. Rep. 253, stating the test for the issuance of the writ, and sustaining its issue to compel the auditor to countersign a street-assessment warrant. Approved, also, in *Willard v. Superior Court*, 82 Cal. 470, in dissenting opinion of Thornton, J.; and *Clark v. Crane*, 57 Cal. 634. Cited in 58 Am. Dec. 407, note; *Keane v. Murphy*, 19 Nev. 94.

7 Cal. 133-135. **BIGELOW v. GOVE.**

Pleadings.—Complaint joining action of trespass quare clausum, ejectment, and praying equitable relief, is bad on demurrer, p. 135.

Explained and distinguished in *Weaver v. Conger*, 10 Cal. 237, sustaining complaint joining action for diversion of water, and for an injunction. Cited as authority in *Pfister v. Dascey*, 65 Cal. 405, for joinder of action to restrain working of mines, and to recover possession thereof. And cited in *Reynolds v. Lincoln*, 71 Cal. 190, as an instance of judgment upon the merits reversed on account of the erroneous overruling of a demurrer to a complaint, which improperly joined two causes of action.

Same.—Appellate court will not resort to the rules of construction to determine the species of relief demanded in the complaint, p. 135.

Cited in *Nevada County etc. Canal Co. v. Kidd*, 37 Cal. 304, discussing object of prayer for relief.

7 Cal. 135-136. **FARMER v. CRAM.**

Variance between Pleadings and Proof may be taken advantage of by objecting to the evidence when offered, or by moving for a nonsuit, p. 136.

Approved in *Elmore v. Elmore*, 114 Cal. 521. Cited in *Harrison v. McCormick*, 69 Cal. 621, an instance of variance between pleading and proof in an action against defendants as partners. Cited as authority that a recovery is not authorized where the complaint alleges facts showing a cause of action in tort, by proving on the trial a cause of action in contract, in *Wilson v. Haley Live Stock Co.*, 153 U. S. 47.

7 Cal. 139-140. **PEOPLE v. SHEAR.**

Jurisdiction.—Appellate jurisdiction of supreme court in criminal cases is confined to felonies, p. 140.

Affirmed in *People v. Johnson*, 30 Cal. 101; *People v. Apgar*, 35 Cal. 390.

Same.—Writs or process can only be issued in aid of its appellate jurisdiction, p. 140.

Affirmed in *Miliken v. Huber*, 21 Cal. 169, denial of issue of writ of certiorari where its issuance would be the exercise of an original jurisdiction to superintend the proceedings of an inferior tribunal.

7 Cal. 140-144. PEOPLE v. STEWART.

Juror.—Is not incompetent to sit in a capital case, though opposed to capital punishment on principle, if he has no conscientious scruples upon the subject, p. 144.

Cited as authority in *People v. Gehr*, 8 Cal. 361, in which case it is held, the fact that the juror says he could try the case impartially, will not make him competent. Commented on, in *People v. Murphy*, 45 Cal. 143, discussing allowance of challenge for implied bias. Cited in *Stratton v. The People*, 5 Colo. 279, 280, construing the decision to mean that "conscientious scruples," to disqualify, must be such as to preclude a finding of guilty in accordance with the law and the evidence. Also cited in *Smith v. Eames*, 36 Am. Dec. 532, note discussing subject at length.

7 Cal. 148-149. SIMS v. SMITH.

Mining Claims.—Water of stream may be used to carry off tailings, p. 149.

Cited in *Blair v. Boswell*, 37 Or. 170, but denying injunction against lower proprietor because of damming stream.

7 Cal. 150-152. ADAMS v. PUGH.

Action for Value of Services.—The defendants in this case having by their own acts violated the special contract entered into with the plaintiff, the latter might sue on the special contract for damages, or declare for the value of his work and labor, p. 151.

Cited in *Castagnino v. Balletta*, 82 Cal. 257, as authority for use of the common counts in actions on contracts. Rule approved in *O'Connor v. Dingley*, 28 Cal. 20, but held to be inapplicable, as there appeared to be no breach of the contract in the matter alleged.

7 Cal. 152-153. McCARRON v. O'CONNELL.

Trespass.—Possession in plaintiff is sufficient to enable him to recover against a mere trespasser, p. 153.

Approved in *Kellogg v. King*, 114 Cal. 383; S. C. 55 Am. St. Rep. 77, action for injunction to restrain threatened acts of trespass.

7 Cal. 153-160. HAYES v. BONA.

Contracts.—Under Mexican laws, and by custom of California, contracts for the sale of land were required to be in writing, and it was necessary that the instrument should contain the names of the parties, the thing sold, the date of the transfer, and the price paid, p. 159.

Followed in *Stafford v. Lick*, 10 Cal. 17; approved in *Maxwell Land-Grant Co. v. Dawson*, 7 N. Mex. 154, 155, in dissenting opinion of Freeman, J. So, in *Stanley v. Green*, 12 Cal. 166, holding that no seal was
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requisite under the civil law; denied as to the necessity of stating date and price, in *De Merle v. Mathews*, 26 Cal. 469, 470; and cited on subject of requisites of valid conveyances under the civil law, in *Steinbach v. Stewart*, 11 Wall. 576; *Maxwell Land-Grant Co. v. Dawson*, 151 U. S. 595; and 52 Am. Dec. 295, note. Referred to in *Gildersleeve v. New Mexico Min. Co.*, 6 N. Mex. 42, sustaining the validity of a will executed according to the Mexican custom.

General citation: *County Com'rs. Lake Co. v. State*, 24 Fla. 272.

7 Cal. 160-162. **KELSEY v. DUNLAP.**

Deed.—Acknowledgment to deed must show that the officer knew the person making the acknowledgment, and that such person acknowledged to him that he executed the deed, p. 162.

Rule approved in *Henderson v. Grewell*, 8 Cal. 584. Cited, 65 Am. Dec. 511, note.

Corporate Stock transferred to another as security on corporate books may be reached by garnishment, p. 165.

Cited in *Bank v. Williams*, 112 Mich. 568, sustaining stock garnishment under local statutes.

7 Cal. 165-166. **PEOPLE v. VICK.**

Supreme Court has no jurisdiction of a criminal case not amounting to a felony, p. 166.

Affirmed in *People v. Johnson*, 30 Cal. 101; and *People v. Appgar*, 35 Cal. 390.

7 Cal. 166-169. **WILD v. VAN VALKENBURGH.**

Negotiable Instrument.—Where place of payment is named in a bill of exchange or promissory note, it is necessary to allege and prove a demand at the place specified, p. 168.

Overruled in *Montgomery v. Tutt*, 11 Cal. 326.

7 Cal. 169-171. **PEOPLE v. DOWNER.**

Commerce.—Power of Congress to regulate commerce with foreign nations and among the states, is exclusive, p. 171.

Approved in *Lin Sing v. Washburn*, 20 Cal. 579, declaring the act of 1862, designed to protect free white labor against competition with Chinese coolie labor, to be unconstitutional. So, in *People v. Raymond*, 34 Cal. 498, declaring the revenue act of May 14th, 1862, to be unconstitutional and void. Doctrine approved also, in *Carson River Lumbering Co. v. Patterson*, 33 Cal. 340.

7 Cal. 171-175. **BILLINGS v. MORROW.** 68 Am. Dec. 235.

Power of Attorney.—Where the authority to perform specific acts

is given in the power, and general words are also employed, such words are limited to the particular acts authorized, p. 174.

Cited in *Alcorn v. Buschke*, 133 Cal. 657, holding deed without consideration not authorized by power to sell; *Smythe v. Lynch*, 7 Colo. App. 387, holding act in question not embraced within power; *McIntosh v. Rice*, 13 Colo. App. 402, ruling similarly under facts stated. Rule limited, construing the same power of attorney, in *De Rutte v. Muldrow*, 16 Cal. 510, 512, and holding that the attorney had power to bind his principal in an executory contract for the same sale of land. So, in *Jones v. Marks*, 47 Cal. 247, 248, construing the same instrument, and holding that the attorney was authorized thereunder to execute any instrument affecting the real estate of the principal, unless it might be, a conveyance of it. Approved in *Wilcoxon v. Miller*, 49 Cal. 195, holding that the instrument did not authorize the execution of conveyances. So, in *Hunter v. Beet Sugar Co.*, 11 Fed. Rep. 16, 17, 18; S. C. 7 Sawyer, 500-504. Rule approved and applied in *Quay v. Presidio etc. R. R. Co.*, 82 Cal. 6, holding that under a power of attorney to exchange old certificates of stock for new ones, the attorney is not authorized to transfer the stock of the principal. So, in *Golinsky v. Allison*, 114 Cal. 460, holding that a power of attorney authorizing the agent to "superintend" the property of his principal, does not authorize him to execute a note for an antecedent debt incurred with respect to such property, or to secure it by a mortgage thereon. So, in *Coulter v. Portland Trust Co.*, 20 Oreg. 480, defining the extent of the agent's power conferred by the words "selling or transferring" in respect of real estate business. So, to the same effect, in *Frost v. Erath Cattle Co.*, 81 Tex. 509; S. C. 28 Am. St. Rep. 834; *Smyth v. Lynch*, 7 Colo. App. 387; and *Pollock v. Cohen*, 32 Ohio St. 523. Cited as to construction of power of attorney, in 80 Am. Dec. 467, note; 83 Am. Dec. 782, note; 13 Am. St. Rep. 220, note.

Same.—Principal who ratifies acts of agent must know the character of the acts to be ratified, otherwise the ratification is void, p. 174.

Approved in *Davidson v. Dallas*, 8 Cal. 244; *Dupont v. Wertheman*, 10 Cal. 367; *De Vaughn v. McLeroy*, 82 Ga. 700; *First Nat. Bank v. Drake*, 29 Kan. 324; S. C. 44 Am. Rep. 653; and *Brown v. Bamberger*, 110 Ala. 355. And cited as sustaining this rule in 77 Am. Dec. 323, note; 84 Am. Dec. 614, note; 86 Am. Dec. 158, note; 97 Am. Dec. 736, note; 98 Am. Dec. 524, note; 14 Am. St. Rep. 94, note; and 15 Am. St. Rep. 763, note.

7 Cal. 175-181. **EX PARTE ROWE.** S. C. again 7 Cal. 181-184.

Appeal lies from judgment or order putting a party in contempt, p. 178.

Approved in *Ware v. Robinson*, 9 Cal. 111; and cited as authority sustaining the right of appeal in cases of contempt, in *Whitten v.*

State, 36 Ind. 207; *Ex parte Wright*, 65 Ind. 512; *Gandy v. State*, 13 Neb. 452; *State v. Knight*, 3 S. Dak. 512, 44 Am. St. Rep. 810; *Hebb v. County Court*, 48 W. Va. 283, sustaining right of respondent to show that order disobeyed was erroneous. Cited in *Clark v. People*, 12 Am. Dec. 184, note, as authority for the proposition that the court in which a contempt is committed must punish it.

Contempts.—Party committed for contempt in not answering questions as a witness will be discharged on habeas corpus, upon abatement of the action, p. 177.

Cited in *Ex parte Overend*, 122 Cal. 204, ruling similarly as to effect of discontinuance of trial; *In re Cowden*, 139 Cal. 246, on point that imprisonment for failure to pay alimony is not allowable where party is unable to pay. *Mullin v. People*, 22 Am. St. Rep. 423, note.

7 Cal. 181-184. EX PARTE ROWE.

Contempt.—Supreme court can review, on writ of habeas corpus, the decisions of inferior courts in cases of contempt, p. 182.

Approved in *Ware v. Robinson*, 9 Cal. 111. Cited as authority in *People v. O'Neil*, 47 Cal. 110, as sustaining the rule that the jurisdiction of the lower court to punish and imprison for contempt is reviewable by the supreme court, on habeas corpus. So, to same effect, in *Ex parte Hollis*, 59 Cal. 408. Referred to in *Huerstal v. Muir*, 62 Cal. 481, as an instance of discharge in habeas corpus, on the ground that, in particular circumstances, the court had no jurisdiction to adjudge the contempts, but declining to extend the authority of the decision as strengthening the argument in favor of hearing appeals from contempt judgments and orders; and cited in this connection, in *People v. District Court*, 6 Colo. 537; *State v. Houston*, 35 La. An. 1195.

Warrant of commitment for contempt should state all the material facts upon which the action of the court is predicated, p. 183.

Cited as authority in *Ex parte Kilgore*, 3 Tex. App. 253. *Ex parte Clarke*, 126 Cal. 240, 77 Am. St. Rep. 180, releasing respondent on habeas corpus, for disregard of unlawful order; *Overend v. Superior Court*, 131 Cal. 285, annulling commitment on certiorari; *State v. Judges*, 32 La. An. 1262, holding that the warrant should show that opportunity was given the party to be heard in his defense.

7 Cal. 184-185. EX PARTE ROWE.

Witnesses.—Where answer of witness would subject him to criminal punishment, he is not privileged from answering, on the ground that his answer would disgrace him, but solely on the ground that he is not compelled to criminate himself, p. 185.

Reviewed in *Counselman v. Hitchcock*, 142 U. S. 568, in which case it is held that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him,

can have the effect of supplanting the privilege conferred by the 5th amendment to the constitution of the United States. Cited as authority in *Brown v. Walker*, 161 U. S. 598, construing act of Congress of February 11, 1893, chap. 83, 27 Stat. at Large, 443, relative to testimony before Interstate Commerce Commission. Also cited in *Fries v. Brugler*, 21 Am. Dec. 59, note, discussing subject of privilege of witness.

7 Cal. 186-187. **LE FRANC v. HEWITT.**

Evidence.—Account book of tradesman is not in general admissible to establish a charge for money loaned, nor to establish a single item, p. 186.

Cited in *White v. Whitney*, 82 Cal. 166, as sanctioning the rule that a tradesman's book of original entries is admissible in evidence as prima facie proof, when supported by the tradesman's oath to its correctness. So, in *Henderson v. Morris*, 5 Or. 28.

7 Cal. 187-205. **ADAMS v. HACKETT.**

Partnership.—Creditors of firm may obtain priority by adverse proceedings before decree, notwithstanding a bill has been filed for dissolution of the partnership, p. 199.

Approved in *Adams v. Woods*, 8 Cal. 158; S. C. 68 Am. Dec. 316; *Naglee v. Minturn*, 8 Cal. 544; *Adams v. Woods*, 9 Cal. 26. Examined in *Jackson v. Lahee*, 114 Ill. 297, and the principle held to be inapplicable.

Proceedings Supplementary to Execution were intended as a substitute for a creditor's bill, p. 201.

Cited as authority in *Pacific Bank v. Robinson*, 57 Cal. 522; S. C. 40 Am. Rep. 121; *Byrd v. Badger*, McAll. 446; *Hexter v. Clifford*, 5 Colo. 170; *Sperling v. Calfee*, 7 Mont. 529; *Barber v. Briscoe*, 9 Mont. 348; and *Herrlich v. Kauffman*, 99 Cal. 275, adding, "except in cases where the statutory proceedings would not afford adequate relief." *Bank v. Brooks*, 9 N. Mex. 126, holding jury trial not demandable therein; *Matteson etc. Co. v. Conley*, 144 Cal. 485, discussing and distinguishing the different proceedings. Cited in *Bates v. International Co.*, 84 Fed. Rep. 524; *Massey v. Gorton*, 90 Am. Dec. 292, 294, note, discussing creditor's bills, and proceedings in equity in aid of executions. So, in *Lathrop v. Clapp*, 100 Am. Dec. 501, 510, note on supplementary proceedings. Cited also in *State v. Brewer*, 37 Am. St. Rep. 760.

Pleading.—Two of the leading ends contemplated by the code system are simplicity and economy, p. 201.

Cited in *Piercy v. Sabin*, 10 Cal. 28, and applied in matter of framing pleadings.

Execution.—Debts and credits are considered property in the statute, subject to execution, and a judgment is a debt of record, p. 203.

Restricted as to levy and sale of choses in action, in *Crandall v. Blen*, 13 Cal. 22. Cited in *Davis v. Mitchell*, 34 Cal. 88, holding that a promissory note, being the property of the defendant in an attachment and execution, is liable to seizure and sale thereunder. Distinguished in *McBride v. Fallon*, 65 Cal. 303, holding that a judgment cannot be levied upon and sold under execution as personal property capable of manual delivery. Cited in *Osborn v. Cloud*, 92 Am. Dec. 416, note, where the cases are collected and collated. And see *Dore v. Dougherty*, 72 Cal. 232, affirming *McBride v. Fallon*, supra. Cited as to meaning of term property, in 55 Am. Dec. 405, note.

General Citations.—Referred to in *Rosenberg v. Frank*, 58 Cal. 405, construing a will, as an instance of the use in an opinion of the words "pro rata." So, in *Ackerman v. Ackerman*, 50 Neb. 60, attachment of property in hands of receiver.

7 Cal. 206-208. **KINDER v. MACY.**

Fraud.—To maintain a creditor's bill to reach equitable assets, alleged to have been fraudulently conveyed, facts and circumstances must be set forth, which will reasonably sustain the theory of the bill, p. 207.

Principle affirmed in *Meeker v. Harris*, 19 Cal. 289; S. C. 79 Am. Dec. 216; *Castle v. Bader*, 23 Cal. 77; *Walden v. Murdock*, 23 Cal. 550; S. C. 83 Am. Dec. 137; *Kent v. Snyder*, 30 Cal. 674; *Lawrence v. Gayetty*, 78 Cal. 131; S. C. 12 Am. St. Rep. 33, 34; and *Pehrson v. Hewett*, 79 Cal. 598, in all of which cases it is held insufficient to aver fraud in general terms, and that the facts constituting the fraud must be alleged. So, in *Water Works v. San Francisco*, 82 Cal. 321; S. C. 16 Am. St. Rep. 134; dissenting opinion of Thornton, J.; *Flewellen v. Crane*, 58 Ala. 629; *Railroad Co. v. Commissioners*, 18 Kan. 178; and *Harris v. Howe*, 2 Ind. App. 425. *Claffin Co. v. Simon*, 18 Utah, 160, holding allegations of fraud in affidavit for attachment insufficient. Referred to as to degree of particularity in the statement of facts and circumstances required when a fraudulent conveyance is alleged to have been made, in *Kohner v. Ashenauer*, 17 Cal. 580. Distinguished in *Hager v. Shindler*, 29 Cal. 60, and holding that a purchaser of land at sheriff's sale who files a bill to set aside a fraudulent deed need not aver his insolvency. Cited to the ruling stated, in *Massey v. Gorton*, 90 Am. Dec. 298, note, treating of pleading and evidence in creditor's suits.

7 Cal. 208, 209. **PEOPLE v. MARKHAM.**

Gaming.—Act to suppress, must be construed with Criminal Code, and party fined may be imprisoned to enforce payment, p. 208.

Approved in *State v. Sheppard*, 15 Or. 601, construing similar statutory provisions (Hill's Code, secs. 2052, 1408), and holding the judgment in the particular case to be without warrant of law, overruling *State v. Crowley*, 11 Or. 512.

Same.—Sentence of fine, and imprisonment until paid, the statute providing for imprisonment for a limited number of days, though irregular, does not render the judgment wholly inoperative, p. 209.

Cited as authority in *Ex parte Mooney*, 26 W. Va. 41; S. C. 53 Am. Rep. 63, holding that if the judgment is in excess of that which the court had power to pronounce, it is void for the excess only. So, to same effect, in *Ex parte Crenshaw*, 80 Mo. 457; *In re Fanton*, 55 Neb. 706, 70 Am. St. Rep. 420, holding such sentence not reviewable in habeas corpus; and cited in *Commonwealth v. Lecky*, 26 Am. Dec. 46, note, treating of inquiry into jurisdiction on habeas corpus proceeding.

7 Cal. 213-215. MARKWALD v. CREDITORS.

Carriera.—Right of vendor of goods to stoppage in transitu exists until they arrive at their final destination, or come into the possession of the consignee, p. 214.

Affirmed in *Blackman v. Pierce*, 23 Cal. 510. So, in *Jones v. Earl*, 37 Cal. 632; S. C. 99 Am. Dec. 338, holding that upon demand by the vendor, while the right of stoppage in transitu continues, the carrier will become liable for a conversion of the goods, if he declines to redeliver them to the vendor, or delivers them to the vendee. Cited in *Hause v. Judson*, 29 Am. Dec. 389, note; and *Rucker v. Donovan*, 19 Am. Rep. 90, note.

7 Cal. 215-242. BECKETT v. SELOVER.

Public Administrator.—Oath and Bond are not requisite in each administration, p. 230.

Cited in *Healy v. Superior Court*, 127 Cal. 662, construing sections 1388, 1402, and 1727, Code of Civil Procedure.

Administration.—Petition for letters of, must allege death of party, and that he was, at the time of his death, a resident of the county in which the letters are applied for, and these allegations must be true in point of fact, pp. 233, 236.

Affirmed in *Haynes v. Meeks*, 10 Cal. 118; S. C. 70 Am. Dec. 707. So, in *Stevenson v. Superior Court*, 62 Cal. 62, as respects the question of the fact of death. Overruled, in so far as the question of the residence of the deceased at the time of death is concerned, in *Irwin v. Scribner*, 18 Cal. 507, 508. Approved as to sufficiency of petition for letters of administration, in *Abel v. Love*, 17 Cal. 238; *Liddicoat v. Treglow*, 6 Colo. 50; and *Weir v. Monahan*, 67 Miss. 449. Cited in *Springer v. Shavender*, 116 N. C. 16; S. C. 47 Am. St. Rep. 792, holding

that the appointment of an administrator upon the estate of a living person is void for all purposes. Also cited as follows: 33 Am. Dec. 239, 242, note; 73 Am. Dec. 126, note; id., 366, note; id., 484, note; 79 Am. Dec. 65, 66, note; 47 Am. Rep. 465, note; and *Morrill v. Morrill*, 23 Am. St. Rep. 114, note, treating generally of the validity of grants of administration.

Public Administrator.—Letters need not formally issue to validate acts, p. 238.

Cited in concurring opinion, *Dennis v. Bint*, 122 Cal. 48, ruling similarly as to effect of unsealed letters.

Under California system, the real and personal estate vest in the heir, subject to the lien of the administrator for the payment of debts and the expenses of administration, with the right in him of present possession, p. 238.

Cited in *Elder v. Mining Co.*, 9 S. Dak. 642, 62 Am. St. Rep. 899, construing local statutes; *Murphy v. Crouse*, 135 Cal. 18, holding common-law rule as to succession not operative here. Affirmed in *Haynes v. Meeks*, 10 Cal. 120; S. C. 70 Am. Dec. 707; *Updegraf v. Trask*, 18 Cal. 459; *Meeks v. Hahn*, 20 Cal. 627; *Johns v. Nolting*, 29 Cal. 510; *Estate of Woodworth*, 31 Cal. 604; and *Chapman v. Hollister*, 42 Cal. 463. Approved as the correct rule under Nevada system, in *Gossage v. Crown Point M. Co.*, 14 Nev. 158; and *Wright v. Smith*, 19 Nev. 147, holding, in the latter case, that the title to community property after a man's death is vested in the widow, subject to the payment of the debts. Approved also, in dissenting opinion of Thornton, J., in *Bayley v. Muehe*, 65 Cal. 349, in which case it is held that in an action against an administrator to foreclose a mortgage, the heirs of the deceased mortgagor are not necessary parties. Cited in *Janes v. Throckmorton*, 57 Cal. 387, holding that an administrator has no power to bring a suit to enforce a trust and to compel a conveyance of land to himself. So, in *Murphy v. Clayton*, 113 Cal. 159, restricting the possession and lien mentioned to the estate of the decedent, having no application to that held in trust for others. So, in *Gillett v. Gaffney*, 3 Colo. 358, discussing descendibility of titles to estates, in absence of statutory provisions. Also cited to the ruling stated as follows: *Elder v. Horse-shoe Min. & Mill Co.*, 9 S. Dak. 642; 75 Am. Dec. 61, note; 76 Am. Dec. 357, note; 83 Am. Dec. 230, note; 86 Am. Dec. 339, note; 88 Am. Dec. 308, note; and 59 Am. St. Rep. 224, note.

Same.—Public administrator has only such powers as are given him by law. There must be a judicial grant of administration to him in each particular case, of which his official commission is not proof, p. 230.

Approved in *Rogers v. Hoberlein*, 11 Cal. 128; *Matter of Estate of Hamilton*, 34 Cal. 468; *In re Pingree*, 100 Cal. 80. Distinguished in *County of Los Angeles v. Kellogg*, 146 Cal. 573, holding where under

law public administrator is salaried officer and required to pay all commissions into county treasury, he must pay all commissions into treasury if he continues to act in partially administered estate after expiration of term.

Same.—Although for some purposes the allowance of a claim against estate of decedent is a judgment, it does not bind the heirs in a proceeding for the sale of real estate for the payment of debts. They may nevertheless dispute the validity of the claim, pp. 238, 239.

Approved in *Estate of Crosby*, 55 Cal. 582; and *Wingerter v. Wingerter*, 71 Cal. 111. Cited in *Matter of Estate of Hidden*, 23 Cal. 363, doubting whether such judgment would bind another creditor of the estate who is not a party to it; so, in *Estate of Glenn*, 74 Cal. 568, holding that an allowed claim must draw interest; so, in *First Baptist Church v. Sims*, 51 N. J. Eq. 367, holding that a judgment against an executor is not conclusive upon the heirs and devisees who are not in privity with him; so, to same effect in *Carey v. Roosevelt*, 81 Fed. Rep. 609; and so, as to regards generally the binding effect of an allowance of a claim, is cited in *Yeatman v. Yeatman*, 35 Neb. 425; *Willett v. Malli*, 65 Iowa, 679; and *Moore v. Hillebrandt*, 65 Am. Dec. 122, 124, 125, note.

In *Suits for Benefit of Estate* the administrator represents both the creditors and the heirs, p. 239.

Approved in *Jenkins v. Jensen*, 24 Utah, 124, where administrator neglects to bring action within time prescribed, heir also barred, though he was minor at time of accrual of action in favor of administrator.

Same.—Presentation of claim to administrator is the commencement of a suit upon it, and is sufficient to stop the running of the statute of limitations, p. 241.

Approved in *estate of Schroeder*, 46 Cal. 316, 317; and *Cole v. Lafontaine*, 84 Ind. 451. Cited in 65 Am. Dec. 123, note; 81 Am. Dec. 146, note; and 99 Am. Dec. 378, note.

General Citations.—As to nature and extent of jurisdiction of probate courts, in *Townsend v. Gordon*, 19 Cal. 206; *State v. Benton*, 12 Mont. 77; *Territory v. Klee*, 1 Wash. St. 188; and *Holmes v. Oregon etc. R. R. Co.*, 6 Sawyer, 280; S. C. 5 Fed. Rep. 529. That each proceeding commenced in a probate court pending administration must be considered a separate suit, or in the nature of a distinct action, in *Estate of Dunne*, 53 Cal. 632. That in all suits for the benefit of the estate the administrator represents creditors and heirs, in *Meeks v. Olpherts*, 100 U. S. 569; and *Hyde v. Heller*, 10 Wash. St. 602. Validity of administrator's sale, in 72 Am. Dec. 638, note; and 76 Am. Dec. 561, note; and as to the jurisdiction of superior court to order sale of real estate of decedent, in *Wills v. Pauly*, 116 Cal. 581.

7 Cal. 244-245. **COULTER v. STARK.**

Appeal.—When taken bona fide, appellate court will permit a new undertaking to be filed when original is defective, p. 245.

Approved in *Payne v. Davis*, 2 Mont. 384; *Territory v. Milroy*, 7 Mont. 562; and *Towle v. Bradley*, 2 S. Dak. 478, 479. So, in *McCracken v. Superior Court*, 86 Cal. 77, but held not to apply where the sureties fail to justify within the time fixed by statute. Referred to in *Salt Lake Brewing Co. v. Gilman*, 2 Idaho, 183, as proper remedy where undertaking is defective.

Certiorari.—Writ of, will not lie where there has been no excess of jurisdiction, p. 245.

Approved and applied in *Hetzel v. Board of County Commissioners*, 8 Nev. 362, holding that such board acted within its jurisdiction in refusing to order an election.

7 Cal. 245-246. **BENEDICT v. BUNNELL.**

Homestead.—Premises never assume character of, until actual residence thereon by the family, p. 246.

Approved in *Hale v. Heaslip*, 16 Iowa, 452; *Campbell v. Adair*, 45 Miss. 178. Cited as authority in *Austin v. Stanley*, 46 N. H. 52, holding that temporary absence from the premises is not an abandonment of the homestead. So, in *Tipton v. Martin*, 71 Cal. 326, construing Homestead Act of 1860. And so, to this point, in *Taylor v. Hargous*, 60 Am. Dec. 609, 613, note. Cited in *Gambette v. Brock*, 41 Cal. 83, construing Homestead Act of 1860, and holding that the residence of the wife alone, under the circumstances stated, was sufficient to establish the homestead claim.

7 Cal. 247-250. **PARKE v. WILLIAMS.**

Limitations.—Action on foreign judgment is barred in two years from entry, p. 249.

Cited in *Higgins v. Graham*, 143 Cal. 133; noted under *Patten v. Ray*, 4 Cal. 287.

Evidence.—A copy of the record of a judgment of a sister state, certified as provided by statute, is admissible in evidence in California, 249.

Cited as authority in *Wickersham v. Johnston*, 104 Cal. 414; S. C. 43 Am. St. Rep. 122, construing section 1906, Code of Civil Procedure.

7 Cal. 250-252. **LOVE v. WALTZ.**

Judgment of court of competent jurisdiction directly upon the point is, as a plea, a bar, and, as evidence, conclusive between the same parties upon the same matter directly in question in another court, p. 252.

Cited as authority in *Wiese v. San Francisco Musical Soc.* 82 Cal. 646, and applied to the judgment of a superior court rendered on appeal from a justice's court; *Racke v. Brewing Assn.*, 17 Tex. Civ. App. 170, holding judgment bar under facts stated.

7 Cal. 253. **MARTIN v. TRAVERS.**

Appeal.—None lies from an order refusing to dissolve an injunction. It should be taken from the order granting the injunction, p. 253.

Cited and commented on as recognizing the right of appeal from ex parte orders granting injunctions, in *Sullivan v. Triunfo Min. Co.*, 33 Cal. 392.

7 Cal. 253-256. **FINN v. VALLEJO STREET WHARF COMPANY.**

Witness.—Where defense set up is the negligence of plaintiff's servant, the servant is not a competent witness for his employer, p. 256.

Cited in 55 Am. Dec. 245, note.

Pleading.—He who avers a fact in excuse of his own malfeasance, must prove it, p. 255.

Cited in 55 Am. Dec. 519, and 63 Am. Dec. 139.

7 Cal. 257-258. **BLISS v. WYMAN.**

Malicious Prosecution.—Defense that defendant acted by advice of counsel must show that the advice was given upon a full and fair statement of the facts, p. 257.

Approved in *Ross v. Innis*, 35 Ill. 507; *S. C.* 85 Am. Dec. 376; *Scot-ten v. Longfellow*, 40 Ind. 30; *Cooper v. Utterbach*, 37 Md. 309, and *Smith v. Davis*, 3 Mont. 111.

7 Cal. 258-261. **McEWEN v. JOHNSON.**

Assignment.—An order drawn by a creditor on his debtor is prima facie evidence of an assignment of the debt pro tanto, p. 260.

Cited in *Thomas v. Rock Island etc. Min. Co.*, 54 Cal. 579, holding that an action cannot be maintained by the assignee of part of an entire demand without the express agreement or distinct ratification of the judgment debtor.

Denied in *Donohoe etc. Co. v. S. P. Co.*, 138 Cal. 187, holding syllabus in case not justified by its facts.

Findings of court, sitting as a jury, may refer to the pleadings for the facts found, but the reference should be distinct and pointed, p. 260.

Approved in *Pralus v. Pacific Gold etc. Min. Co.*, 35 Cal. 35; *Gwinn v. Hamilton*, 75 Cal. 266, and *Gale v. Bradbury*, 116 Cal. 40. So, in *McFadden v. Friendly*, 9 Oreg. 224, under Oregon practice. Cited in

Parke v. Hinds, 14 Cal. 418, sustaining qualified findings. So, in *Hihn v. Peck*, 30 Cal. 286, as to sufficiency of findings by referee. Distinguished in *Breeze v. Doyle*, 19 Cal. 105, in which case the findings were held to be insufficient, because not referring distinctly to those allegations decreed material. Examined in *Bard v. Kleeb*, 1 Wash. St. 370, 373, and held to be an insufficient mode of finding facts under Washington practice.

7 Cal. 261-264. **MAERIS v. BICKNELL**. 68 Am. Dec. 257. S. C. 10 Cal. 217.

Water Rights.—Diversion of water from its natural channel for the purpose of drainage simply, is not an appropriation of the water, p. 262.

Affirmed in *McKinney v. Smith*, 21 Cal. 383. Cited in *Hague v. Nephi etc. Co.*, 16 Utah, 431, 67 Am. St. Rep. 639, discussing right to appropriation beyond appropriator's necessities.

Same.—But where a ditch is constructed in good faith for the purpose of using the water, the right thereto dates from the commencement of the work, p. 263.

Explained in *Nevada County etc. Canal Co. v. Kidd*, 37 Cal. 312, and the ruling approved in *Woolman v. Garringer*, 1 Mont. 543, 544. Cited, 68 Am. Dec. 313, note; and 60 Am. St. Rep. 803, note.

Same.—And mere change in the use of the water from one mining locality to another does not forfeit the right, p. 263.

Affirmed in *Davis v. Gale*, 32 Cal. 32, 33. S. C. 91 Am. Dec. 557; and *Santa Paula Water Works v. Peralta*, 113 Cal. 43, holding that the tests of a valid appropriation of water are priority of possession and beneficial use. Approved in *Woolman v. Garringer*, 1 Mont. 543; also, in *Wimer v. Simmons*, 27 Oreg. 10; S. C. 50 Am. St. Rep. 691, holding that the place or character of the use of the water may be changed within the limits of the original right, even to the injury and total deprivation of one who has subsequently used the water after it had left the prior appropriator's ditch. So, in *Fuller v. Mining Co.*, 12 Colo. 16; and *Trambley v. Luterman*, 6 N. Mex. 27. Doubted in *McKinney v. Smith*, 21 Cal. 383. So, in *Last Chance Min. Co. v. Mining etc. Co.*, 49 Fed. Rep. 433, denying right in that case to change place of use.

General Citations.—As to requisites of valid appropriation of water, in *Heath v. Williams*, 43 Am. Dec. 281, note, discussing subject at length; 76 Am. Dec. 479, note; 85 Am. Dec. 150, note; 91 Am. Dec. 692, note; 97 Am. Dec. 559, note; 50 Am. St. Rep. 700.

7 Cal. 266-275. **SELOVER v. AMERICAN ETC. COMMERCIAL COMPANY.**

Wife's Separate Property.—Sale of separate estate of wife, real

or personal, without an inventory of such property upon record, or a privy examination of wife, is void, pp. 273, 274.

Cited in *Kendall v. Miller*, 9 Cal. 592, holding that in the acknowledgment of a married woman to a deed, there must be a privy examination. So, in *Maclay v. Love*, 25 Cal. 374, 376; S. C. 85 Am. Dec. 135, 137, discussing rights of married woman, and holding that such rights depend mainly upon the constitution and statutes of the state. So, in *Bodley v. Ferguson*, 30 Cal. 518, discussing power of married woman to contract. So, in *Dentzel v. Waldie*, 30 Cal. 142, holding that a married woman could not, prior to the act of 1863, sell and convey her separate estate by an attorney in fact, but must do it in propria personae. So, in *Dow v. Gould et c.* Min. Co., 31 Cal. 644, as reserving the question of the constitutionality of the statutory provision, requiring a deed conveying the separate property of the wife to be signed by the husband as well as the wife, and deciding that such provision was not unconstitutional. Cited as authority in *Tafft v. Presidio et c.* R. R. Co., 84 Cal. 139; S. C. 18 Am. St. Rep. 170, case of defective indorsement upon a certificate of stock.

Same.—Question of what capacity was conferred by the state constitution upon a married woman, in respect to her separate property, and what incidents belong to such capacity, considered, p. 271 et seq.

Cited in *Love v. Watkins*, 40 Cal. 559; S. C. 6 Am. Rep. 628, discussing the same question, and holding that an executory contract for the sale of the wife's separate property, executed by the husband and wife in the mode prescribed by the statute, defining the rights of husband and wife, is valid and binding on the latter, and may be enforced by a decree of specific performance.

Same.—Sale of separate property of wife, whether real or personal, must be in writing, signed and acknowledged in the mode pointed out by the statute, or it is void, p. 274.

Distinguished in *Miller v. Newton*, 23 Cal. 566, as being founded upon the statute relating to conveyances by a married woman and as having no application to an agreement enforceable only in equity. Cited in *Wedel v. Herman*, 59 Cal. 512, as stating the law prior to the adoption of the codes, but holding that under the codes the certificate of acknowledgment is not an essential part of a married woman's conveyance, but is regarded simply as record proof of acknowledgment. Cited as to sufficiency of acknowledgment by married woman, in 52 Am. Dec. 493, note. So, in *Jordan v. Corey*, 52 Am. Dec. 523, note, treating of the power of courts to amend certificates of acknowledgment; so, in 58 Am. Dec. 124, note, to the point that the statute prescribing the mode of conveying the wife's property does not declare absolutely void any other mode of conveyance.

General Citation.—The principal case is cited to the point that it is the duty of the wife to live with her husband, and that her removal

with him from the homestead is no abandonment thereof, in *Ravalk v. Kraemer*, 8 Cal. 72; S. C. 86 Am. Dec. 306, which appears to be a miscitation.

7 Cal. 276-279. DRAPER v. NOTEWARE.

Mandamus.—Writ of, simply commands the performance of duty, and is only issued where the party has no other plain, speedy, and adequate remedy, p. 279.

Affirmed in *Clune v. Sullivan*, 56 Cal. 250; *Hatch v. Stoneman*, 66 Cal. 633; *State v. Wilson*, 123 Ala. 281.

7 Cal. 279-281. DORENTE v. SULLIVAN.

Judgment by Default, where summons has been served, cannot be attacked collaterally for mere irregularity of service, or for a defective return. The defendant must appeal from the judgment, p. 280.

Ruling approved in the following cases: *Rowley v. Howard*, 23 Cal. 404; *Sharp v. Doughney*, 33 Cal. 512; *Drake v. Duvenick*, 45 Cal. 466; *Keybars v. McComber*, 67 Cal. 399; *Ex parte Sternes*, 77 Cal. 163; S. C. 11 Am. St. Rep. 255; *Ex parte Ah Men*, 77 Cal. 201; S. C. 11 Am. St. Rep. 265; *Kidd v. Four-Twenty Min. Co.*, 3 Nev. 384; and *Trullenger v. Todd*, 5 Oreg. 40. Cited in *Peck v. Strauss*, 33 Cal. 685, as to default on defective affidavit of service; *Burke v. Interstate etc. Assn.*, 25 Mont. 324, as to affidavit not stating age of process server. 61 Am. St. Rep. 487, extended note on subject.

7 Cal. 281-282. CARTWRIGHT v. PHOENIX.

Sale.—Acts constituting a sufficient delivery of personal property, and the validity of the sale thereof sustained, p. 282.

Approved in *Dodge v. Jones*, 7 Mont. 129, case of sale of horses running at large on a range with other horses, those sold having been corralled and branded on the left shoulder, and then turned loose. So, in *Toguini v. Kyle*, 17 Nev. 213, 215; S. C. 45 Am. Rep. 444, 446, case of sale of charcoal in pits, the pits being marked with the name of the purchaser, who put a person in charge of the pits. As to sufficiency of delivery where manual delivery is impracticable, cited in *Clafin v. Rosenberg*, 97 Am. Dec. 347, note, discussing subject of delivery.

7 Cal. 282-286. OSBORN v. HENDRICKSON. S. C. 88 Cal. 31.

Contract.—Parol evidence is not admissible to vary the terms of a written contract, so as to make it embrace property not described therein, p. 285.

Approved and applied in California etc. *Nav. Co. v. Wright*, 8 Cal. 591, facts being nearly similar. Principle also approved in *Frink v. Roc*, 70 Cal. 316.

7 Cal. 286-287. **THOMAS v. ARMSTRONG.**

Ferries.—A ferry franchise is not the subject of levy and sale under execution, p. 287.

Approved and applied in respect of a franchise to construct a turnpike road and collect tolls thereon, in *Wood v. Truckee Turnp. Co.*, 24 Cal. 487; so, in *People v. Duncan*, 41 Cal. 511; so, in *Northern Pac. R. R. Co. v. Shimmell*, 6 Mont. 164, in respect to franchise of railroad company; so, in *Knott v. Frush*, 2 Oreg. 238, in respect to a ferry franchise. Principle of the decision approved and held to be applicable to franchises generally, in *Gregory v. Blanchard*, 98 Cal. 313; and in *re Scott*, 6 Sawyer, 235; S. C. 11 Fed. Rep. 134. Cited in *Montgomery v. Railway Co.*, 11 Oreg. 353; and *Hockett v. Wilson*, 12 Oreg. 37, wherein it is questioned whether a ferry license is assignable or not. Disapproved in *Lippencott v. Allander*, 27 Iowa, 464; S. C. 1 Am. Rep. 302, holding that a ferry license when granted becomes the property of the grantee, and is a private right, subject only to the governmental control growing out of its other nature of publici juris. Cited, as authority that franchises are not subject to execution, in *Ammant v. Turnpike Road*, 15 Am. Dec. 595, note. So, in *Brunswick Gas Light Co. v. United Gas etc. Co.*, 35 Am. St. Rep. 391, note, discussing at length the subject of nontransferability of franchises.

Same.—Authority of board of supervisors relative to ferries considered, and holding that when the board acts under mistake of law, awarding the license to another, supposing that he has succeeded to the rights of the owner of the franchise, the error may be corrected by mandamus, or any other proper proceeding, p. 287.

Cited in *Fall v. Paine*, 23 Cal. 303, holding that the judgments of the board, in proper cases, where its action is not final and conclusive, can be reviewed by certiorari. Also cited in this connection in *Tilden v. Sacramento County*, 41 Cal. 77.

7 Cal. 288-289. **HENSLEY v. TARPEY.**

Evidence.—Record or certified copy of recorded instrument is inadmissible in evidence, unless the absence of the original is accounted for. An affidavit, showing that the custodian of the original has adopted a rule, refusing to allow it to be taken from the files, is a sufficient predicate, p. 289.

Cited as authority in *Bagley v. Eaton*, 10 Cal. 147; *Fallon v. Dougherty*, 12 Cal. 105; *Soto v. Kroder*, 19 Cal. 94.

Same.—Courts are not bound to take official notice of the rules adopted for the regulation of the various departments of the federal government, or those established by the board of land commissioners or surveyor-general of the United States for California, p. 289.

Approved in *United States v. Williams*, 6 Mont. 396; and cited in

Lanfear v. Mestier, 89 Am. Dec. 689, note, collecting and collating authorities on subject.

7 Cal. 289-290. PEOPLE v. APPLE.

Evidence.—A general objection to the admission of, is insufficient, p. 290.

Approved in *People v. Glenn*, 10 Cal. 37; and *People v. Chee Kee*, 61 Cal. 405. So, in *Rush v. French*, 1 Ariz. Ter. 125, holding that the general objection is unworthy of consideration.

7 Cal. 290-292. GREWELL v. HENDERSON.

Judgment.—Every intendment is in favor of a judgment of a court of record, p. 292.

Approved in *Federico v. Hancock*, 1 Ariz. Ter. 514. Referred to in *Henderson v. Grewell*, 8 Cal. 584, as expressing the opinion that the instrument set out in the record was not a mortgage, but that it was not necessary then to decide that point, as the decision rested upon another ground.

7 Cal. 292-294. CHAMBERLAIN v. BELL. 68 Am. Dec. 260.

Conveyance—Notice.—Record of prior deed, the record not being a true copy of the original in the matter of the land conveyed, does not operate as notice to a subsequent purchaser, p. 294.

Cited in *Cady v. Purser*, 131 Cal. 555, applying rule where record made in wrong book; as authority sustaining the proposition that the record may be relied on by a subsequent purchaser, and that he cannot be affected by a deed not truly recorded, in the following cases: *Page v. Rogers*, 31 Cal. 320, dissenting opinion of Shafter, J.; *Davis v. Ward*, 109 Cal. 189; S. C. 50 Am. St. Rep. 30, a mistake in description of land in mortgage; *Barnard v. Campau*, 29 Mich. 164; *Gilchrist v. Gough*, 63 Ind. 589; S. C. 30 Am. Rep. 257, where a mortgage was entered and indexed correctly stating the amount, but in the record the amount was stated as less; and *Todd v. Union etc. Inst.*, 118 N. Y. 346, where the record failed to represent that the instrument was sealed. Disapproved in *Mangold v. Barlow*, 61 Miss. 597; S. C. 48 Am. Rep. 85, holding that a grantee fully acquits himself of all duty imposed by law when he lodges the instrument with the proper officer for record, and from that time it is notice to subsequent purchasers and creditors of what it contains, and not what the recording officers may make it to show on the record. So, to same effect, in *Shore v. Larsen*, 22 Wis. 146; and *Sinclair v. Slawson*, 44 Mich. 125; S. C. 38 Am. Rep. 236. Cited by counsel in *Wiseman v. Hutchinson*, 20 Ind. 43, as authority that purchaser is bound by recitals in deed. And cited on subject of record of deed as notice in the notes to the following cases: 30 Am. Dec. 464; 74 Am. Dec. 378; 80 Am. Dec. 428, 445; 81 Am. Dec. 487; 91 Am. Dec.

108, 109; 95 Am. Dec. 776; 5 Am. St. Rep. 74; 13 Am. St. Rep. 481; 42 Am. St. Rep. 871; and 50 Am. St. Rep. 33.

7 Cal. 297-312. BIRD v. DENNISON.

Conveyance—Notice by Possession.—Question of implied notice arising from possession under an unregistered deed, considered, holding it to be one of bad faith, and that it should be left to the jury whether the subsequent purchaser had actual notice, or such means of notice as to make his negligence a species of fraud, p. 302, et seq.

Cited as authority in this connection, in *Ellis v. Jeans*, 7 Cal. 416; *Bryan v. Ramirez*, 8 Cal. 467; S. C. 68 Am. Dec. 343. Construed in *Bird v. Lisbors*, 9 Cal. 6; S. C. 70 Am. Dec. 619, as holding that when a party relies upon possession as his sole evidence of title, he must be held to know the acts of those through whom he claims; and so referred to, in *Partridge v. McKinney*, 10 Cal. 184.

Registry Acts.—Construed, and holding that the penalty for failing to record conveyances declared in the statute must be limited to conveyances as defined by the statute, pp. 307 et seq.

Approved in *Middle Creek Ditch Co. v. Henry*, 15 Mont. 575. Applied as a rule of statutory construction, in *Belloc v. Rogers*, 9 Cal. 128; and *Perkins v. Thornburgh*, 10 Cal. 190.

7 Cal. 312-316. PORTER v. SCOTT.

Arbitration.—Award is void, if it appears on the face thereof that the arbitrators have not disposed of the whole matter in controversy, p. 316.

Cited as authority in *Fulmore v. George*, 91 Cal. 616; *Alexander v. McNear*, 12 Sawyer 86; S. C. 72 Fed. R. 406; also in *Jocelyn v. Donnel*, 14 Am. Dec. 754, note.

Same.—Award cannot be altered after delivery, without consent, p. 316.

Cited and distinguished in *Dudley v. Thomas*, 23 Cal. 368, holding that the making of a new and supplementary paper, and attaching it to the award, after it has been delivered, does not vitiate the original award, and may be treated as surplusage.

7 Cal. 317-330. MERCED MIN. CO. v. FREMONT. 68 Am. Dec. 262; S. C. before 7 Cal. 130.

Mining Claim.—Interest of occupant of is property, and his right to protect the property, for the time being, is as full and perfect as if he were tenant of the superior proprietor for years or for life, p. 327.

Affirmed in *McKeon v. Bisbee*, 9 Cal. 142; S. C. 70 Am. Dec. 643, holding that the interest of the occupant in property is subject to seizure.
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ure and sale under execution. So, in *State v. Moore*, 12 Cal. 70, holding that it is in the power of the legislature to tax such property. Cited as authority for the ruling stated, in *Partridge v. McKinney*, 10 Cal. 183; *Boggs v. Merced Min. Co.*, 14 Cal. 313, in argument of counsel; *Gillett v. Gaffney*, 3 Colo. 357; and *Gold Hill etc. M. Co. v. Ish*, 5 Oreg. 106; in 60 Am. Dec. 599, note, that possession is prima facie evidence of title; also, to same effect, in 63 Am. Dec. 110, note; 65 Am. Dec. 533, note.

Same.—Mining claims are real property, respecting which a suit will lie, under the provisions of the statute, against any persons claiming an adverse estate or interest therein, pp. 319, 320.

Cited as so holding, in *Hughes v. Devlin*, 23 Cal. 506; treating of the liability of a mining claim to partition among the several claimants thereto. Cited in *Phoenix etc. Co. v. Scott*, 20 Wash. 50, but holding mining location by husband not community property; *Mt. Rosa etc. Co. v. Palmer*, 26 Colo. 62, 77 Am. St. Rep. 250, sustaining action to quiet title to placer claim; *Bakersfield etc. Co. v. Kern Co.*, 144 Cal. 152, holding possessory right to mining claim, properly taxable as real property; *Fulkerson v. Chisna Min. etc. Co.*, 122 Fed. 786, one in possession of mining claim in Alaska under valid location may sue to quiet title under Alaska Code, section 475. *Curtis v. Sutter*, 15 Cal. 263, as authority for the maintenance of such suit as a measure of equitable relief. So, in *Burke v. McDonald*, 2 Idaho, 323; and *Loring v. Downer*, McAll. 366. Ruling affirmed in *Pralus v. Pacific etc. Min. Co.*, 35 Cal. 34; and approved in dissenting opinion of Hawley, J., in *Blasdel v. Williams*, 9 Nev. 172. Cited in *Kellogg v. King*, 114 Cal. 383; 8 C. 55 Am. St. Rep. 77, 79, to the point that a party may rely upon his possession as against a mere trespasser. So, in *Green v. Glynn*, 71 Ind. 339, construing statute providing for actions to quiet title. So, in *Faught v. Faught*, 98 Ind. 476; *Indiana etc. R. R. Co. v. Allen*, 113 Ind. 588; and *Davis v. Lennen*, 125 Ind. 188, holding that a decree quieting title concludes the parties.

Same.—Injunction lies to restrain trespass in entering upon a mining claim, and removing auriferous quartz therefrom, where the injury threatens to be continuous and irreparable, pp. 320, et seq.

Referred to as authority for sufficiency of complaint seeking relief against mere threatened trespass, in *Weaver v. Conger*, 10 Cal. 238. Cited as authority in *More v. Massini*, 32 Cal. 594, holding that an injunction lies to restrain a threatened injury to real property in the nature of waste, although the plaintiff be in possession. So, to same effect, in *Kellogg v. King*, 114 Cal. 386; *Richards v. Dower*, 64 Cal. 64; and *Silva v. Garcia*, 65 Cal. 592. Also, cited as authority in *Kirby v. Superior Court*, 68 Cal. 605, for issue of writ of prohibition to restrain threatened action of court where the remedy by appeal, though adequate, is not speedy. So, as authority for the allowance of an injunc-

tion in cases of trespass upon mines, in *Lockwood v. Lunsford*, 56 Mo. 78; *Zinc Co. v. Franklinita Co.*, 13 N. J. Eq. 343; *Mining Co. v. Mining Co.*, 5 Utah, 42; *Chapman v. Toy Long*, 4 Sawyer, 28, 34, S. C. 49 Fed. Rep. 536; *Buskirk v. King*, 72 Fed. Rep. 25; *United States v. Parrott*, McAllister, 317; *Hindley v. Wellington*, Fed. Cas. No. 6513; *Jerome v. Ross*, 11 Am. Dec. 501, note; and 72 Am. Dec. 78, note. So, in *Dudley v. Hurst*, 1 Am. St. Rep. 376, defining irreparable injury.

Same.—Allegation in complaint that defendant justified under an adverse claim will in no sense prejudice the right to the injunction, p. 324.

Cited as authority and applied in *Tuolumne Water Co. v. Chapman*, 8 Cal. 397, an action to restrain the diversion of water from a stream.

General Citations.—In 63 Am. Dec. 116; and 89 Am. Dec. 694, notes thereto, that courts take judicial notice of political and social condition of the country.

As to sufficiency of complaint in trespass, in *Weaver v. Conger*, 10 Cal. 238. In *United States v. Guglard*, 79 Fed. Rep. 23, as authority for sufficiency of complaint for injunction against cutting and removing timber.

7 Cal. 330-335. ANDREWS v. MOKELUMNE HILL COMPANY.

Appeal.—Rehearing will not be granted as to matters insufficiently presented on argument, p. 333.

Cited in *Sweigle v. Gates*, 9 N. Dak. 550, denying rehearing.

Pleading.—Defect of parties appearing upon face of complaint must be taken advantage of by demurrer, p. 334.

Affirmed in Dunn v. Tozer, 10 Cal. 170.

Same.—Allegation in answer that the debt sued for, if due at all, is due to plaintiff and another, as partners, cannot be treated as a demurrer, p. 334.

Examined in *Williams v. Southern Pac. R. R. Co.*, 110 Cal. 461, in which case it is held that one member of a firm may recover the whole amount due the firm, unless the defendant plead the nonjoinder of the other members as parties; and where there is no such plea in the answer, the plaintiff cannot be nonsuited merely because a partnership demand is proven instead of a separate demand due the plaintiff. Referred to in *Cope v. Prospecting Co.*, 1 Mont. 55, as an instance of hybrid pleading, not favored in law. Referred to in *Ryan v. Riddle*, 78 Mo. 522, as confining the rule that "parties united in interest must be joined as plaintiffs or defendants," to equity cases.

7 Cal. 335. TENNEY v. MINER'S DITCH CO.

Ditch Owner is not liable for leakage not caused by his negligence, p. 339.

Cited in *Central etc. Co. v. Wabash etc. Co.*, 57 Fed. 448, applying rule to damages caused by overflow of culvert.

7 Cal. 340-342. **COKER v. SIMPSON.**

Pleading.—Complaint which fails to aver a continuing injury is insufficient to sustain an injunction, p. 341.

Cited in *Mendelson v. McCabe*, 144 Cal. 233, but holding averment of intention to continue sufficient in absence of special demurrer; *Ball v. Kehl*, 87 Cal. 507, a case presenting similar facts. And cited in *Cox v. Railw. Co.*, 55 Ark. 459, as holding that past injuries constitute no ground for an injunction.

7 Cal. 342-346. **DORSEY v. McFARLAND.**

Mortgage of Homestead by husband, without concurrence of wife is void, p. 345.

Approved, and the rule applied, in *Van Reynegan v. Revalk*, 8 Cal. 76; *Dunn v. Tozer*, 10 Cal. 172; *Larson v. Reynolds*, 13 Iowa, 581; S. C. 81 Am. Dec. 446; *Sharp v. Bailey*, 14 Iowa, 390; S. C. 81 Am. Dec. 492. Cited as authority to the point that a judgment is not a lien upon the homestead of the judgment debtor, in *Hale v. Heaslip*, 16 Iowa, 457; so, as to the rights of bona fide purchaser, in *American Mort. Co. v. O'Harra*, 56 Fed. Rep. 281. Also cited in 60 Am. Dec. 615, note; and *Poole v. Gerrard*, 65 Am. Dec. 485, note. Cross-reference, *Revalk v. Kramer*, 8 Cal. 66.

Distinguished in *Gray v. Law*, 6 Idaho, 566, certificate of acknowledgment of married woman valid on face unless proof of falsity clear and convincing.

7 Cal. 347-348. **DEWEY v. LAMBIER.**

Legislature.—Has no power to affect past contracts, or to alter or destroy nature or tenure of estates, p. 348.

Cited as authority, construing Homestead Act of 1860, in *Cohen v. Davis*, 20 Cal. 195; and is cited as affirming validity of alcalde grants, in *Welch v. Sullivan*, 8 Cal. 201; *White v. Moses*, 21 Cal. 41; *Scott v. Dyer*, 54 Cal. 433, 434.

7 Cal. 348-352. **PEOPLE v. HOUGHTALING.**

Fraud.—In many cases involving questions of fraud courts of equity have concurrent jurisdiction with courts of law, p. 351.

Cited as authority in *Duff v. Duff*, 71 Cal. 533, holding that a court of equity has jurisdiction of an action to set aside a deed alleged to have been fraudulently executed, the remedy by ejectment in the particular case being inadequate. As to concurrent jurisdiction in courts of law and courts of equity, is cited in *Sweeny v. Williams*, 36 N. J. Eq. 629.

Trustee "de son tort."—Administrator sued in equity to compel him to pay over to the county treasurer, moneys collected by the intestate, as tax collector, may be treated as the trustee of a specific fund constituting no part of the assets of the estate, p. 351.

Referred to in *Gunter v. Janes*, 9 Cal. 658, the facts being substantially the same, and holding that the claimant of specific property, and not of a debt, cannot properly be called a creditor, within the meaning of the probate law. Cited as authority in *Hardy v. Hunt*, 11 Cal. 350; S. C. 70 Am. Dec. 790, discussing question of title to fund deposited in the hands of another for the purpose of betting on an election. So, in *Lathrop v. Bampton*, 31 Cal. 23; S. C. 89 Am. Dec. 145, as to when the cestui que trust may elect between personal liability of trustee and specific property. So, in *Aldrich v. Willis*, 55 Cal. 86, and applied in case of one wrongfully intermeddling with the property of an infant. So, in *Theller v. Such*, 57 Cal. 460, holding that if all the members of a partnership die, the rights of their representatives or successors can only be determined in a court of equity. Rule approved in *Easterly v. Barber*, 85 N. Y. 252; and *Root v. Railway Co.*, 105 U. S. 215.

Pleading.—Where defendant is described in the caption of the complaint as administrator, but the allegations of the complaint show that he is not sought to be charged as such, the objection that he is sued in his representative capacity is untenable, p. 350.

Approved in *Burling v. Thompson*, 77 Cal. 258.

7 Cal. 352-356. TAAFFE v. JOSEPHSON.

Presumption.—A person is presumed to know the law, and whether he does or not, the law holds him equally responsible, p. 355.

Cited in *Swartz v. Hazlett*, 8 Cal. 128, case of conveyance of property by a parent to his infant son in consideration of services performed, and holding the deed to be void against the creditors of the parent. So, in *Seligman v. Kalkman*, 8 Cal. 215, holding that a purchaser of goods must be held to know the true state of his own business, and, if he does not, the consequences should not be visited upon the party who had not the means of knowing.

Judgment.—Where one or more of the several elements composing an entire judgment is illegal, the whole judgment is void, as against creditors, p. 355.

Applied in *McKenty v. Gladwin*, 10 Cal. 228, to the case of a promissory note, part of the consideration being fraudulent. Distinguished in *Gladwin v. Garrison*, 13 Cal. 334, where the consideration of the note was the liability incurred by plaintiff as the indorser for defendants, and his express promise to assume and pay such liabilities. Principle approved in *re George Elder*, 1 Sawyer, 83; S. C. 3 Bank. Reg. 167, 684, holding that a claimant against a bankrupt's estate will not be

allowed to separate the good from the bad and prove his claim under the bankrupt law.

Same.—Fact of knowingly taking a judgment for more than was due at commencement of suit, is, in contemplation of law, conclusive evidence of fraud, p. 355.

Overruled, in *Patrick v. Montader*, 13 Cal. 442, in which case it is held, that an attachment issued before the maturity of the debt is only *prima facie* void as against a subsequent attachment. So, to the same effect, in *Gamble v. Voll*, 15 Cal. 510; so, in *Mendes v. Freiters*, 16 Nev. 397. Commented on, in *Tully v. Harloe*, 35 Cal. 308; S. C. 95 Am. Dec. 104, and said to be one of the cases which merely establishes the doctrine that a note or mortgage given for a greater sum than is due is void in any event, so far as the excess is concerned, and, in toto, unless satisfactorily explained. Cited as authority for granting relief against attachments based on demands not yet due, in *Davis v. Claffin Co.*, 63 Ark. 165; S. C. 58 Am. St. Rep. 105; and as to rights of junior attaching creditor generally, is cited in *Glaser v. First Nat. Bank*, 62 Ark. 176, 178; and as authority that misrepresentation of material fact is a fraud, in 68 Am. Dec. 280, note.

7 Cal. 356-357. **PEOPLE v. GILL.**

Criminal Law.—Where a statute is changed between the time of the commission of an offense and conviction therefor, but contains a saving clause as to offenses committed prior to the change, the punishment of the offender must be regulated by the old law, p. 357.

Cited as authority to the ruling stated in *Wharton v. State*, 94 Am. Dec. 219, note, discussing subject of saving clauses in statutes.

7 Cal. 358-360. **TUTTLE v. MONTFORD.**

Mechanic's Lien.—Is deemed to have accrued, and attaches to the property at the time of the commencement of the work, or the beginning to furnish the materials, p. 360.

Affirmed in *McCrea v. Craig*, 23 Cal. 525.

Mechanic's lien is favored in law, because the parties have, in part, created the very property on which the lien attaches, p. 360.

Approved in *Humboldt Lumber Mill Co. v. Crisp*, 146 Cal. 688, mechanic's lien does not attach on land where filed after destruction of building; *Galbreath v. Davidson*, 25 Ark. 494; S. C. 99 Am. Dec. 235, holding that laws creating such liens should have a liberal construction; *Ford v. Springer etc. Assn.*, 8 N. Mex. 48, construing local statutes.

7 Cal. 361-388. **HOLLAND v. SAN FRANCISCO.**

Municipal Corporations.—In its public and political capacity, the exercise by a municipal corporation of its delegated discretion can-

not be controlled by the judiciary; but in its private capacity, its acts are subject to judicial control, p. 377.

Distinction recognized and approved in *S. F. Gas Co. v. San Francisco*, 9 Cal. 466, 468, holding that such corporation, outside of its governmental capacity, is in many respects to be regarded the same as a private corporation. So, to like effect, in *Argenti v. San Francisco*, 16 Cal. 270, stating, however, that the questions involved in the two cases were entirely different. Cited on distinction stated, in 38 Am. Dec. 677, note; 55 Am. Dec. 349, 350, note.

Same.—A subsequent valid ordinance appropriating the proceeds of a sale of city property under an invalid ordinance, is a sufficient recognition of the first to render the sale valid and binding on all parties, pp. 377, et seq.

Overruled in *McCracken v. San Francisco*, 16 Cal. 621, and also distinguished in this, that in the principal case the fact that the property had been previously dedicated to public use as a public dock was not presented. Also overruled in *Pimental v. City of San Francisco*, 21 Cal. 362, holding that the sale was invalid, and passed no title to the bidders, and that they were entitled to recover back from the city the purchase money paid by them, and received and appropriated by the city authorities. Cited as authority, construing provisions of charter relative to enactment of ordinances, in *Satterlee v. San Francisco*, 23 Cal. 318. So, in *Newman v. City of Emporia*, 32 Kan. 464, as authorizing a municipal corporation to ratify, in a proper case, what its agents or officers attempted in good faith to do, but failed on account of some irregularity or informality.

General Citations.—It is said in *McMillan v. Richards*, 9 Cal. 421; S. C. 70 Am. Dec. 674, that where all the facts are found by the court below, it is the settled practice of the supreme court, since the decision of *Holland v. San Francisco*, supra, to direct upon a reversal, the entry of the judgment warranted by the facts found. Cited in 68 Am. Dec. 280, note, as authority for the rule that a person is bound to remember his own acts, and to be acquainted with the state of his own business. Referred to for some of the reasons sustaining the views of the court in *Lucas v. San Francisco*, 7 Cal. 468, where some of the questions involved in the principal case were considered.

7 Cal. 388-389. **RITTER v. STEVENSON.** S. C. 11 Cal. 27.

Mechanic's Lien.—Partakes of the nature of a mortgage on the land, and can only be assigned in writing, p. 389.

Explained as declaring a rule of evidence, in *Patent Brick Co. v. Moore*, 75 Cal. 211, and holding that in an action by an assignee to foreclose a mechanic's lien, it is not necessary that the complaint should specifically allege, or that the findings should show, that the assignment of the claim on which the lien is based was in writing. An

allegation and finding that the claim was assigned to the plaintiff is sufficient. Approved in *Curnow v. Blue Gravel etc. Co.*, 68 Cal. 264, holding that the lien is in the nature of a mortgage, and that an action for its foreclosure is a judicial proceeding in equity in which a party thereto is not entitled as matter of right to a jury trial.

Same.—Rule applicable to assignment of mortgage liens by assignment of the note or debt applies to assignments of mechanics' liens, p. 389.

Approved as authority in *Duncan v. Hawn*, 104 Cal. 14, 15, asserting the general rule, that if the existence of a lien does not depend upon possession it may be assigned, and that the assignment of the claim carries with it the right to the lien as an incident. Cited as authority sustaining the assignability of a laborer's lien, under the Mississippi statute, in *Kerr v. Moore*, 54 Miss. 288. Examined in *Skyrme v. Occidental Mill etc. Co.*, 8 Nev. 231, holding that an assignment of the paper called a mechanic's lien, with all rights thereunder, is an assignment of the debt as well as of the lien.

7 Cal. 390-391. CHAMBERS v. WATERS.

Replevin.—When property is not reclaimed, and judgment for costs is given for defendant, without judgment for return or value, payment of such judgment discharges the sureties, p. 390.

Distinguished in *Mills v. Gleason*, 21 Cal. 279, and held not to apply to cases where the action is dismissed by the plaintiff before trial. Cited in *Thomas v. Irwin*, 90 Ind. 561, reviewing the decisions on the subject, and holding that when there is a verdict for the defendant and that the property be returned, but no judgment of return, the sureties are not liable for failure to return. So, in *Farrah v. Bursley*, 100 Mich. 549, as sustaining the rule that the defendant must set up some affirmative right upon his part to have the goods delivered to him, or a return will not be adjudged; *Bank v. Morse*, 60 Kan. 532, holding sureties exonerated by similar judgment; also in *Truitt v. Collins*, 2 Penne. (Del.) 38, on point that in action on bond, matters triable in original action cannot be considered.

7 Cal. 391-393. LANDECKER v. HOUGHTALING.

Evidence.—Declarations of vendor before sale are admissible to impeach the sale on the ground of fraud, p. 392.

Rule affirmed in *Visher v. Webster*, 8 Cal. 113; *Jones v. Morse*, 36 Cal. 207; and *Eppinger v. Scott*, 112 Cal. 373; and approved in *Gregory v. Frothingham*, 1 Nev. 262; *O'Hare v. Duckworth*, 4 Wash. St. 474; and *Hinson v. Walker*, 65 Tex. 107. *Anderson v. White*, 18 Wash. 663, admitting such declarations on question of vendee's participation. Cited in *Horton v. Smith*, 42 Am. Dec. 631, note, collecting and collating the authorities on the subject. So, in *Massey v. Gorton*, 90 Am. Dec. 300, note.

7 Cal. 393-395. DOANE v. SCANNELL.

Contested Election.—What must be shown in action to contest an election, considered, p. 395.

Commented on in *People v. Scannell*, 7 Cal. 442, the principal questions involved being the same in both cases, and discussed together in argument before the court.

7 Cal. 395-398. PEOPLE v. DOUGHERTY.

An indictment for an offense committed on a vessel in the inland waters of the state, should set forth all the facts, giving the extra-territorial jurisdiction under the statute, p. 398.

Approved in *Connor v. State*, 29 Fla. 485; S. C. 30 Am. St. Rep. 134, an indictment for obtaining money by false pretenses, alleged to have been made in one of two places; *State v. Graham*, 23 Utah, 285, determining venue of prosecution for unlawful cohabitation where defendant had lived with different women in different counties. Cited as authority for sufficiency of a similar indictment, in *State v. Robinson*, 14 Minn. 451; and doubted in *Carlisle v. State*, 32 Ind. 59, 61, holding that a variance between the allegation as to the place of the offense and the proof on the trial, the place not being a part of the description of the offense, and both places being within the jurisdiction of the court, is not material.

7 Cal. 398-400. BROWN v. TOLLES.

Appeal.—Facts of case not reviewed, unless a new trial was demanded in court below, p. 399.

Approved and followed as rule of practice, in *Whitmore v. Shiverick*, 3 Nev. 303. Affirmed in *Allen v. Fennon*, 27 Cal. 69, holding it to be the settled practice even in equity cases.

Error in law, occurring at trial, may be reviewed on appeal although a new trial was not asked, p. 399.

Approved in *Walls v. Preston*, 25 Cal. 61; *Carpentier v. Williamson*, 25 Cal. 159; *Jones Lumber Co. v. Faris*, 5 S. Dak. 350; and *Cooper v. Insurance Co.*, 7 Nev. 121. Cited in *United States v. Trabing*, 3 Wyo. 147, but the rule held to be otherwise in Wyoming.

Party complaining of error must show wherein it consists, p. 399.

Approved in *Caulfield v. Bogle*, 2 Dak. Tr. 465; *Haugh v. Tacoma*, 12 Wash. St. 387, 389. Cited in *Bell v. S. P. R. R. Co.*, 144 Cal. 573, as to rulings on evidence; *Purdy v. Steel*, 1 Idaho, 217, holding that all exceptions taken in the court below will be treated as waived unless assigned as error.

7 Cal. 400-402. SCOFIELD v. WHITE.

Statutes.—Repeal of by implication is not favored, and in case of irreconcilable conflict between two acts, the last act governs, p. 401.

Affirmed in *Matter of Yick Wo*, 68 Cal. 304. Cited as authority, holding that repeals are not favored by implication, in *County of Saguache v. Decker*, 10 Colo. 153.

7 Cal. 402-403. PEOPLE v. CARPENTER.

Bail.—Sureties in bail bond cannot avail themselves, in defense to an action thereon, of an insufficiency of the justification of the undertaking, p. 403.

Approved as authority in *Murdock v. Brooks*, 38 Cal. 603; and *State v. Hays*, 2 Oreg. 320. Referred to, sustaining the validity of a recognizance, in *State v. Murphy*, 23 Nev. 400.

7 Cal. 403-405. PEOPLE v. OLIVERA.

Indictment, when fully sets forth the offense, word "feloniously" need not be used, p. 404.

Approved in *People v. Garcia*, 25 Cal. 533; *People v. Shaber*, 32 Cal. 38, an indictment for burglary; and *People v. Kelly*, 59 Cal. 378, in argument of district attorney, adopted as opinion of court. So, in *Cohen v. People*, 7 Colo. 276, an indictment for forgery. Referred to in *Kaelin v. Commonwealth*, 84 Ky. 361, quoting the language of *Murray, C. J.*, and holding that an indictment for a common-law felony should charge that the act was done "feloniously," or "with a felonious intent."

7 Cal. 405-408. MEIGGS v. SCANNELL.

Lien on Boats and Vessels Attaches as soon as service is had in the suit, p. 408.

Affirmed in *Fisher v. White*, 8 Cal. 422.

7 Cal. 409-418. ELLIS v. JEANS. S. C. 10 Cal. 456; 26 Cal. 272.

Conveyance.—Vendor's right to an equitable lien upon the land for the payment of the purchase money, sustained, p. 415.

Cited as authority in *Hill v. Grigsby*, 32 Cal. 59.

Estoppel.—Where two claim title under the same grantor, each is estopped to deny that the grantor had title in him or had a right to convey, p. 416.

Cited, in *Gilliam v. Bird*, 49 Am. Dec. 383, note, discussing subject of estoppel of persons claiming by deed.

Same.—One who enters into possession of land, claiming under another, and in subordination to his title, is estopped from questioning it, p. 416.

Doctrine affirmed in *Walker v. Sedgwick*, 8 Cal. 403; and *O'Keiffe v. Cunningham*, 9 Cal. 590; and cited in 52 Am. Dec. 295, note.

Ejectment.—One or more defendants may be joined in, and may

answer separately, or demand separate verdicts, but if not, will be concluded by a general verdict, p. 417.

Approved in *Ellis v. Jeans*, 26 Cal. 276; and cited in 60 Am. Dec. 599, note. Cited, in *Townsley v. Hornbuckle*, 2 Mont. 584, which was an action against several defendants for diverting water, and it was held that the court properly exercised its discretion in granting one of them a separate trial.

General Citations.—Cited as authority in *Kelly v. Dooling*, 23 Ark. 586, construing a similar instrument as a bond for title, or agreement to convey.

7 Cal. 418-419. **BERRY v. METZLER.**

New Trial.—Discovery of material testimony too late for trial is no ground for. The party should apply for a continuance, p. 419.

Affirmed in *Klockenbaum v. Pierson*, 22 Cal. 164; cited in *Scanlan v. San Francisco etc. Co.*, 128 Cal. 589, sustaining denial of new trial under facts stated. *Stevenson v. Sherwood*, 74 Am. Dec. 144, note, discussing subject of continuances.

7 Cal. 419-421. **CITY OF SACRAMENTO v. KIRK.**

Contract.—Any alteration in a contract made under an ordinance can only be by ordinance, p. 420.

Cited as authority in *County of Moultrie v. Savings Bank*, 92 U. S. 634, holding that ordinances of a municipality will be treated as a subscription to municipal bonds when so intended, and, upon acceptance, will constitute a contract. Also cited in *De Voss v. City of Richmond*, 98 Am. Dec. 671, note, fully discussing the subject.

7 Cal. 423. **LETTER v. PUTNEY.**

Exceptions.—To instructions given or refused in the lower court, must be taken at the time, and cannot be taken after verdict, p. 423.

Construed in *St. John v. Kidd*, 26 Cal. 267, as implying that such exceptions are well taken at any time before verdict. Approved in *Lobdell v. Hall*, 3 Nev. 520.

7 Cal. 424-427. **DOMINGUEZ v. DOMINGUEZ.**

Equity.—Refuses relief to stale demands, where a party has long slept upon his rights, and acquiesced for a great length of time, p. 427.

Approved in *Grattan v. Wiggins*, 23 Cal. 34, an action to foreclose mortgage; so, in *Hancock v. Plummer*, 66 Cal. 338, an action to determine conflicting claims to land.

Practice.—Verdict of jury in equity case being advisory only, error in the instructions is immaterial, p. 427.

Approved in *Schneider v. Brown*, 85 Cal. 206.

7 Cal. 428-432. **McALLISTER v. STRODE.**

Insolvent Act.—Party seeking benefit of, must comply strictly with its provisions, p. 430.

Approved in *Judson v. Atwill*, 9 Cal. 478, case of misdescription of note in schedule. So, in *McDonald v. Katz*, 31 Cal. 169, holding that the proceedings are special, and that no intendments can be made in favor of the jurisdiction. Cited to the ruling stated, in *Dulaney v. Hoffman*, 28 Am. Dec. 212, note, discussing subject at length.

7 Cal. 432-443. **PEOPLE v. SCANNELL.**

Quo Warranto.—Information in nature of, is the proper proceeding to try title to office, p. 439.

Approved in *Hull v. Superior Court*, 63 Cal. 177.

Official Bond.—Proceeding to obtain valid discharge of surety must be had before the officer or tribunal authorized by law to approve the bond, and not by the tribunal or officer which did, in fact, approve it, p. 439.

Construed as so holding and approved, in *People v. Evans*, 29 Cal. 433, 434, involving question of discharge of sureties on official bond of county treasurer.

Official Bonds.—Failure to approve does not ipso facto defeat officer of right to office, p. 440.

Cited in *Duffy v. State*, 60 Neb. 822, applying doctrine of relation to approval of bond in proper form and presented for approval within statutory time.

Generally.—The principal questions involved in this case, also arose in *Doane v. Scannell*, 7 Cal. 393, and the two cases were discussed together in the argument before the court. But in this case, the whole question arose upon a demurrer to defendant's answer; while in *Doane v. Scannell*, there was an inquiry made into the real facts of the case, and the decision of the county judge was predicated upon those facts. See 7 Cal. 394.

7 Cal. 443-449. **STEARNS v. AGUIRRE.** S. C. 6 Cal. 176.

Appeal.—Effect of simple reversal of erroneous judgment usually is, that the parties in the court below have the same rights which they had originally, p. 448.

Affirmed in *Phelan v. Supervisors etc.*, 9 Cal. 16; *Argenti v. San Francisco*, 30 Cal. 462; *Ryan v. Tomlinson*, 39 Cal. 646; *Sharp v. Miller*, 66 Cal. 99; *Meyers v. McDonald*, 68 Cal. 165; and *Falkner v. Hendy*, 107 Cal. 54. Approved in *Harrison v. Trader*, 29 Ark. 96. Construed in *Davidson v. Dallas*, 15 Cal. 84, as meaning that the parties "had the same right to try the case—not the right to try it in disregard of the

opinion of the appellate court." Referred to in *Woodman v. Garringer*, 2 Mont. 408, as not in point; the court holding "that where the error complained of occurs subsequent to the trial, and where a general verdict or a special verdict shows the facts found by a court or jury, and these are not controverted, and they are sufficient to warrant what we deem a correct judgment, and the opinion of the court clearly indicates what it would consider a correct judgment, then judgment of this court to the effect that the judgment of the court below is reversed and cause remanded, should not be construed as granting a new trial, but as putting the parties back to the stage of the case where the error occurred for which the judgment was reversed."

Judgment is valid until vacated or reversed when rendered by court having jurisdiction, p. 449.

Cited in *Estate of Mitchell*, 126 Cal. 250, holding order not necessarily vacated by subsequent order.

When judgment is rendered by a mere ministerial officer, without authority of law, it is void, p. 449.

Cited as authority in *Chipman v. Bowman*, 14 Cal. 158, and holding that in such case there is no ground for equity to interfere. Approved in *Kelly v. Van Austin*, 17 Cal. 566, holding that the clerk, in entering judgments upon default, must conform strictly to the provisions of the statute; so, in *Glidden v. Packard*, 28 Cal. 652; *Wilson v. Cleaveland*, 30 Cal. 198; and *Reinhart v. Lugo*, 86 Cal. 398; S. C. 21 Am. St. Rep. 54; and ruling affirmed in *Lacoste v. Eastland*, 117 Cal. 680, case of judgment in an action of ejectment, entered by the clerk without authority. Cited in *Welsh v. Kirkpatrick*, 30 Cal. 205; S. C. 89 Am. Dec. 87; and *Bond v. Pacheco*, 30 Cal. 534, discussing the question whether a judgment entered by the clerk on default is void when erroneous, and the latter case holding that a judgment so entered for a sum greater than is demanded in the prayer of the complaint and specified in the summons, is not void, but simply erroneous. Distinguished in *Salter v. Hilgen*, 40 Wis. 369, holding a premature rendition of judgment to be an irregularity. Ruling approved, but case said not to be in point, in *Sieber v. Frink*, 7 Colo. 151, the question being whether judgment may be entered in vacation, and answered affirmatively. Cited as authority in *Hazard v. Cole*, 1 Idaho, 287, holding that equity will not undertake to question a judgment for irregularities.

Distinguished in *Boyd v. Steele*, 6 Idaho, 629, clerk cannot defeat dismissal by neglecting or refusing to enter formal judgment of dismissal.

Same.—Where several defendants are jointly sued, the clerk has no authority to enter a several judgment by default against one of them, p. 448.

Followed in *Long v. Serrano*, 55 Cal. 20; and ruling approved in

Curry v. Roundtree, 51 Cal. 186. Case referred to as so deciding while the Practice Act was in force, in Wharton v. Harlan, 68 Cal. 427, construing corresponding sections 414 and 585 of the Code of Civil Procedure.

7 Cal. 450-455. BARROILHET v. BATTELLE.

Lease.—Covenant in, that a building to be erected by the lessee is mortgaged as security for the rent, will be treated in equity as a mortgage thereof, p. 452.

Explained and distinguished in *M. E. Church v. Seitz*, 74 Cal. 290, holding that where an owner of land having buildings thereon belonging to another executed a lease of the land to the latter, containing a provision giving the lessee the option at the expiration of the term either to remove the buildings or to require the lessor to purchase them at an ascertained valuation, an assignment by the lessee, of all his right, title, and interest in the lease, transferred to the assignee the ownership of the buildings and the right to compel the lessor to purchase them. Cited in *Bank v. Johnson*, 47 Ohio St. 311, discussing legal and equitable character of mortgages. So, in *Neubawer v. Gabriel*, 86 Wis. 204, holding that the assignee of a lease is bound to know the terms and contents thereof, and is thereby estopped to deny the lessor's title.

7 Cal. 455-462. GUTTMAN v. SCANNELL.

Sole Trader.—Act of 1852 vests in the married woman, who avails herself of it, the exclusive ownership and control of all the money and property invested in the trade or business in which she is engaged, p. 458.

Cited as authority in *Camden v. Mullen*, 29 Cal. 566, sustaining the validity of a promissory note and mortgage executed by a sole trader in her own name. So, in 63 Am. Dec. 128, note, denying the husband the right to dispose of the wife's portion of the community property by will.

Same.—Capital invested by wife as sole trader, to the extent of five thousand dollars, may be furnished by the husband, if not embarrassed. Otherwise the transfer would be a fraud upon his creditors, p. 459.

Approved in *Thomas v. Desmond*, 63 Cal. 428.

Same.—The statute does not prohibit the wife from employing her husband, but if she does, it would be a circumstance tending to establish fraud, though not conclusive evidence of it, p. 461.

Approved in *Youngworth v. Jewell*, 15 Nev. 48, construing Nevada sole traders act.

7 Cal. 463-478. LUCAS v. SAN FRANCISCO.

S. C. again, 28 Cal. 591, 592, involving questions of pleading and practice, and announcing the law of the case. See, also, further history of the case, *Wetmore v. San Francisco*, 44 Cal. 298.

Municipal Corporation may ratify an act defectively performed, if it had original power to perform it, p. 469.

Examined and doubted in *Argenti v. San Francisco*, 16 Cal. 272; but approved in *Newman v. City of Emporia*, 32 Kan. 464.

Same.—Controller's warrant, to be valid, must be in the form prescribed by the charter of San Francisco, p. 476.

Approved as authority in *Raymond v. People*, 2 Colo. App. 341, and applied to city warrants drawn upon the city treasury.

Same.—Courts are not bound to take judicial notice of the ordinances of municipal corporations, p. 474.

Cited as authority in *Carpenter v. Shinnors*, 108 Cal. 364, and applied to ordinances authorizing tax proceedings. Cited in 38 Am. Dec. 513, note; and 89 Am. Dec. 668, note.

Cross Reference.—*Holland v. San Francisco*, 7 Cal. 361, ante.

7 Cal. 479-503. STAFFORD v. LICK. S. C. 10 Cal. 12.

Conveyances.—Deed executed prior to the act concerning conveyances must, in order to prevail against a subsequent deed taken in good faith and for a valuable consideration, be first recorded, p. 486.

Affirmed on principle of *stare decisis*, in *Clark v. Troy*, 20 Cal. 224. Approved in *Noble v. Hook*, 24 Cal. 640, construing homestead act of 1862. Approved, also, in *Anderson v. Fisk*, 36 Cal. 634; and *Graff v. Middleton*, 43 Cal. 343.

Same.—Said act held to be constitutional, neither impairing the obligation of contracts, nor divesting vested rights, p. 487.

Cited in *Robinson v. Magee*, 9 Cal. 85; S. C. 70 Am. Dec. 641, holding that contracts cannot be impaired by statute.

Same.—Possession under an unrecorded deed is not constructive notice of title, but is admissible in evidence as tending to prove actual notice, p. 489.

Cited as authority in *Fair v. Stevenot*, 29 Cal. 490. Dissenting opinion of Burnett, J.; referred to, in 52 Am. Dec. 295, note.

7 Cal. 503-511. ALVAREZ v. BRANNAN. 68 Am. Dec. 274.

Fraud.—Action will lie to recover back purchase money of land, the sale of which, by deed of bargain and sale, was procured through false and fraudulent representations respecting title, and the procurement by the defendant of a full title, and tender of a conveyance, will not bar a recovery, p. 509.

Adhered to in *Wright v. Carillo*, 22 Cal. 604, 605, questioning a different view maintained in *Peabody v. Phelps*, 9 Cal. 213. Approved in *Kimball v. Saquin*, 86 Iowa, 191, holding that an action for deceit will lie against a vendor of land for misrepresentations as to his title. Cited in *Spencer v. Sandusky*, 46 W. Va. 586, granting rescission and recovery under facts stated; and to same effect see *Muller v. Palmer*, 144 Cal. 312. Approved, also, in *Morris v. Courtney*, 120 Cal. 65, 66; *Meeks v. Garner*, 93 Ala. 21. Cited in note, 28 Am. Dec. 430, and 71 Am. Dec. 218.

Same.—Misrepresentation of a material fact is fraudulent, though unintentional, pp. 507, 508.

Approved in *Taafe v. Josephson*, 7 Cal. 355; *Holland v. San Francisco*, 7 Cal. 378; *Seligman v. Kalkman*, 8 Cal. 215, purchaser concealing the fact of his insolvency; and *Groppengiesser v. Fake*, 103 Cal. 42, presenting a similar state of facts. Approved, sustaining instructions on fraudulent transfer, in *Young v. Harris*, 4 Dak. 375; and cited on subject of fraud and fraudulent representations in the notes to the following cases: 75 Am. Dec. 672; 77 Am. Dec. 689, 772; 80 Am. Dec. 183; 81 Am. Dec. 58, 376; 84 Am. Dec. 162; 90 Am. Dec. 425, 431; 9 Am. St. Rep. 730; and 11 Am. St. Rep. 350.

Same.—Injured party may elect to rescind, or proceed upon the covenants of his deed, p. 510.

Approved in *Loaiza v. Superior Court*, 85 Cal. 30; S. C. 20 Am. St. Rep. 207, case of fraudulent misrepresentations as to the value of the land, knowingly made by the vendor. So, in the similar case of *Groppengiesser v. Lake*, 103 Cal. 42; and principle likewise approved in *Adams v. Reed*, 11 Utah, 504. Cited in 74 Am. Dec. 739, note.

Pleading.—Objection to defect of parties, apparent upon face of complaint, must be taken by demurrer, or it will be deemed waived, p. 510.

Cited as authority in *Dunn v. Tozer*, 10 Cal. 170; 88 Am. Dec. 81, note; 97 Am. Dec. 513, note; 3 Am. St. Rep. 579, note; 13 Am. St. Rep. 221, note; 33 Am. St. Rep. 430, note; and 58 Am. St. Rep. 179, note.

7 Cal. 511-514. **MURDOCK v. MURDOCK.**

Services—Implied Contract.—Where a step-mother was supported by the step-children, for whom she performed domestic services, held that the law did not imply a contract to pay for such services, p. 513.

Cited as authority in *Russell v. Switzer*, 63 Ga. 723; *Holloway v. Holloway*, 86 Ga. 579; S. C. 22 Am. St. Rep. 486, that step-mother may assume the relation of parent towards the step-children, and so, as the head of a family, entitled to have a homestead set apart for the benefit of herself and them. Principle approved in *Livingston v. Hammond*, 162 Mass. 376. Cited in *Bartley v. Richtmyer*, 53 Am. Dec. 346,

note, discussing subject of step-parents' right to compensation, for support, education, etc., of step-children.

Same.—In such cases, all the circumstances must be considered to ascertain what were the expectations of the parties as to compensation, etc., existing while the relation continued, p. 514.

Approved in *Swartz v. Hazlett*, 8 Cal. 123, case of conveyance of property by parent to infant son in consideration of services performed by the latter. So, in *Barstow v. City Railroad Co.*, 42 Cal. 468, which was an action against a corporation by one of its directors to recover on a quantum meruit for services performed for the corporation as director.

7 Cal. 514-518. **TAAFFEE v. ROSENTHAL.**

Appeal will lie, after final judgment, from an order refusing to discharge an attachment, p. 518.

Approved in *Sheppard v. Yocum*, 11 Oreg. 235. Denied in *Allendar v. Fritts*, 24 Cal. 488; criticised, but followed as a rule of practice in *Williams v. Glasgow*, 1 Nev. 537; and cited as authority to the ruling stated, in *Clark v. Ostrander*, 13 Am. Dec. 548, note. Such orders are nonappealable by legislative enactment. See Cal. Code Civ. Proc., sections 939, 963.

Undertaking on attachment, made payable to the people of the state of California, instead of the defendant in the suit, is unobjectionable, p. 518.

Approved in *Cuirac v. Packard*, 29 Cal. 200, case of undertaking running in the name of the sheriff. Cited in *Hollister v. Hubbard*, 11 S. Dak. 462, sustaining action by party in interest against sheriff on latter's official bond in favor of county. Principle of the decision approved in *Lomme v. Sweeney*, 1 Mont. 590; *Territory v. Hildebrand*, 2 Mont. 429; and *Commissioners etc. v. Lineberger*, 3 Mont. 238.

7 Cal. 519-527. **PEOPLE v. MIZNER.**

Office.—Vacancy in, and power of the governor to fill, considered, and holding that the intent of the constitution is to limit the executive patronage, pp. 523, 524.

Approved in *People v. Langdon*, 8 Cal. 15, distinguishing between power to fill vacancy and power to fill office. Examined, and the doctrine of the case to some extent modified, in *People v. Addison*, 10 Cal. 7; *People v. Whitman*, 10 Cal. 46; *People v. Stratton*, 28 Cal. 392; *People v. Tilton*, 37 Cal. 618, 619, 621, 622, 625; *People v. Parker*, 37 Cal. 642, 647, 649. Approved as authority in *Weeks v. Gamble*, 13 Fla. 18; *State v. Murphy*, 32 Fla. 150, 151. Cited as authority for restricting the power of the governor, in dissenting opinion of McKinstry, *J.*, *Treadwell v. Yolo County*, 62 Cal. 569. So, in *State v. Johns*, 3 Oreg. 535, holding that an appointee of the governor, appointed to fill a

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vacancy caused by death or resignation, only holds until the first general election after the vacancy occurs. So, in *People v. Ward*, 107 Cal. 241, case of vacancy where a district attorney had been elected, but died after qualification, and before the expiration of the term of the prior incumbent. Distinguished in *State v. Finnerud*, 7 S. Dak. 242, construing a different constitutional provision relating to the subject.

7 Cal. 527-535. **NIETO v. CARPENTER**. S. C. 21 Cal. 455, 458.

Estoppel.—Recognition of title by Mexican government under an assumed Spanish grant, estops it from regranteeing the premises to another, p. 533.

Principle of decision approved and applied in *Oxford Township v. Columbia*, 38 Ohio St. 95. Referred to in *Reid v. State*, 74 Cal. 261, but holding that there can be no estoppel against the state. Cited in *Reid v. State*, 74 Ind. 261, but holding that there can be no estoppel against the state; *Graff v. Castleman*, 16 Am. Dec. 754, note, sustaining the rule that recitals in conveyances by the government are as binding on the government as on a private person.

7 Cal. 535-542; 68 Am. Dec. 280. **SAYRE v. NICHOLS**. S. C. before, 5 Cal. 487.

Agency.—Word "agent" appended to name of agent designates the capacity in which he acts, and is not a mere *descriptio personae*, p. 538.

Cited as authority in *Davidson v. Dallas*, 8 Cal. 247; and *Southern Pac. Co. v. Dredger Co.*, 118 Cal. 372; so, in 100 Am. Dec. 468, note; 9 Am. St. Rep. 196, note; 13 Am. St. Rep. 632, note. Doubted in *Gillig v. Lake Bigler Road Co.*, 2 Nev. 223.

Same.—When a bill of exchange is headed with the name of a banking office, and when paid, to be charged to that office, and is signed by a person as agent, such person is not personally liable thereon, p. 540.

Approved as authority in *Hitchcock v. Buchanan*, 105 U. S. 417; S. C. 39 Am. Rep. 302, note; and *Falk v. Moers*, 127 U. S. 603, analogous cases. So, to same effect, in *Hall v. Crandall*, 29 Cal. 571; S. C. 89 Am. Dec. 66; and *Gillig v. Lake Bigler Road Co.*, 2 Nev. 223. Cited in *Tannatt v. Rocky Mt. Nat. Bank*, 1 Colo. 286; S. C. 9 Am. Rep. 163, holding that the agent must either sign the name of the principal to the bill, or it must appear on the face of the bill itself in some way, that it was in fact done for him, or the principal will not be bound. So, as authority to same effect, in *Mott v. Hicks*, 13 Am. Dec. 563; and 94 Am. Dec. 326, note.

Same.—In cases of doubt, parol evidence is admissible to show the true character of the instrument, and who was intended to be bound by it, p. 539.

Cited as authority in *Burgess v. Fairbanks*, 83 Cal. 216, 17 Am. St. Rep. 231; *Gerber v. Stuart*, 1 Mont. 177; and *McDonough v. Templeman*, 2 Am. Dec. 518, note.

Agent may delegate mere mechanical powers or duties but cannot delegate discretionary powers, p. 542.

Cited in *Rohrbough v. United States etc. Co.*, 50 W. Va. 153, holding principal bound by acts of clerk employed by agent; as authority sustaining this rule, in 72 Am. Dec. 323, note; 92 Am. Dec. 442, note; 17 Am. St. Rep. 183, note, and *Davis v. King*, 50 Am. St. Rep. 111, 112, note, where the authorities bearing on the subject are collected and collated.

General Citations.—Cited in *Greenberg v. Whitcomb Lumber Co.*, 48 Am. St. Rep. 917, note, treating of liability where agent acts without authority. *Riley v. Simpson*, 83 Cal. 218.

7 Cal. 543-548. **NAGLEE v. PALMER.**

Setoff.—To justify setoff at law, the demands must be between parties to the record in their own right, and must be of the same kind and quality, p. 546.

Cited as authority in *Lyon v. Petty*, 65 Cal. 324, construing code provisions relative to counterclaim. Commented on, in *Duff v. Hobbs*, 19 Cal. 659, and setoff disallowed, the claim not being between the parties to the record. See *Duff v. Hobbs*, 23 Cal. 596.

Same.—Mere existence of cross-demands does not justify setoff in equity, without equitable circumstances, p. 547.

Cited as authority in *Duff v. Hobbs*, 23 Cal. 627, holding that a court of equity will not permit cestuis que trusts, who are insolvent, to enforce and collect, through their trustee, a judgment against parties who hold a just and valid demand against them, which they have no means of enforcing or collecting if a setoff is denied.

7 Cal. 549-551. **DUTERTRE v. DRIARD.**

Execution.—Levy on personal property capable of manual delivery must be made by taking property into possession, p. 551.

Cited in *People v. Sylva*, 143 Cal. 63, holding levying officer not a trespasser under facts stated.

Distinguished in *Hawkins v. Roberts*, 45 Cal. 41, in which case the contest arose between a prior vendee of the defendant in attachment, who did not take the possession, and the sheriff who, finding the goods still in the possession of the plaintiff's vendor, levied an attachment thereon.

7 Cal. 551-554. **BAKER v. BARTOL.**

Bond may be valid as common-law bond though not warranted by statute, p. 553.

Cited in note to *Babcock v. Carter*, 67 Am. St. Rep. 200, on defective bonds.

Parties.—Beneficiary of contract may sue as the real party in interest, though not a party to the contract, p. 554.

Approved in *Lally v. Wise*, 28 Cal. 544; *Curiae v. Packard*, 29 Cal. 200; *Wormouth v. Hatch*, 33 Cal. 127; *Lomme v. Sweeney*, 1 Mont. 590; *Commissioners etc. v. Lineberger*, 3 Mont. 238. Facts of the case restated in *Riddle v. Baker*, 13 Cal. 302.

7 Cal. 554-567. **THORNBURGH v. HAND.**

Pleading.—Justification of officer for seizure of property in possession of a stranger to the writ, must be specially pleaded, p. 561.

Approved as authority in *Scarborough v. Dugan*, 10 Cal. 305. So, in *Pope v. Bowzer*, 1 Kan. App. 729; and *Fisher v. Kelly*, 30 Oreg. 8. Cited in *Stephens v. Hallstead*, 58 Cal. 197, sustaining sufficiency of plea of justification. So, in *Whetmore v. Rupe*, 65 Cal. 239.

Attachment.—Officer who seizes property in hands of debtor may justify under the writ of, simply. But if he takes the property from a third person, who claims to be the owner thereof, he must allege and prove not only the attachment, but also the proceedings on which it was based, pp. 561, 566.

Cited in *Darville v. Mayhall*, 128 Cal. 618, holding justification insufficient; *Aigeltinger v. Einstein*, 143 Cal. 613, quoting *Bickerstaff v. Doub*, 19 Cal. 112. Approved as authority, sustaining the ruling stated, in the following cases: *Bickerstaff v. Doub*, 19 Cal. 112; *S. C. 79 Am. Dec. 205*; *Knox v. Marshall*, 19 Cal. 622; *Sexey v. Adkinson*, 34 Cal. 350; *S. C. 91 Am. Dec. 700*; *Horn v. Corvarubias*, 51 Cal. 526; *Brichman v. Ross*, 67 Cal. 604; *Hootman v. Bray*, 3 Mont. 412; *Oberfelder v. Kavanaugh*, 21 Neb. 491; *Williams v. Eikenberry*, 25 Neb. 731; *S. C. 13 Am. St. Rep. 524*; *Keys v. Grannis*, 3 Nev. 550; *Miller v. Koertge*, 70 Tex. 166; *S. C. 8 Am. St. Rep. 590*; *Buddee v. Spangler*, 12 Colo. 221; *Braley v. Byrnes*, 20 Minn. 439; *Howard v. Manderfield*, 31 Minn. 339; *Franklin v. Gummersell*, 9 Mo. App. 88; *Boot and Shoe Co. v. Bain*, 46 Mo. App. 593; *Freiburg v. Foreman*, 1 Tex. App. Civ. 219; and *Jones v. McQueen*, 13 Utah, 187. So, to same effect, in *Castle v. Bader*, 23 Cal. 78; *Seaver v. Fitzgerald*, 23 Cal. 93; and *West v. Humphrey*, 21 Nev. 86; and cited as authority for the rule, in 23 Am. Dec. 299, note.

Same.—Party seeking to enforce remedy by attachment must comply strictly with the law, p. 565.

Cited as authority to this point, in *Fridenberg v. Pierson*, 79 Am. Dec. 165, note, collecting and collating the authorities on the subject.

Witness Cannot be Cross-examined, except in reference to matters concerning which he has been examined in chief, p. 561.

Cited as authority in *Aitken v. Mendenhall*, 25 Cal. 213; and *Blake v. Powell*, 26 Kan. 326.

7 Cal. 568-573. **NICKERSON v. CHATTERTON.**

Replevin.—A judgment for the plaintiff, in order to hold the sureties on the undertaking for the return of the property, must be in the alternative, p. 571.

Commented on, but followed on the principle of stare decisis, in *Clary v. Rolland*, 24 Cal. 149-153, holding that in an action on such undertaking the complaint must aver that the value of the property was found by the jury, and that an alternative judgment was rendered. Distinguished in *Ginica v. Atwood*, 8 Cal. 448, case of a nonsuit, and holding that the decision in *Nickerson v. Chatterton* only applies to cases submitted to a jury. Denied in *Lomme v. Sweeney*, 1 Mont. 592, 596, in which case it is held, that a judgment for the return of the property, which does not fix its value, if a return cannot be had, irregular, but not illegal or void. So, in *Manix v. Franke*, 9 Kan. 136.

Same.—An averment in the complaint in an action on the undertaking, that an execution was issued and returned unsatisfied, is unnecessary, p. 573.

Cited as authority and applied in *Tissot v. Darling*, 9 Cal. 285; *Murdock v. Brooks*, 38 Cal. 604; and *Pieper v. Peers*, 98 Cal. 43, actions on undertakings on appeal.

Same.—But it is necessary to allege and prove that the property was delivered to the party requiring it, and for whom the bond was given, p. 572.

Cited as authority in *Coburn v. Pearson*, 57 Cal. 308, holding that a complaint in an action upon an undertaking in attachment was defective in not stating that the sheriff did not complete the levy.

Same.—When judgment is in the alternative, title to the property vests in the party against whom the judgment is given, subject to the right of the successful party to take it in discharge of so much of the judgment as is made up by the assessed value of the property, p. 572.

Cited as authority in *Hunt v. Robinson*, 11 Cal. 278, in which case it was held that an attachment lien continued unimpaired during the proceedings in replevin.

Same.—Liabilities of the sureties and limitation thereof, considered, p. 572.

Referred to in this connection in *Harrison v. Wilkin*, 60 N. Y. 417, in which case it is held that the parties to an action on an undertaking by the plaintiff in replevin may waive the formalities of the statutory proceedings, and in such case the sureties are bound by the waiver, and are estopped from questioning the recitals in the undertaking.

General Citations.—Referred to in *Chambers v. Waters*, 7 Cal. 390, as settling most of the points arising in the latter case.

7 Cal. 573-575. MINTURN v. FISHER.

Bank Check.—Notice of dishonor may be dispensed with by express waiver, or by any act that will amount to a waiver, p. 575.

Cited in *Allen v. Rundle*, 50 Conn. 27; S. C. 47 Am. Rep. 606, denying the admissibility of parol evidence to prove the waiver of the collectibility of a note prescribed by the parties in their contract. Also cited, bearing on this question, in 1 Am. Dec. 99, note.

7 Cal. 575-577. SOULE v. DAWES. S. C. 6 Cal. 473; and S. C. 14 Cal. 247; and 20 Cal. 522 under the title of **SOULE v. RITTER.**

Mechanic's Lien.—By relation, attaches from the date of the commencement of the work, p. 576. In this case, part of the lien claim postponed to the lien of a mortgage, id.

Approved, as to time lien attaches, in *Crowell v. Gilmore*, 13 Cal. 56. So, in *McCrea v. Craig*, 23 Cal. 525; and *Welch v. Porter*, 63 Ala. 232. So, in similar case of *Capron v. Strout*, 11 Nev. 313, postponing lien for work to mortgage lien. Examined in *Hartun Steam Heater Co. v. Gordon*, 2 N. Dak. 251; S. C. 33 Am. St. Rep. 779, asserting the rule that a mechanic's lien is paramount to the lien of a mortgage executed, after the building was commenced, but before the labor or material was furnished. Cited in *In re Coulter*, 2 Sawyer, 49; S. C. 3 Bank. Reg. 70, construing lien act of Oregon. So, in *Union Water Co. v. Fluming Co.*, 22 Cal. 631, holding that a mortgage on a flume for the conveyance of water will, without any special provisions, include all improvements then upon the line of the work, and also all which may afterwards be put thereon. Referred to in *Soule v. Ritter*, 20 Cal. 523, same case on third appeal, and the doctrine of previous decisions as to the conclusiveness, on a second appeal, of a decision upon points of law made by the supreme court in the same case on a former appeal, recognized and applied. And referred to in *Soule v. Dawes*, 14 Cal. 249 (second appeal), as settling the equities of the parties as to the matters passed upon by the judgment in the case.

7 Cal. 577-579. SACRAMENTO VALLEY RAILROAD CO. v. MOFFATT. S. C. 6 Cal. 74.

Eminent Domain.—Parties in possession of land, claiming title, are presumed to be the owners thereof, and entitled to compensation before it can be taken for public uses, p. 579.

Cited as sustaining the ruling stated, in 60 Am. Dec. 579, note; and 89 Am. Dec. 435, note.

Eminent Domain.—Title to lands cannot be inquired into, p. 579.

Distinguished in *City v. Pomeroy*, 124 Cal. 611, holding rule confined to proceedings under statute of 1853.

7 Cal. 579-584. **PEOPLE v. WOOD.**

Statute.—Act of 1851, authorizing funding of debt of San Francisco, entered into and became a part of the new contract thereby authorized between the city and her creditors, and it was not competent for the legislature to substantially change its terms, so as to impair or destroy the rights of parties under the contract, p. 584.

Cited and construction approved, in *People v. Bond*, 10 Cal. 570. So, in *Forstall v. Association of Planters*, 34 La. An. 777, construing a statute in some respects similar; so, in *Smith v. City of Appleton*, 19 Wis. 472; and *Maenhaut v. New Orleans*, 2 Woods, 112. Cited, discussing powers of municipal corporation, in *Moore v. New Orleans*, 32 La. An. 739, 757; and *City of Richmond v. Railroad Co.*, 21 Gratt. 617.

7 Cal. 584-588. **SMITH v. CURTIS.**

Appeal.—Rulings of court upon orders, etc., not reviewed on, unless regularly excepted to in court below, p. 587.

Approved and applied in *Lamkin v. Sterling*, 1 Idaho, 126, denial of motion to quash writ of mandate; and *Goodman v. Milling Co.*, 1 Idaho, 133, order denying motion to open default.

Summons.—Errors and defects in, waived by appearance and pleading of party, p. 587.

Cited as authority and applied in *Ford v. Bushard*, 116 Cal. 276, case of substitution of assignee as plaintiff made ex parte, and holding that the answer to the supplemental complaint of the assignee was a waiver of the error in that regard. Approved in *Dyas v. Keaton*, 3 Mont. 504, wherein facts are set out constituting a waiver of defective notice in the summons.

7 Cal. 588-594. **GUNTER v. LAFFAN.**

Law of Case.—Decision of supreme court in a given case, although erroneous, becomes the law of the case, p. 592.

Doctrine affirmed in *Soule v. Dawes*, 14 Cal. 249; *Davidson v. Dallas*, 15 Cal. 82; and *Leese v. Clark*, 20 Cal. 417; approved and applied in *Davenport v. Kleinschmidt*, 8 Mont. 480; *Dodge v. Gaylord*, 53 Ind. 372; and *Silva v. Pickard*, 14 Utah, 249. Cited in *Haley v. Kilpatrick*, 104 Fed. 648, quoting *Leese v. Clark*, 20 Cal. 388. So, in *Duffitt v. Crozier*, 30 Kan. 152, holding that no new or additional facts having been presented to the court below, judgment must be rendered so as to conform to the mandate of the supreme court.

Tenant in Common may purchase at judicial sale cotenant's interest in joint property, p. 593.

Affirmed in *Bradbury v. Barnes*, 19 Cal. 123. Cited in *Moss v. Rose*, 27 Or. 598; S. C. 50 Am. St. Rep. 744, discussing rights of tenants in common of an irrigating ditch. *Mullins v. Butte etc. Co.*, 25 Mont. 536, on point that possession by one cotenant is presumed to be for benefit of all. So, in *Ward v. Ward*, 52 Am. St. Rep. 927, note, maintaining that cotenants may occupy, as between each other, the relation of landlord and tenant.

VOLUME VIII.

By JOSEPH A. JOYCE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

8 Cal. 1-20. PEOPLE v. LANGDON.

Office.—Power to fill vacancy and the power to fill an office are distinct, p. 15.

Cited, *People v. Rucker*, 5 Colo. 464, in approval where it was held that the legislature had the power to create an office and vest the appointment in the governor by and with the advice and consent of the senate; but that the senate not being in session, the governor had no power to appoint, and there being no incumbent, there was a vacancy only to be filled as provided in the constitution.

Power to Fill an Office is political, and is exercised in common by the legislatures, governors, and other executive officers, except withheld by the constitution, p. 16.

Cited in *State v. Compson*, 34 Or. 28, sustaining local statute as not invading governor's prerogatives under constitution; *Commissioners v. George*, 104 Ky. 270, quoting note to *People v. Freeman*, 13 Am. St. Rep. 129, 130; *Travelers' Ins. Co. v. Oswego*, 59 Fed. Rep. 67, where it is held that the legislature has under the constitution of Kansas power to appoint officers. It is also cited upon the general principle of legislative powers. *People v. Freeman*, 80 Cal. 236; 13 Am. St. Rep. 125, to the point that the legislature can fill offices by itself created. So, also, in *State ex rel. v. Hyde*, 121 Ind. 42, to this last point. Extended note, 13 Am. St. Rep. 129, 130.

Office.—Vacancy under the constitution occurs when the appointing or electing power fails to act, or the party elected or appointed fails to qualify; it occurs in the statutory sense when the party enters on the duties of the office, and then dies or resigns, or otherwise ceases to be an incumbent, before the term expires, pp. 13-16.

Cited, *People v. Tilton*, 37 Cal. 617, 621, 625, but this distinction is disapproved; *State v. Johns*, 3 Ore. 535, 538, where a somewhat similar distinction is made.

Office.—Power to Fill Vacancy may be derived under the constitution when it does not exist under the statute, pp. 13-15.

Cited, *People v. Parker*, 37 Cal. 650, where it is said, "The constitutional provision only steps in where no other appointing power is provided," and also declaring that the construction of such provision should strictly limit the power of the executive.

Official Term of resident physician of insane asylum runs only from date of his election, p. 16.

Cited, *People v. Whitman*, 10 Cal. 46, and applied to the office of comptroller.

Office.—Power of Appointment for a full term being vested in the legislature, the governor may not appoint for such term. It is the intention of the constitution to restrict the power of the governor, pp. 15, 16.

Cited, *People v. Tilton*, 37 Cal. 621, as to restriction of power of the governor; *Weeks v. Gamble*, 13 Fla. 18, to the point the executive could not fill vacancy beyond a next election thereafter; *State v. Johns*, 3 Oreg. 535, 538, to the same effect as to restriction of powers, and holding office only until next election.

General Citation.—State v. Coeke, 54 Tex. 485, only as to the general point of what circumstances justify an incumbent from holding over when entitled to hold till his successor is elected and qualified.

8 Cal. 21-26; 68 Am. Dec. 287. **WEBSTER v. HAWORTH.**

Return on Attachment may be amended so as to postpone subsequent intervening attachments, p. 25.

Cited, *Renick v. Ludington*, 20 W. Va. 552, but declared to throw no light on the question before the court, as there had been no amendment of process, nor had any third person's rights attached on the verity of the sheriff's returns; *Richards v. Ladd*, 6 Sawy. 45, to substantially the same effect; note, 13 Am. Dec. 180, as to effect of amendment.

Execution.—Caveat emptor applies to valid judicial sales in the absence of misrepresentations, p. 26.

Cited, extended note, 70 Am. Dec. 572, as to when purchaser at such sale may be relieved from his bid, and the rule caveat emptor; *Id.* 582, as to misrepresentation as ground for relief; notes, 71 Am. Dec. 227; 83 Am. Dec. 230; 5 Am. St. Rep. 277; 8 Am. St. Rep. 752.

8 Cal. 26-27. **ANTHONY v. DUNLAP.**

Injunction.—One court has no power to interfere with the judgments and decrees of another court of concurrent jurisdiction, except where the court in which the action is pending is unable by reason of jurisdiction to afford the relief sought, p. 27.

Cited, *Uhlfelder v. Levy*, 9 Cal. 614, where it is said the rule is not based upon the personal rights of parties, but upon the rights of courts of co-ordinate jurisdiction, and an exception was made in cases where the provisions of the code require the action to be tried in a particular county, and where several fraudulent judgments are confessed in several courts; *Crowley v. Davis*, 37 Cal. 269, in affirmance; *Spreckels v. Hawaiian Com. etc. Co.*, 117 Cal. 382, holding that under section 3423, Cal. Civ. Code, state courts cannot restrain persons within the state from prosecuting pending actions in a domestic or foreign jurisdiction except to prevent a multiplicity of suits; considering also section 3366, and subd. 3, section 3422, of said code; *Scott v. Runner*, 146 Ind. 15, 58 Am. St. Rep. 347, so holding, although the judgment is void on which the final process is based; Cited in *Lake etc. Co. v. Mimms*, 49 La. Ann. 1285, holding execution from state court not stayed by appointment of receiver for defendant by federal court; *Beck v. Fransham*, 21 Mont. 120, denying injunction against execution from court of concurrent jurisdiction; *Platto v. Deuster*, 22 Wis. 486, in approval of a like rule as the principal case.

8 Cal. 27-29. **GOODALE v. SCANNELL.**

Replevin.—To estop plaintiff as against a creditor of a third party, it must appear that he parted with a right or advantage upon faith of the plaintiff's declaration, p. 29.

Cited, *Bashore v. Parker*, 146 Cal. 529, declarations of son of wife by former marriage and declarations of wife, made in his absence, cannot raise an estoppel as to title of husband to community property; *Warder v. Baker*, 54 Wis. 61, where it is said: "We have been unable to find any well-considered case in which it was held that an admission of liability made by a defendant before action brought, even though the action be brought by the plaintiff in reliance upon such admission, estops the defendant from contesting such liability upon the trial, where the plaintiff shows no injury to himself as the result of such admission, except that he was induced to bring the action. On the other hand, we find many cases which hold substantially the contrary."

8 Cal. 29-30. **PEOPLE v. CHISHOLM.**

Levy Under Execution, on property sufficient to satisfy the same, satisfies the judgment, p. 30.

Cited, *Mulford v. Estudillo*, 23 Cal. 100, in affirmance; *Lindley v. Kelley*, 42 Ind. 310, in approval, where also no distinction between a levy on real or personal property is made; *Day v. Ramey*, 40 Ohio St. 449, where the court says: "It is a well-settled rule that if the creditor recovers a judgment against principal and surety, and execution thereon is levied upon the property of the principal, and such property is released from the levy and lost as a security by the act of the creditor, the surety will be discharged to the extent of his injury thereby";

Hyde v. Rogers, 59 Wis. 160, 162, where the rule as applied to a surety is to the same effect, but it was held that the seizure of the property of one joint debtor was not a satisfaction; extended note, 59 Am. Dec. 350, 359.

8 Cal. 31-33. **OSBORN v. HENDRICKSON.** S. C. 6 Cal. 175; S. C. 7 Cal. 282.

Evidence—Pleading.—Burden is on defendant to prove new matter alleged as a defense, p. 32.

Cited, Wilson v. California etc. R. R. Co., 94 Cal. 172, in approval and appealed to the burden of proof to show absence of negligence.

Parol Evidence is inadmissible to show that a bill of sale included property not embraced therein, p. 32.

Cited, Biddle Boggs v. Merced Min. Co., 14 Cal. 307, in approval, and appealed to a statement that a party is not bound to make an original grant convey title to property not included in its terms when issued.

Interest.—Action for use and occupation was not included in cases specified in statute of 1850 allowing interest, p. 33.

Cited, Burke v. Carruthers, 31 Cal. 470, 471, where the syllabus of the principal case on this point by the reporter is declared incorrect, and the case is explained. The above headnote, however, is nearly the same language as that of the court. The citing case allowing interest on a judgment of forcible entry and detainer.

8 Cal. 33. **CUNNINGHAM v. HOPKINS.**

Amendment.—Defective undertaking on appeal may be amended in county court, where the offer to amend is made before a motion to dismiss is determined, p. 33.

Cited, McCracken v. Superior Court, 86 Cal. 77, where the failure of sureties to justify on an appeal bond in the justice's court, was held to render the appeal a nullity, and that the superior court might not extend the time to justify or allow other sureties, distinguishing from the case of a defective or informal undertaking; Salt Lake Brewing Co. v. Gilman, 2 Idaho, 183, where the order of filing the undertaking and service of copy of appeal from a justice's court was declared immaterial but the court said it would not decide whether if a certain course, within the rule of the principal case, had been followed, it would have availed; Territory v. Milroy, 7 Mont. 562, in approval of the rule of the principal case, the defect in the bond in the citing case being only an informality; Vaill v. Town Council, 18 R. I. 410, as so deciding, but no amendment was, however, allowed, as the statute had not been complied with, nor was a new bond permitted to be filed nunc pro tunc. It was also declared that the statute was the basis of jurisdiction of the appellate court, such statute allowing an appeal

to the court of common pleas from the doings of the common council in laying out highways; *Towle v. Bradley*, 2 S. Dak. 479, to the same effect as the principal case.

8 Cal. 34-36. **RICKETT v. JOHNSON.**

Injunction.—One court has no power to restrain the execution of orders or the carrying into effect of decrees of another court of co-ordinate jurisdiction, where the latter court can afford ample relief, pp. 35, 36.

Cited, *Revalk v. Kraemer*, 8 Cal. 71; 68 Am. Dec. 305; *Chipman v. Hibbard*, 8 Cal. 271; *Phelan v. Smith*, 8 Cal. 521; *Gorham v. Toomey*, 9 Cal. 77; *Pixley v. Huggins*, 15 Cal. 134—all in affirmance; *De Godey v. De Gody*, 39 Cal. 162, where it was claimed that there was an interference with a court of co-ordinate jurisdiction, but the court declared that it was not so, as the "object of the suit here is the division of the community property; that of the suit in *Kern* was the dissolution of the marriage tie," and that there was no conflict. The following citations—*Uhlfelder v. Levy*, 9 Cal. 614; *Crowley v. Davis*, 37 Cal. 269; *Scott v. Runner*, 146 Ind. 16; 58 Am. St. Rep. 348; *Platto v. Deuster*, 22 Wis. 486—all bear on the subject of concurrent jurisdiction.

Common-law Rule will be modified where reason therefor has ceased, p. 36.

Cited in *Katz v. Walkinshaw*, 141 Cal. 124, noted under *Connolly v. Goodwin*, 5 Cal. 221.

8 Cal. 36-39. **WHIPLEY v. DEWEY.**

Tenant Cannot Remove erections made by him on the premises after a forfeiture or re-entry for covenant broken, p. 39.

Cited, *Morey v. Hoyt*, 62 Conn. 547, to the same effect; *Henderson v. Ownly*, 56 Tex. 649; 42 Am. Rep. 692, as cited by appellants in that case, but held not in point—that case holding that in trespass for title the defendant may not be allowed for improvements made after suit, although with the intention of renewal, and after sequestrations and replevy; *Ex parte Hemenway*, 2 Low. (U. S. D. C.) 498, where the court says of the principal case: "The ground of decision appears to be that the right was lost by laches or nonuser. The learned judge . . . cites no cases, and I have found none to support that doctrine, unless in the same sense that no tenant can remove fixtures after his tenancy is out, which perhaps is all that is intended." Note, 69 Am. Dec. 516.

8 Cal. 39-42. **VAUGHN v. ENGLISH.**

Officer includes all persons in any public station or employment conferred by government and a clerk in one of the departments is an officer, p. 41.

Cited in *Patton v. Board*, 127 Cal. 395, 399, 78 Am. St. Rep. 71, 74, holding term to include health inspector; *McCornick v. Thatcher*, 8 Utah, 301, ruling similarly as to members of board of construction under local statutes. Distinguished in *Attorney General v. McCaughey*, 21 R. I. 346, holding highway commissioners not public officers. See, also, note to *State v. Hocker*, 63 Am. St. Rep. 181, 187, 190, 192, defining public officer; *Meller v. Board etc.*, 4 Idaho, 52, contract by county commissioners with one appointed to be board's legal adviser for two years, defining his duties and fixing duties is void; *State v. Brandt*, 41 Iowa, 607, where the deputy state treasurer was held an officer who might be indicted for embezzlement; *State v. Spaulding*, 102 Iowa, 644, holding that the treasurer of the commissioners of pharmacy elected by the commissioners is not a public officer within the Iowa statute making the conversion by a public officer of funds received by virtue of his office an embezzlement; *Somers v. State*, 5 S. Dak. 586, where the constitution prohibited any change of compensation of any public officer "during his term of office," and it was held that a deputy appointed by an officer to hold during his principal's pleasure did not hold for a term"; *United States v. Hartwell*, 6 Wall. (U. S.) 393, where the defendant was a clerk of the assistant treasurer of the United States, and the court says: "Was the defendant an officer or person 'charged with the safekeeping of the public money' within the meaning of the act? (Aug. 6th, 1846, 9 Stats. at Large, 59). We think he was both." Extended note, 72 Am. Dec. 181, 182, 183, 184.

8 Cal. 42-44. PEOPLE v. COHEN.

Criminal Law.—"Bailee" under the statute of 1850 must be construed in a limited sense as designating bailees to keep, transfer, or to deliver, p. 43.

Cited, extended note, 98 Am. Dec. 149; *People v. Johnson*, 71 Cal. 390, as so holding, and also deciding that the defendant need not be named as bailee if the terms of the contract as set forth show a bailment. Overruled, *People v. Poggi*, 19 Cal. 601.

Indictments Against Bailees should set forth the character of the bailment, the mode of conversion, the description of the property or specification of the articles, the value, and that the value was in lawful money or current coin of the United States, pp. 43, 44.

Cited, *People v. Winkler*, 9 Cal. 236, where it was held not necessary to state that the value was in "lawful money of the United States"; *People v. Peterson*, 9 Cal. 315, where the indictment was held defective in not stating the character of the bailment and in the description of the coin; *People v. Johnson*, 71 Cal. 390, holding that the defendant need not be named as bailee if the terms of the contract as set forth show a bailment; *Kibs v. The People*, 81 Ill. 600, where it is declared that the defendant's fiduciary character, being the distinguishing fea-

ture between embezzlement and larceny, must be specifically averred; *State v. Griffith*, 45 Kan. 145, where it is said: "It has generally been held under similar statutes that the indictment or information should not merely state the bailment or trust, but should aver the facts and circumstances which made the case embezzlement; and it is also necessary to state the purpose for which the defendant was intrusted with the property"; *Williams v. State*, 5 Tex. App. 118, holding it necessary for the indictment to show that the money was current coin of the United States or some other government; *United States v. Greve*, 65 Fed. Rep. 490, to the point that the word "funds" in a statute covered several kinds of property, and was not sufficiently definite; extended note, 98 Am. Dec. 151, 152, 153, 154, 155, 156. Contra, *People v. Winkler*, 9 Cal. 236, to the extent stated under the last headnote herein; *People v. Green*, 15 Cal. 513, in that this case is declared in *People v. Poggi*, 19 Cal. 601, to have overruled the principal case as to the necessity of specifying that the value was in current "coin of the United States"; *People v. Johnson*, 71 Cal. 390, to the extent stated under the last headnote herein; *State v. You*, 20 Oreg. 215, holding that under the statute of that state the allegation of being a bailee covered all the necessary facts; *People v. Hill*, 3 Utah, 357, where it is held sufficient if the language of the statute and the words "as bailee" were used, without setting forth the facts, etc.; *Webb v. York*, 79 Fed. Rep. 621, where it is said that since the principal case the code has been very much changed, and that the affidavit charging embezzlement need not describe the precise character thereof (4 Deering's Annot. Codes Cal., p. 203, sec. 950). See extended note, 98 Am. Dec. 151-156, citing the principal case.

General reference, showing present law: See *People v. Cobler*, 108 Cal. 538; secs. 967 and 1131, Penal Code, Cal.; 1 Deering's Cal. Dig., p. 814, C, nos. 1511 et seq.

8 Cal. 44-47. MEYER v. KOHLMAN.

Insolvency.—Proceedings are special, created by statute, which must be strictly followed. No intendments exist in favor of jurisdiction, which must affirmatively appear, p. 47.

Cited, *McDonald v. Katz*, 31 Cal. 169, in affirmance.

Insolvency—Partnership.—Application made in the joint name of partners is void, not being authorized by the insolvent act, p. 47.

Cited, *Cal. Furniture Co. v. Halsey*, 54 Cal. 317, to the same point; Id. 318, where it was said that the creditors of the firm had a right to pursue the partnership property under their judgment against the firm; *In re Baker*, 55 Cal. 303, where the rule of the principal case was applied to both the act of 1852 and that of 1876; *Hawley & Co. v. Campbell*, 62 Cal. 446, where it is said that more of the cases under either act held that "an individual member of a firm could not be dis-

charged from his individual liability for firm debts"; and also that "the creditors of such firms can lawfully pursue the firm property, regardless of the insolvency proceedings."

Partnership.—Bankruptcy proceedings which are without jurisdiction and void constitute no bar to an action against partners, p. 47.

Cited, *Cal. Furniture Co. v. Halsey*, 54 Cal. 318, noted under the last heading herein, it being also held that the superior court exceeded its jurisdiction in issuing a writ of prohibition against the examination of one of the partners, after execution issued under a judgment obtained by creditors against the partnership, in a justice's court.

8 Cal. 47-49. **FRANK v. BRADY.**

Appeal.—If affidavit for continuance does not show due diligence, and there is no abuse of discretion in refusing to grant same, the order will not be reviewed, p. 48.

Cited, *People v. De Lacey*, 28 Cal. 590, and applied to a case where there appeared want of good faith in making the affidavit, and there was no abuse of discretion; extended note, 74 Am. Dec. 141, as to discretionary nature of the power to grant or refuse a continuance.

8 Cal. 49-51. **GORDON v. SEARING.**

Secondary Evidence is admissible where the original is traced to the possession of a party out of the state, p. 50.

Cited, *Zellerbach v. Allenberg*, 99 Cal. 73, where a letter was held "lost" which was out of the state, it having been duly directed and mailed to one residing in a foreign jurisdiction; *Wiseman v. Northern Pac. R. R. Co.*, 20 Oreg. 431; 23 Am. St. Rep. 139, to the same point as the principal case; *Dwyer v. Salt Lake City Mfg. Co.*, 14 Utah, 343, to substantially the same effect.

Same.—Order in which the testimony is given rests in the court's discretion, p. 50.

Cited, *Bagley v. Eaton*, 10 Cal. 148, as supporting the point that the preliminary testimony may in the discretion of the court be given orally or by affidavit.

8 Cal. 51. **PEOPLE v. MARSHALL.**

Tenant in Common.—Sale of interest of one does not divest the interest of the other joint owners, p. 51.

Cited, *Midgley v. Walker*, 101 Mich. 584; 45 Am. St. Rep. 432, to the same point in a case holding that the individual interest of one of two or more joint tenants is subject to levy and sale upon execution running against such tenant.

8 Cal. 52-58; 68 Am. Dec. 290. **GILMAN v. CONTRA COSTA**. S. C. 5 Cal. 426; S. C. 6 Cal. 676.

Appeal.—An order is the judgment or conclusion of the court upon any motion or proceeding, and covers cases where affirmative relief is granted or relief denied, p. 57.

Cited, *In re Rose*, 80 Cal. 170, where it is said: "Every direction of a court or judge made in writing and not included in a judgment is denominated an order" (Code Civ. Proc., sec. 1003). An order, as distinguished from a final judgment, is the judgment or conclusion of the court upon any motion or proceeding"; *In re Smith*, 98 Cal. 640, quoting from the principal case, and applied in connection with the meaning of "final judgment" under subdivision 1, section 963, Cal. Code Civ. Proc.; *Alexander v. Leland*, 1 Idaho, 428, quoting from the principal case to this point, and holding that an order overruling a motion for a stay of proceedings is an appealable order; *Cary v. Richardson*, 35 La. Ann. 506, as supporting the statement that "definitive judgments are those adjudications which have acquired the force of *res judicata*, by which the questions determined are set at rest beyond possibility of revision by appeal"; *Clark v. Gonn*, 2 Mont. 539, quoting the definition of the principal case.

Order.—Appeal lies from an order refusing to quash an execution, pp. 57, 58.

Cited in *Southern California etc. Co. v. Superior Court*, 127 Cal. 421, applying rule to order striking out appeal bond, further holding amount involved immaterial; *Alexander v. Leland*, 1 Idaho, 428, holding that an order overruling a motion for stay of proceedings is an appealable order; *Cary v. Richardson*, 35 La. Ann. 507, to the point that "any order or decree finally settling any right or interest in controversy between the parties to a cause is final and reviewable"; *Orr v. Haskell*, 2 Mont. 351, to the point that an order overruling a motion to quash an execution is a "special order made after final judgment," from which an appeal lies; *Clark v. Gonn*, 2 Mont. 539, holding that an order refusing a stay of execution is a "special order" and appealable; notes 77 Am. Dec. 302; 10 Am. St. Rep. 349.

County Could Not be Sued at common law, and this was the rule until the act of 1854, p. 57.

Cited in *San Francisco Sav. Union v. Reclamation Dist.*, 144 Cal. 643, applying rule to actions against such districts; *Lee County v. Yarbrough*, 85 Ala. 592, to the point that the liability of counties for injuries caused by defective public bridges is purely statutory; *Payne v. Washington County*, 25 Fla. 806, where it is said: "A county cannot be burdened with expense or debt except so far as the power is given therefor either expressly, or by clear implication from some other power expressly given. Being the creature of statute, the extent of its action toward incurring liability must be limited by statute"—citing

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note to principal case, 68 Am. Dec. 291; *Dotterer v. Bowen*, 84 Ga. 771, holding that a county cannot be garnisheed without express authority by statute; *Board of Commissioners v. Allen*, 142 Ind. 575, holding that a county is not impliedly liable for defective bridges nor for the acts or omissions of their officers; *Templeton v. Linn County*, 22 Oreg. 314, to the point that at common law a county was not liable for an injury from a defective highway; extended note 18 Am. Dec. 203, as to counties not being liable to garnishment; notes 68 Am. Dec. 694, as to remedies against counties; 81 Am. Dec. 107, as to liabilities of counties, etc.; 87 Am. Dec. 441; 2 Am. St. Rep. 591, as to liability for defective bridges, referring to note to principal case, 68 Am. Dec. 290-300; 2 Am. St. Rep. 716, referring to same note; 19 Am. St. Rep. 882, as to liability of counties for acts or negligence of servants, referring to same note; 31 Am. St. Rep. 65, as to liabilities of counties, referring to same note; 46 Am. St. Rep. 468, as to liability of counties for torts, referring to same note; 49 Am. St. Rep. 887, as to liability for negligence, referring to same note.

Property of county is exempted from forced sale, in execution, p. 58.

Cited in *Emeric v. Gilman*, 10 Cal. 410; 70 Am. Dec. 745, holding that property of an inhabitant of the county is not liable to seizure and sale on execution upon judgment against the county; *Emery Co. v. Buresen*, 14 Utah, 330, 60 Am. St. Rep. 901 (and note, 902), construing local statutes; notes, 23 Am. St. Rep. 455, as to statute exempting from execution being a mere affirmation of the common law; 31 Am. St. Rep. 68, 60 Am. St. Rep. 901, note, as to exemption of property on execution.

General Citations.—*Gilman v. Contra Costa County*, 10 Cal. 508, where the judgment in the principal case is affirmed in an opinion of a line and a half; *Oklahoma etc. College v. Willis*, 6 Okla. 599; note 36 Am. St. Rep. 452, as to the definition of counties, referring to note to principal case, 68 Am. Dec. 291; extended note 51 Am. St. Rep. 119, as to what constitute counties, referring to same note.

8 Cal. 58-62. PEOPLE v. SUPERVISORS EL DORADO COUNTY.
S. C. 11 Cal. 170.

Certiorari lies to review action of supervisors when deciding upon a right. Such officers exercise judicial, legislative, and executive powers in matters of police and fiscal regulations of counties (pp. 61, 62).

Cited, *People v. Supervisors Marin County*, 10 Cal. 345, holding that supervisors exercise powers of a judicial character in passing upon the sufficiency of the bond of an officer, and whether the officer has vacated his office by failure to comply with the requisition of the supervisors to file a new bond, also holding that *certiorari* lies; *Robinson v. Supervisors of Sacramento County*, 16 Cal. 210, which is declared analogous

in principle, and the questions as to when certiorari lies and when the proceedings of supervisors are judicial were discussed; *Uridias v. Morrill*, 22 Cal. 478, where the principles of the principal case were declared to govern that case; article III. of the constitution of California being discussed; *Fall v. Paine*, 23 Cal. 303, a case as to the jurisdiction of supervisors as to bridges and ferries, holding that "the judgments and orders of the board in proper cases, where their action is not final and conclusive, can be reviewed on certiorari"; *Murray v. Supervisors Marin County*, 23 Cal. 495, holding that certiorari lies to review the action of the board in granting a ferry license; *Stone v. Elkins*, 24 Cal. 127, where the quasi judicial or mixed character of acts of the board in the principal case is recognized as existing in certain cases, but held not applicable in that case, which was one of constitutional construction of the act giving supervisors power to try contests in relation to the office of county judge; *Miller v. Sacramento County*, 25 Cal. 97, holding that the board exercises judicial functions as to approval of bonds of officers; *Emery v. Bradford*, 29 Cal. 85, a case as to the fulfillment of a street contract, and the remedy of the owner of a city lot assessed therefor; also declaring that the character of the acts of the superintendent of public streets and of the supervisors is judicial, and in the aggregate mixed; *People v. Provines*, 34 Cal. 527, 531, and also at 541 in concurring opinion, quoting at length from and considering the principal case in connection with *Burgoyne's case*, 5 Cal. 19, and holding that it is "erroneous only so far as it implies that boards of supervisors are rescued from the operation of the rule in *Burgoyne's case* only by force of the fifth section of the eleventh article of the constitution, which provides that the legislature shall have power to provide for the election of a board of supervisors in each county. While we agree as to what was said as to the meaning of the latter section, we dissent from the doctrine that in the absence of that section the legislature could not by reason of the third article confer mixed functions upon boards of supervisors"; *Kimball v. Alameda County*, 46 Cal. 23, where the doctrine of the principal case as to judicial powers of supervisors is declared to have been "steadily adhered to ever since"; *Spring Valley W. W. v. Bryant*, 52 Cal. 135, 136, construing the principal case to mean "that the legislature could impose upon the supervisors of counties duties in their nature judicial, and when in the discharge of such duties they exceeded their jurisdiction, their action could be revised and amended by certiorari"—but the court limited the rule to judicial powers; *Bixler v. County of Sacramento*, 59 Cal. 702, limiting certiorari to cases where the power exercised by the board is in its nature judicial; this case was one of swamp land assessment, and the writ was denied; *Lent v. Tillson*, 72 Cal. 434, a case of an action to enjoin an enforcement of a street assessment, where the injunction was ordered dissolved, and the complaint dismissed, the principal case being cited in the concurring opinion to

the point that the remedy at law by means of certiorari was adequate, plain, and speedy; *Wulsen v. Board of Supervisors*, 101 Cal. 26, 40 Am. St. Rep. 28, holding that certiorari lies to review acts of supervisors in opening a street and designating lands to be taken therefor, and distinguishing between judicial and legislative powers in such case; *Belser v. Hoffschneider*, 104 Cal. 460, where the action of the city council in the matter of an appeal was held judicial; also, that the final judgment entertained by the council could not be vacated. This was a case of a street assessment; *State v. Board*, 23 Nev. 249, but denying writ to review order of county commissioners employing attorney; *State v. Ormsby County*, 7 Nev. 397, quoting at length from the principal case to the same point as given in the above headnote; *State v. Washoe County*, 14 Nev. 70, as deciding, under a like statute, "that the power of the supervisors to allow accounts against the county is confined to those 'legally chargeable,' and that a writ of certiorari would lie to review the action of the board"; extended notes 12 Am. Dec. 536, as to what tribunals the writ will issue; 40 Am. St. Rep. 39, as to questions reviewable and to what boards the writ will issue.

8 Cal. 62-66; 68 Am. Dec. 300. **ASHBURY v. SANDERS.**

Presumption of Death arises after unexplained absence of seven years, but not before, unless he is shown to have met with some specific peril, or there are circumstances shown to shorten the time, pp. 64-66.

Cited, *Northwestern Mut. L. Ins. Co. v. Stevens*, 71 Fed. Rep. 262, where the rule as to presumption of death in seven years is stated, yet it is also held that circumstances may shorten the time; notes 79 Am. Dec. 573; 83 Am. Dec. 526, 655; extended note 91 Am. Dec. 526; note 92 Am. Dec. 257; extended notes 92 Am. Dec. 705; 46 Am. Rep. 762.

8 Cal. 66-74; 68 Am. Dec. 304. **REVALK v. KRAEMER.**

Injunction will not lie in one court to restrain decrees in another court of co-ordinate jurisdiction, p. 71.

Cited, *Pixley v. Huggins*, 15 Cal. 134, but held not to apply to a proceeding brought not to stay execution issued against the property of the judgment debtor, but to prevent a sale of property of the plaintiff under the claim that it is the property of the debtor; *Crowley v. Davis*, 37 Cal. 269, in affirmance of the principal case, unless it plainly appear that the court rendering the judgment or decree is unable by reason of its jurisdiction to afford the relief sought; *Lake etc. Co. v. Mimms*, 49 La. Ann. 1285, noted under *Anthony v. Dunlap*, 8 Cal. 26; *Platto v. Deuster*, 22 Wis. 486, where the rule of the principal case is declared fully sustained by authority, and applied to proceedings to restrain a judgment in equity in a court of co-ordinate jurisdiction.

Cross-reference.—Anthony v. Dunlap, 8 Cal. 26; Rickett v. Johnson, 8 Cal. 34; Chipman v. Hibbard, 8 Cal. 268; Phelan v. Smith, 8 Cal. 521.

Homestead may be established upon common property of husband and wife or the separate estate of the husband, p. 71.

Cited, In re Buchanan's Estate, 9 Cal. 509, to the last point; Gimmy v. Doane, 22 Cal. 638, to the same point as the principal case; Riley v. Pehl, 23 Cal. 74, where the homestead appeared to have been carved out of the common property; extended note, 70 Am. Dec. 346.

Same.—As to the separate property of the wife—quære? p. 71.

Cited, Riley v. Pehl, 23 Cal. 74, where the court held that it was unnecessary to decide the point, although the claim had been raised by counsel; extended note 70 Am. Dec. 346, upon the point out of what estate a homestead may be carved

Homestead.—Right therein is not concluded by foreclosure of mortgage by husband to which wife was no party. Legal proceedings to be conclusive must embrace both, p. 72.

Cited, Kraemer v. Revalk, 8 Cal. 75; Van Reynegan v. Revalk, 8 Cal. 76; Cook v. Klink, 8 Cal. 353; Marks v. Marsh, 9 Cal. 97; Building etc. Assn. v. Chalmers, 75 Cal. 334; 7 Am. St. Rep. 174; Watts v. Gallagher, 97 Cal. 51; Brackett v. Banegas, 116 Cal. 283; 58 Am. St. Rep. 165—all in affirmance of the doctrine; Larson v. Reynolds, 13 Iowa, 584; 81 Am. Dec. 449, as deciding that the wife is a necessary party to a foreclosure, and that it is error to refuse to allow her to intervene, although it is declared not a settled rule, and it is held that the wife, when not a party is not estopped by a foreclosure decree of a mortgage executed by her husband alone; also, that under such decree she cannot be ousted from possession; Burnap v. Cook, 16 Iowa, 158; 85 Am. Dec. 512, in affirmance of the doctrine of the principal case; also, that such decree and sale thereunder were inoperative as to her; Adams v. Beale, 19 Iowa, 68, to the point that the character of the wife's homestead is such that it is not in general liable to be affected or concluded by the omission, neglect, or default of the husband; Morris v. Ward, 5 Kan. 246, 249, to the same effect as the principal case, and extending the rule to all judgments and decrees against the husband alone; Davies v. Cole, 28 Kan. 261, to the same effect; notes 68 Am. Dec. 309, as to action against husband alone; 83 Am. Dec. 218, that such foreclosure decree does not conclude the wife; 85 Am. Dec. 513; 7 Am. St. Rep. 175; 31 Am. St. Rep. 122.

Homestead.—Conveyance or mortgage by husband alone was void under act of 1851, nor did it become valid because of such homestead right having ceased, pp. 72, 73.

Cited, Larson v. Reynold, 13 Iowa, 583; 81 Am. Dec. 447, 448, to the same effect; also that such mortgage is not rendered valid by the death

of the wife. "In such a case the debt remains good, and the property, if liable, becomes so just as if no mortgage ever existed"; *Morris v. Ward*, 5 Kan. 246, to the point that a mortgage signed by the husband alone is void; *Campbell v. Elliott*, 52 Tex. 159, as deciding with other cases resting on particular statutes, that the wife must join in the deed, and that a conveyance by the husband alone is void as against him or his wife; but the case holds that under the constitution of that state no mortgage or trust deed or other lien is valid except for the purchase money or improvements, whether such deed is executed by the husband or by him and his wife; extended note 65 Am. Dec. 484, as to joinder in release of homestead; notes 68 Am. Dec. 323; 85 Am. Dec. 512; 87 Am. Dec. 239; 7 Am. St. Rep. 175. Contra, *Himmelman v. Smith*, 23 Cal. 120, where under the act of 1860 the contrary rule to that of the principal case is held. See next heading herein.

Homestead was a sort of joint tenancy, with the right of survivorship, under the act of 1851, p. 73.

Cited, *In re Buchanan's Estate*, 8 Cal. 509, to the same point; *Gee v. Moore*, 14 Cal. 477, which holds contra, under the same act, that the surviving wife did not take by survivorship, but as property set apart by law, thus overruling the principal case; *Brennan v. Wallace*, 25 Cal. 114, where both the principal case and *Gee v. Moore*, 14 Cal. 477, are considered, and the point declared not free from embarrassment, and the point is considered in connection with the question as to how far certain acts and declarations of the husband were admissible on the question of abandonment before the amendment to the act of 1860; *Levins v. Rovegno*, 71 Cal. 280, 281, where the principal cases on this point are considered, and under the acts of 1860 and 1862 it was held that one-half descended to the survivor and the other half to the legitimate child or children of the deceased; *Adams v. Beale*, 19 Iowa, 68, where the husband and wife are declared to be practically joint tenants subject to certain limitations for the benefit of children, etc.; extended note 65 Am. Dec. 483, 486, as to the character of the estate.

Homestead.—After death of his wife the husband had the power to alienate or encumber the homestead by his single deed, p. 73.

Cited, *Himmelman v. Smith*, 23 Cal. 120, to exactly this point.

Homestead.—Any individual, whether married or not, may be the head of a family and entitled to a homestead right, but the right ceases when the relation ceases, pp. 72, 74.

Cited, *McQuade v. Whaley*, 31 Cal. 535, in specially concurring opinion to the same points; *Roth v. Insley*, 86 Cal. 138, where the same, and also because section 1265 of the Civil Code as amended in 1880 was not then the law; *Stanley v. Snyder*, 43 Ark. 436, in dissenting opinion, quoting at length from the principal case, pp. 72, 73, upon the point as to whether the privilege of homestead continues when the debtor ceases to be the head of a family; the case holding that a homestead

acquired and occupied is not lost by the death of wife and children; *Kimbrel v. Willis*, 97 Ill. 498, to the point that where the householder ceases to have a family, his homestead exemption ceases; but the court says: "We are not satisfied that under the phraseology of our statute the construction there would have been different from the one we adopt," which was that the right was not forfeited by ceasing to have a family; *Calvit v. Williams*, 35 La. Ann. 325, in dissenting opinion in support of the point, substantially, that when one ceases to become the head of a family, the exemption ceases and the creditor is freed as to the homestead exemption; *Hill v. Franklin*, 54 Miss. 636, as deciding contra to that case, where "householder" and "having a family" were held not to cover those to whom a childless widower sustained no legal duty (being an adopted daughter and her husband), and as to whom there was no allegation that he had voluntarily assumed their support, and for aught that appeared he was under no obligation to shelter them, they merely depending upon their own exertions; *Barney v. Leeds*, 51 N. H. 267-273, quoting at length from the principal case (p. 72, 73) as to whether the privilege ceases when the party ceases to be the head of the family; *Id.* 267, as to what constitutes the head of a family, and holding that a widower with a minor child is such head and does not cease to hold the right by the mere removal of the child; 60 Am. Dec. 615, to the point that removal of the wife is not an abandonment, in extended note as to abandonment; extended note 61 Am. Dec. 590, 591, as to who is the head of a family; note 77 Am. Dec. 137, that head of a family only has right to homestead; 36 Am. Rep. 729, as to head of family, and what determines the right; 3 Am. St. Rep. 583, as to wife being head of family; 21 Am. St. Rep. 29, as to effect of death of husband or wife; 22 Am. St. Rep. 487, as to termination of homestead by death of husband or wife; 36 Am. St. Rep. 578, as to termination of right in general; note, 70 Am. St. Rep. 107, 109-111, defining head of family.

Cross-reference generally—*Dorsey v. McFarland*, 8 Cal. 342.

8 Cal. 74-75. **KRAEMER v. REVALK.**

Homestead Right.—Husband and wife are both necessary parties in action to determine, p. 75.

Cited, *Cook v. Klink*, 8 Cal. 353; *Building etc. Assn. v. Chalmers*, 75 Cal. 334; 7 Am. St. Rep. 174. Both these cases are fully noted under the last California case herein.

8 Cal. 75-76. **VAN REYNEGAN v. REVALK.**

Homestead.—The points decided in this case, as well as the following citations, are fully considered in *Revalk v. Kraemer*, 8 Cal. 66-74, above noted herein.

Cited, *Building etc. Assn. v. Chalmers*, 75 Cal. 334; 7 Am. St. Rep.

174; *Larson v. Reynolds*, 13 Iowa, 584; 81 Am. Dec. 449, and the note 68 Am. Dec. 309, are considered under the fourth heading of said *Revalk v. Kraemer*; *Larson v. Reynolds*, 13 Iowa, 584, 81 Am. Dec. 447, and note, 68 Am. Dec. 309, are considered under the fifth heading of said *Revalk v. Kraemer*.

8 Cal. 76-77. **FEILLETT v. ENGLER.**

Jurisdiction.—Consent cannot give jurisdiction that constitution denies, p. 77.

Cited in *Finders v. Bodle*, 58 Neb. 59, on point that judgment beyond jurisdiction of court is absolutely void.

Jurisdiction.—Justices of the peace cannot entertain suits for money demands where the amount in controversy exceeds two hundred dollars, and consent cannot give jurisdiction which constitution denies, p. 77.

Cited, *Bradley v. Kent*, 22 Cal. 171, where it is held that the "amount in controversy" which determines the jurisdiction of a justice's court is the principal sum exclusive of interest and costs, but the judgment may exceed the amount in controversy; *Cramer v. McDowell*, 6 Colo. 371, holding that the amount due or the value of the property at the time of action brought is the amount conferring jurisdiction on a justice's court, and also that accrued interest is included in such amount; extended notes 23 Am. St. Rep. 115; 29 Am. St. Rep. 78.

8 Cal. 77-80; 68 Am. Dec. 310. **PARKE v. KILHAM.**

Water Rights.—Line upon which a ditch is actually intended to be dug must be run within a reasonable time after preliminary survey, to make ditch-owner's right date back to survey, p. 79.

Cited, extended note 43 Am. Dec. 281, as to what is necessary to constitute a valid appropriation; notes 68 Am. Dec. 260, as to the right relating back to commencement of work; 68 Am. Dec. 340.

Water Rights—Estoppel.—If one stands by and sees another appropriate water at a great expenditure of money and labor, and does not assert his claim, he and his vendees are estopped, pp. 78, 79.

Cited, *Lux v. Haggin*, 69 Cal. 278, quoting the instructions in the principal case; but the court says: "In the light of the subsequent decisions it can scarcely be claimed that the facts recited in the instruction constituted an equitable estoppel, which could be relied on as a defense at law. . . . We cannot assent to the proposition . . . that the mere silence of plaintiff's grantors disconnected from other circumstances in evidence, created an estoppel at law"; *McBroom v. Thompson*, 25 Oreg. 569; 42 Am. St. Rep. 809, to the point of estoppel arising from acquiescence for a number of years in diversion of water for irrigation; also, from knowledge of an

expenditure of money and aid furnished by a nonriparian owner; note 68 Am. Dec. 345.

Water Right—Nuisance.—A ditch to carry off water rightfully flowing to a mining claim is as much a nuisance as a dam to flood the premises, p. 80.

Cited, *Fabian v. Collins*, 3 Mont. 224, to the same point, and as based upon the principle that equity will always interfere by injunction to restrain an irreparable injury caused by the obstruction of a water-course or the diversion of water. So, also, in this connection the principal case is cited; *Waddingham v. Robledo*, 6 N. Mex. 373, awarding injunction against diversion of water; *Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 431; 7 Am. St. Rep. 187, which holds that a riparian proprietor is entitled to an injunction restraining the unlawful diversion of water, although the injury caused thereby is incapable of ascertainment, or of being computed in damages; *Herritt v. Story*, 64 Fed. Rep. 524, to the point that the diversion of water from one entitled thereto is in the nature of a private nuisance. This case was one of abandonment of water rights through nonuser and acquiescence.

General Citations.—Notes 68 Am. Dec. 331, as to priority of appropriations; 76 Am. Dec. 479, as to rights of appropriator; 91 Am. Dec. 692.

8 Cal. 80-84. **STEWART v. SCANNELL.**

Statute of Frauds.—A sale of merchandise, the property remaining with the vendors as warehousemen, their receipt for storage being given, is void as to creditors of the vendors, p. 83.

Cited, *Vance v. Boynton*, 8 Cal. 561, in affirmance; a case of sale of property in bulk not followed by actual and continued change of possession; *Bacon v. Scannell*, 9 Cal. 273, in affirmance of the principle that the change of possession must be continuous; *Stanford v. Scannell*, 10 Cal. 9, in affirmance, upon a similar state of facts; *Godechaux v. Mulford*, 26 Cal. 323; 85 Am. Dec. 182, wherein the court declares that the principal case was overruled substantially in *Stevens v. Irwin*, 15 Cal. 503, 76 Am. Dec. 500; and it is held that the vendor, if employed by the vendee as his clerk, cannot remain in the apparently sole possession of the goods after the sale, but if it be apparent to all the world that he has ceased to be the owner, and that another has become such, and that he is only a subordinate or clerk, the rule requiring an actual or continued change of possession is satisfied; notes 60 Am. Dec. 617; extended note 97 Am. Dec. 341.

8 Cal. 84-85. **FEENY v. DALY.**

Statute of Frauds.—A new promise, by an insolvent after his discharge, to pay need not be in writing, p. 85.

Cited, extended note 39 Am. St. Rep. 739, as to promise to pay after debt is released.

8 Cal. 85-87. HOPKINS v. DELANEY.

Acknowledgment.—Certificate complies with the statute if it states that the parties were “known” to the officer omitting the word “personally,” p. 87.

Cited, *Overman Mfg. Co. v. American Min. Co.*, 7 Nev. 318, to the point that a literal compliance with the statute was unnecessary in a case of a certificate to a statement for a new trial; but that it was sufficient if there was a substantial compliance; extended note 41 Am. Dec. 176.

8 Cal. 89-90. PEOPLE v. QUINCY.

Continuance.—Affidavits should show due diligence, and that there are no other witnesses by which the same facts can be proved, p. 89.

Cited, *People v. Gaunt*, 23 Cal. 158, to the same point; also, that affidavit must show that the testimony of the absent witness is not merely cumulative; *People v. Williams*, 24 Cal. 38, to the point that sufficient diligence must be shown to procure witnesses' attendance.

8 Cal. 90-94. PEOPLE v. MOORE.

Murder.—Any kind of unlawful, willful, deliberate, and premeditated killing is murder in the first degree, where the element of malice express or implied exists, pp. 92, 93.

Cited, *People v. Bealoba*, 17 Cal. 399, as holding that any kind of unlawful, willful, and deliberate killing is murder in the first degree, but the error of the citing case consists in leaving out the element of malice in the citation.

Instructions—Criminal Law.—The court's duty is to disregard technicalities, and to determine from the whole case whether the prisoner has had a fair trial and the judgment is correct, p. 93.

Cited, *People v. Butler*, 8 Cal. 441, in affirmance in connection with the point whether the court below erred in permitting a certain question to be asked a witness on a trial for murder.

Instructions.—Where the court erroneously instructs the jury as to what constitutes murder in the first degree, but subsequently clearly and correctly defines the crime so that the jury is not misled, there is no ground for reversal, p. 93.

Cited, *People v. Gibson*, 106 Cal. 474, to the same effect.

8 Cal. 97-101. PEOPLE v. WILLIAMS.

County.—Legislature may make such disposition of county revenues as it may deem proper, but a construction will not be given to legislative acts as would serve to impair the rights of third parties in the absence of express words, p. 101.

Cited, extended notes 68 Am. Dec. 299, as to the power over county funds and debts; 68 Am. Dec. 300, as to creditors' rights.

8 Cal. 101-109. **GARWOOD v. SIMPSON.**

Negotiable Paper.—A draft or order by A on B to pay C or order a balance due, is not negotiable, being for no fixed sum, pp. 104, 105.

Cited, *Palmer v. Andrews, McAll.* 492, as so deciding, but distinguished, as there a sum was fixed; and it was held a promissory note, even though it was to be paid with "current rate of exchange."

Findings—New Trial.—Court will not review facts where no motion for new trial is made, p. 108.

Cited, *Allen v. Fennon*, 27 Cal. 70, in affirmance. So, also, in *Whitmore v. Shiverick*, 3 Nev. 303.

8 Cal. 109-113. **VISHER v. WEBSTER.**

Alteration of Promissory Note by inserting rate of interest in blank space does not avoid the note, p. 112.

Cited, *Knoxville Nat. Bk. v. Clarke*, 51 Iowa, 269, 33 Am. Rep. 133, holding that the insertion of the words "one hundred" in a blank before the word "ten" was such an alteration as avoided the note in the hands of an innocent person, even though there was writing on its face to excite suspicion; *Blakey v. Johnson*, 13 Bush (Ky.), 205, to the point that the insertion in a blank of the words "interest to be paid semiannually" did not avoid the note in the hands of a bona fide holder without notice express or by inspection of the paper; *Holmes v. Trumper*, 22 Mich. 430; 7 Am. Rep. 662, where the insertion of the words "ten per cent" was held to avoid the note in the hands of a bona fide holder before maturity; *Weidman v. Symes*, 120 Mich. 659, 77 Am. St. Rep. 605, holding maker of such note liable to bona fide holder without notice; *First Natl. Bk. v. Carson*, 60 Mich. 437, to the same point as the principal case, the figure "7" being added for interest; *Simmons v. Atkinson*, 69 Miss. 866, as so deciding, but holding a contrary rule, even though there was writing on the face of the note to excite suspicion; in this case the payee wrote his own name after the words "or bearer," and also words fixing a place of payment; *The Paris Nat. Bk. v. Nickell*, 34 Mo. App. 301, where the rate of interest was made ten per cent, and a contrary rule was declared to that of the principal case, though it was also held that if the filling in was necessary to complete the paper it was not thereby avoided; *Farmers etc. Bk. v. Novich*, 89 Tex. 383, where the court says: "The liability of the maker of a note, when it has been changed without his authority, depends upon the question as to whether or not he has committed it to another person in such a form as to imply authority in the person to make the change, and if he has done so the law holds that he has been negligent in so executing and putting it in circulation, and as a result he must

suffer from the acts of the person whom he trusted rather than to throw the loss upon another who did not trust in the matter to the person who made the alteration," extended note 10 Am. Dec. 272; notes, 65 Am. Dec. 535; 2 Am. Rep. 340; 11 Am. Rep. 153.

Declarations and Conduct of a Vendor are competent testimony to show fraudulent intent to impeach a sale for fraud, p. 113.

Cited, *O'Hare v. Duckworth*, 4 Wash. 474, to the same effect; extended notes 42 Am. Dec. 631; 90 Am. Dec. 300.

8 Cal. 118-129. **SWARTZ v. HAZLETT.**

Parent may change his infant child's residence, p. 123.

See note 28 Am. Dec. 460.

Voluntary Deed—Fraud.—Proof of fraudulent intent on the part of the donor is sufficient to avoid the deed as against an innocent donee, pp. 126-128.

Cited, *Judson v. Lyford*, 84 Cal. 508, to the point that it is the intent of the grantor which is material and that it is immaterial how innocent the grantee was; *Merchants' Bank v. Greenhood*, 16 Mont. 458, to the same point as this last citing case; extended note 14 Am. St. Rep. 748, as to when creditors may attack a voluntary transfer as fraudulent.

Voluntary Deed.—Fraudulent intent is a question of fact and not of law, and the want of a valuable consideration does not constitute conclusive evidence of fraud, p. 128.

Cited, *Morgan v. Hecker*, 74 Cal. 543, to the point that the question is one of fact and not of law; *Judson v. Lyford*, 84 Cal. 509, where the facts were considered in the determination of the point of fraudulent intent; *Bull v. Bray*, 89 Cal. 300, where the court says: "The Civil Code provides that the mere want of a consideration does not of itself render a conveyance fraudulent as to creditors, and considering this section in connection with the presumptions recognized by the court in *Swartz v. Hazlett*, 8 Cal. 118, the distinction between sales for an inadequate consideration and voluntary conveyances is entirely imperceptible, and the question in both cases at once becomes one of intent, to be decided from all the evidence in the case"; the question being one of fact for the jury; *Merchants' Bk. v. Greenhood*, 16 Mont. 458, that the question of intent is one of fact.

Presumption—Fraudulent Conveyance.—In determining the question of intent existing at the time of making such conveyance, it will be assumed that the donor knew the law and the facts concerning his own business and also the fact that he was indebted, p. 128.

Cited in *Fidelity etc. Co. v. Thompson*, 128 Cal. 509, holding fraudulent intent shown under facts stated; *Bull v. Bray*, 89 Cal. 296, 297, 300, where the principal case is considered at length and it was held

that the presumption was a disputable one, and that a finding that the grantor was ignorant of his insolvency overcame the inference of fraudulent intent. This case, under the construction given by the court therein to the principal case, establishes a contrary rule.

Fraudulent Deed.—If a parent deeds property to his minor child in consideration of a claimed indebtedness to said child arising from the latter's labor for himself, such deed is void as to creditors of the father, p. 127.

Cited in *Stumbaugh v. Anderson*, 46 Kan. 542, 26 Am. St. Rep. 122, following rule; *Flynn v. Baisley*, 35 Or. 272, 76 Am. St. Rep. 498, but sustaining conveyance resulting from bona fide emancipation of minor child; *Gamet v. Simmons*, 103 Iowa, 167, holding fraudulent a conveyance based upon promise to minor stepdaughter.

Same.—If a cograntee for a valuable consideration knows the want of consideration from said minor child, the deed is void as to him also; but if said cograntee was ignorant of the partial want of consideration, whether the deed would be good as to him, quare? The statute protects the innocent purchaser and not the innocent donee, pp. 128, 129.

Cited in *Bush etc. Co. v. Helbing*, 134 Cal. 679, on point that knowledge or intent of voluntary donee is immaterial; *Allison v. Hagan*, 12 Nev. 56, holding that a purchaser with notice himself from a bona fide purchaser for a valuable consideration, who bought without notice, may protect himself under the first purchaser—that the innocent purchaser and not the innocent donee is protected.

General Citation.—Note 20 Am. Dec. 644, as citing *Clark v. Fitch*, 2 Wend. 463, 20 Am. Dec. 639, upon the point of a parent's right to maintain action for the minor child.

8 Cal. 130-135. **BRYAN v. BERRY.** S. C. 6 Cal. 394.

Appeal.—Transcript must show that necessary undertaking was filed, and it must appear from certificate of clerk that it was filed in due time, p. 134.

Cited, *Franklin v. Reiner*, 8 Cal. 340; *Hastings v. Halleck*, 10 Cal. 31; *Wakeman v. Coleman*, 28 Cal. 59—all in affirmance; *Payne v. Davis*, 2 Mont. 382, by counsel in support of the point that the undertaking was not filed in due time, but that case held that, on appeal from the probate to the district court, the proceeding to trial after motion to dismiss being overruled waived the irregularities in the appeal; *Pardee v. Murray*, 4 Mont. 37, holding that the undertaking must be filed in the limited statutory time.

Appeal.—Court below loses power over judgment after case is pending on appeal, and an order thereafter made amending the judgment is erroneous, p. 135.

Cited, *Stewart v. Taylor*, 68 Cal. 8, holding that after appeal "the

jurisdiction of the court *a qua* is suspended, so that pending the appeal the court below cannot vacate and set aside the order appealed from"; *Peycke v. Keefe*, 114 Cal. 215, in affirmance; *Holland v. State*, 15 Fla. 553, to the point that the record cannot be changed after appeal, and a case cannot then be dismissed in the court below and so dismiss the appeal; *Clark v. Manchester*, 56 N. H. 506, to the point that an appeal suspends all proceedings until it is decided; *State v. California Min. Co.*, 13 Nev. 210, to substantially the same effect as the principal case.

Execution Sale cannot be set aside after third parties have purchased; it is then too late to move to set aside the execution, p. 135.

Cited, *San Francisco v. Pixley*, 21 Cal. 59, quoting from the principal case the quotation therein (at p. 135) from *Day v. Graham*, 1 Gilm. 435; but this last case was distinguished in a discussion as to when a motion or a bill in equity would be proper to set aside a voidable sale under execution; note 15 Am. Dec. 92, as to effect of quashing execution on sale made under it.

General Citation.—*Cunningham v. Hopkins*, 8 Cal. 33, cites the same case as the principal one; 6 Cal. 304, to the point that if a mere defective undertaking is given bona fide a good one may be filed before the case is submitted; the only analogy with the principal case, however, lies in the fact that in the latter it was permitted upon application for rehearing to show that a proper undertaking had been filed and lost.

8 Cal. 136-145. **CRANDALL v. WOODS.**

Water is regarded as an incident to the soil, the use of which passes with the ownership thereof, p. 141.

Cited, *Vansickle v. Haines*, 7 Nev. 267, quoting the language of the principal case, the decision being one relating to a patent carrying the right of the government, with its incidents, among which was a right in the water of natural streams.

Water Rights.—A locator on public lands with a view of appropriation becomes the absolute owner against every one but the government, and is entitled to all the incidents which appertain to the soil except rights antecedently acquired. As between two locators, the rule "*qui prior est in tempore potior est in jure*" must apply, p. 143.

Cited in *Senior v. Anderson*, 130 Cal. 297, discussing rights as between appropriators of water on public lands; *Katz v. Walkinshaw*, 141 Cal. 122, on point that common-law rules as to water rights have been modified in this state; *Leigh Co. v. Independence Ditch Co.*, 8 Cal. 323, quoting from the principal case as settling the principle involved in the citing case; *Lux v. Haggin*, 69 Cal. 356, 357, 360, with extended quotations from the principal case (pp. 143, 144), and the court says said case "very distinctly decides that as between an occupant of riparian land (part of the public lands of the United States) and a subsequent

appropriator of the waters of the stream, the former may assert the riparian right." The court then considers whether the principal case should be overruled saying: "The effect of the presumed grant of land over which water flowed was logically ascertained . . . by reference to the principles of the common law, according to which every part of the land and all its incidents passed by the grant. If we were prepared to say *Crandall v. Woods* was wrongly decided, still there is good reason why it ought not to be overruled in this case"; the alleged overruling cases being declared to relate only to the adverse claims of possessors of land or water on public lands, it being questioned whether such decisions applied to lands belonging to the state; *White v. Douglass*, 71 Cal. 117, to the point that the defendant's application in that case for purchase of university lands, being first in time, was first in right; *Thorp v. Freed*, 1 Mont. 685, in dissenting opinion as to rights of riparian proprietors and appropriation of water in connection also with the laws of the territory and Congress, but cited to the point that defendant was not owner of the fee in the land, but that the title was in the United States, and also that the government having parted with its title the common law rule obtained; *Vansickle v. Haines*, 7 Nev. 289, to the same effect as the last citing case, but the court says that the whole case (the principal one) shows that the decision would have been different if the respective parties had been owners in fee of the land; note 38 Am. Dec. 112; extended note 43 Am. Dec. 280; note 63 Am. Dec. 115.

Water Rights.—Those who construct water ditches will do so with reference to the appropriations of public domain that have previously been made, and the rights that have been already acquired, p. 144.

Cited, *Partridge v. McKinney*, 10 Cal. 183, as sustaining the point that the law does not presume an abandonment of such rights from lapse of time. See next heading, however.

Statute of Limitations.—Water rights may become fixed after five years' adverse enjoyment, pp. 144, 145.

Cited, *Stanford v. Felt*, 71 Cal. 250, to the point that diversion by lapse of time may grow into a right; *Water Co. v. Richardson*, 72 Cal. 601, to the same effect; *Alta Land Co. v. Hancock*, 85 Cal. 226, 20 Am. St. Rep. 221, also to the same point. See, however, the last heading herein.

8 Cal. 145-152. DEWEY v. BOWMAN.

Findings of Fact in equity cases are not conclusive, though no motion for a new trial is made, p. 148.

Same case is cited in *Garwood v. Simpson*, 8 Cal. 108, but the former decision (not reported) was overruled by the principal case; *Duff v. Fisher*, 15 Cal. 381, holding that the finding of a jury on issues in an equity case if not objected to on a motion for a new trial, or if not

set aside by the court's own motion, become established facts, non-reviewable in the supreme court, distinguishing the principal case in that there was no jury in that case; *Gagliardo v. Hoberlin*, 18 Cal. 396, to the same effect as the last citing case, and overruling the principal case; *Lyons v. Lyons*, 18 Cal. 449, holding that though findings of fact are unnecessary in equity cases under the act of 1861, still such findings if made are not to be disregarded; *Burbank v. Rivers*, 20 Nev. 84, quoting from *Gagliardo v. Hoberlin* (noted under this heading), and holding to the same effect as that case.

Pleadings.—If complaint is verified, the answer must specifically deny each allegation, or deny according to information and belief; the object of this statutory requirement being to avoid necessity and expense of producing proof of specific facts which the defendant could not specifically deny, p. 149.

Cited, *Thompson v. Lee*, 8 Cal. 280, to the same effect; also, to the point that a denial where there is no affirmative allegation raises no issue.

Pledge.—Lease assigned as security is a pledge and not a mortgage. A pledge does not transfer legal title either before or after default, but confers only a lien without risk of loss, pp. 150-152.

Cited, *Payne v. Bensley*, 8 Cal. 267, 68 Am. Dec. 319, 320, holding that a pledge of personal property is a mortgage under the attachment act; *Smith v. '49 & '56 Quartz Min. Co.*, 14 Cal. 246, holding that an instrument transferring shares of stock as security for a loan note was a mortgage, though there was a clause of foreclosure for nonpayment, and a provision that the mortgagor might take the property; but it was also held that the mortgagee did not get an absolute title; *Wilson v. Brannan*, 27 Cal. 271, but only referred to generally, as to the distinction between a pledge and mortgage, holding that as to that case such distinction made no practical difference; *Gay v. Moss*, 34 Cal. 132, where a chose in action was assigned as collateral security, and upon the facts held to be a pledge; *Heyland v. Badger*, 35 Cal. 414, as to the distinction between a pledge and mortgage, and holding that a pledge does not vest title in the pledgee, but confers only a lien, and if unredeemed it remains a pledge; *Brewster v. Hartley*, 37 Cal. 25, 99 Am. Dec. 242, to the point that the pledgee has not the legal title, explaining the principal case, and holding that a transfer of shares of stock as security for a loan to be retransferred on payment was a pledge; *Cross v. Eureka etc. Co.*, 73 Cal. 306, 2 Am. St. Rep. 811, to the point that the legal title of shares of capital stock remains in the pledgor as between him and the pledgee; note to *Mitchell v. Roberts*, 5 McCrary, 435, as to the difference between a pledge and chattel mortgage; extended note 49 Am. Dec. 732, 734.

Mortgage of Personal Property passes at law the present legal title in the property itself to the mortgagee, subject to be revested in the

mortgagor, his heirs and assigns, upon performance of an express condition subsequent, p. 150.

Cited, *Payne v. Bensley*, 8 Cal. 267, 68 Am. Dec. 319, 320, quoting from the principal case on this point; *Bryant v. Carson Lumbering Co.*, 3 Nev. 316, 93 Am. Dec. 405, to the same point.

If a Pledgee Sells absolutely without demand or notice, to one having knowledge of his title, the absolute title does not pass, and the property remains as a pledge in the purchasers' hands, p. 152.

Cited in *Williams v. Ashe*, 111 Cal. 188, following rule; *Brittan v. Oakland Bank*, 124 Cal. 289, quoting *Williams v. Ashe*, 111 Cal. 180; *Manton v. Robinson*, 19 R. I. 407, discussing transfer of life insurance policy held as collateral.

8 Cal. 152-158; 68 Am. Dec. 313. **ADAMS v. WOODS.**

Partnership.—After a bill filed, and before a decree of dissolution, a firm creditor may pursue his remedy at law and secure a preference or lien upon the partnership assets, p. 156.

Cited, *Naglee v. Minturn*, 8 Cal. 544, in affirmance; *Ludlum v. Fourth Dist. Court*, 9 Cal. 13, where it is said the judgment of the court in the principal case "was not that the intervenors were then entitled to the relief demanded, but only that they were so entitled on proof of their allegations"; *Adams v. Woods*, 9 Cal. 29, where the material facts were the same as in the last citing case, and the doctrines of the principal case were affirmed, and the court said as to the intervenors: "They first obtained a lien by attachment and ultimate judgment, and then on notice to the receiver sought a decree directing him to pay them in the order of their several priorities. We can see in these proceedings no violation of established principles and no invasion of the jurisdiction of the court in which the suit of *Adams v. Woods*, 8 Cal. 152, was pending"; *Naglee v. Lyman*, 14 Cal. 456, as deciding according to the heading herein, but distinguishing the case, the court saying: "There are, it is true, expressions in the opinion in this last case (the principal one) which, disconnected from the facts, would lead to the inference that a transfer to the receiver of the effects of a defendant under the order of the court would be regarded as an assignment prohibited by law and absolutely void. But the statute does not, neither do the decisions when considered with the facts upon which they were rendered, declare such assignments to be absolutely void, but only void as against the claims of creditors. In the present case no question of the kind arises"; *Jackson v. Lahee*, 114 Ill. 298, and *Ross v. Titsworth*, 37 N. J. Eq. 338, both to the same point as the principal case; *Ackerman v. Ackerman*, 50 Neb. 60, holding property in custody of sheriff pending application for receiver to be attachable; note, 83 Am. Dec. 513, as to priorities of firm creditors.

General Citations.—*Rosenberg v. Frank*, 58 Cal. 405, as containing Notes Cal. Rep.—25.

the expression "pro rata" in the opinion referred to, merely to show the meaning thereof; *Goldtree v. Thompson*, 83 Cal. 422.

8 Cal. 165-203. **WELCH v. SULLIVAN.** S. C. 8 Cal. 511.

Execution.—The writ of venditioni exponas is a simple order of the court to sell property already levied upon. It is no authority to levy, and the recital in the return that the officer had levied and sold by virtue of the writ would be unimportant when it appears that levy had previously been made under execution, p. 186.

Cited, extended note 76 Am. Dec. 84, 88, as to power of officer, after return day of writ by venditioni exponas or otherwise, to sell property.

Same.—Irregularity of sheriff's proceedings will not defeat a sale, p. 186.

Cited, *Frink v. Roe*, 70 Cal. 305, holding that a failure to give notice does not invalidate the sale; *Hazard v. Cole*, 1 Idaho, 289, to the point, objection being made that the sheriff's return was defective, that a purchaser under execution does not depend for his title upon the return of the sheriff. Note 65 Am. Dec. 480, to this point, and also as citing *Smith v. Randall*, 6 Cal. 47; 65 Am. Dec. 475.

Estoppel.—Objection that deeds through which plaintiff derails title are not properly acknowledged is untenable where defendant has no privity with plaintiff as to his title, p. 187.

Cited, *Henderson v. Grewell*, 8 Cal. 584, as to what defect in an acknowledgment does not avoid, but whatever analogy exists is in other facts, to which, however, the principal case is not cited.

Pueblo's Right to Dispose of Lands existed under the laws of Spain and Mexico, p. 195.

Cited, *United States v. Vallejo*, 1 Black (U. S.) 562, as affirming the existence of the decree of the Cortes of 1813, which directs the pueblo lands, etc.; concurring opinion in *United States v. San Pedro etc. Co.*, 4 N. Mex. 307, and *United States v. Santa Fe*, 165 U. S. 698, 700, discussing extent of property of pueblo.

Pueblo Lands.—Act of Congress of 1851 operated as a grant to San Francisco of all lands within her limits vacant and ungranted on July 7, 1846, and a vendee at a sheriff's sale under an execution in 1852, on judgment rendered Sept., 1851, obtained a legal title on which ejectment could be had, pp. 187-197, 203.

Cited, *Hart v. Burnett*, 15 Cal. 588, where the principal case is fully considered and criticised, and declaring that said case only decided that the act of Congress operated as a grant to San Francisco which gave to the vendee at a sheriff's sale under execution a title to the premises, but that this ground was not tenable for reasons which the court fully stated, and it was held that as to said pueblo lands San

Francisco's title was wholly unaffected by sheriff's sales under execution against her.

Pueblo of San Francisco had pueblo lands previous to July 7, 1846, which the ayuntamiento at one time and the alcaldes at another might grant, and upon change of government alcaldes could grant limited portions of said lands. The municipal law continued in force until 1850. Such grants were not American alcalde grants, but were those of the pueblo, and the presumption was as to all grants made by alcaldes that they were of municipal lands, pp. 197, 198.

Cited, *White v. Moses*, 21 Cal. 41, quoting from the principal case; *Scott v. Dyer*, 54 Cal. 434, that alcaldes could make valid grants after the conquest and before the incorporation of San Francisco; *More v. Steinbach*, 127 U. S. 81, upon the point of alcalde grants of San Francisco lots being valid, but that the decision to such effect did not militate against the point in that case, as those officers were agents of the pueblo or city and did not assume to alienate or affect the title to United States lands, and the case holds that the authority and jurisdiction of Mexican officers in California terminated July 7, 1846, and this extended to alcaldes appointed or elected thereafter.

Ejectment.—Outstanding title will defeat recovery, though defendant does not connect himself therewith, p. 201.

Cited, *Piercy v. Sabin*, 10 Cal. 30, 70 Am. Dec. 698, holding that in ejectment, when plaintiff claims title by virtue of older possession, defendant cannot prove a better title in another party through whom he claims.

Stare Decisis.—Courts will not overrule former decisions unless the inconvenience arising from the error greatly outweigh the advantages resulting from adherence to the rule, pp. 188, 200.

Cited, extended note, 27 Am. Dec. 632.

3 Cal. 207-217. **SELIGMAN v. KALKMAN.** S. C. 17 Cal. 152.

Fraud.—Where an insolvent purchaser of goods obtains them on credit and conceals his insolvency from the vendor, it is such a fraud as vitiates the sale, p. 215.

Cited, *Bell v. Ellis*, 33 Cal. 626-630, where the principal case is fully considered and overruled; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 585, 42 Am. Rep. 59, holding that if one knowing himself insolvent buys goods secretly, intending not to pay for them, the vendor ignorant thereof may rescind the sale; *Brower v. Goodyer*, 88 Ind. 573, to the same effect; *Goodman v. Sampliner*, 23 Ind. App. 73, quoting *Brower v. Goodyear*, 88 Ind. 573; *Syracuse etc. Co. v. Blanchard*, 69 N. H. 451, as overruled by *Bell v. Ellis*, 33 Cal. 626; *Kloppenstien v. Mulcahy*, 4 Nev. 300, holding a contrary rule; Extended note 33 Am. Dec. 707, contra; notes 52 Am. Dec. 57, 58, as to insolvency of vendee; 68 Am. Dec. 280; 53 Am. Rep. 450.

8 Cal. 217-226. POTTER v. SEALE. S. C. 5 Cal. 410.

Malicious Prosecution.—Plaintiff must establish not only malice, but want of probable cause; both elements must concur. Malice may be inferred from want of probable cause, but the latter cannot be inferred from malice. Malice is a question of fact, and charge must be shown to have been willfully false. Probable cause is a question of mixed law and fact, p. 220.

Cited in *Davis v. Pacific etc. Co.*, 127 Cal. 319, sustaining nonsuit under facts stated; *Grant v. Moore*, 29 Cal. 649, to the point that want of probable cause is the primary question; that malice may be inferred from the want of probable cause, but that the latter cannot be implied from malice. It is also held that want of probable cause is a mixed question of law and fact; *Levy v. Brannan*, 39 Cal. 488, to the point that actual malice must be proved as a fact; also, that there is no legal presumption of malice, though it may be inferred from want of probable cause; that the charge must be willfully false, and that the burden of proof of want of probable cause is upon plaintiff; *Jones v. Jones*, 71 Cal. 93, that onus is upon plaintiff to show want of probable cause; the case also holds that malice and want of probable cause must concur; *Smith v. Liverpool etc. Ins. Co.*, 107 Cal. 436, 437, to the same effect as the principal case, and in affirmance; *The Pennsylvania Company v. Weddle*, 100 Ind. 147, to the point, "whether the alleged circumstances exist or not is simply a question of fact, and, conceding their existence, whether or not they constitute probable cause is a question of law" (principal case p. 220); *Turner v. O'Brien*, 5 Neb. 545, to the point that belief is a material issue, and so is malice; *Greer v. Whitfield*, 4 Lea (Tenn.), 90, to the same point as the last citing case; Extended note 26 Am. St. Rep. 151, that malice is a question for the jury. Other important points are also considered.

Same.—It is a good defense that the defendant has fully and fairly laid his case before counsel and acted under his advice, though the question of good faith is for the jury, pp. 225, 226.

Cited, *Levy v. Brannan*, 39 Cal. 488; *Jones v. Jones*, 71 Cal. 93, and *Sandell v. Sherman*, 107 Cal. 396—all to the same effect on this point; *Scotton v. Longfellow*, 40 Ind. 30, to the point that in order for the advice of counsel to afford protection, it must be given upon a full and true statement of the facts within the knowledge of the person seeking advice, and must be acted upon in good faith and for an honest purpose; *Cooper v. Utterbach*, 37 Md. 309, to substantially the same effect; so, also, in *Smith v. Davis*, 3 Mont. 111, to the same point; *Turner v. O'Brien*, 5 Neb. 545, and *Greer v. Whitfield*, 4 Lea (Tenn.), 90, to the point that belief is a material issue.

8 Cal. 227-260. DAVIDSON v. DALLAS.

Agent.—Unauthorized acts of ostensible agent bind the principal

as to innocent parties, but a power to sue on contracts of the principal does not authorize suits on unauthorized contracts except as to innocent third parties, although a power to sue authorizes the execution of an indemnity bond in an attachment suit when a third party claims the property, pp. 244-252.

Cited, *Davidson v. Dallas*, 15 Cal. 78, in the same case. noting the petition for rehearing (8 Cal. 256) and the affirmance therein; then considering the facts of record; the notice of points 1, 2, and 3 considered in the principal case (p. 244), and then the court considers the third point, which is noted in this connection below; *Hall v. Crandal*, 29 Cal. 571, 89 Am. Dec. 66, holding that a contract is void when not binding upon principal for want of authority in agent to make it and not binding on the agent for want of apt words to bind him personally; also that agents who execute a note for another without authority, and without apt words to charge them personally, are not liable upon the note; notes 28 Am. Dec. 482; 68 Am. Dec. 287, as citing *Sayre v. Nichols*, 7 Cal. 535; 68 Am. Dec. 280, upon the point of agency in this connection.

Ratification of Agent's unauthorized acts must be with full knowledge thereof, p. 245.

Cited, *Frink v. Roe*, 70 Cal. 311, in connection with the point whether a certain conveyance in excess of authority was void, and the question as to ratification of void and voidable acts; note 68 Am. Dec. 237.

Attachment.—Sheriff is agent of attaching creditors in order of priority, and indemnity bonds being given, and property sold and money paid to first attaching creditor, recourse must be had against such creditor where judgment is obtained against the sheriff. In such case the attaching creditors are not joint trespassers, pp. 252-256, 259.

Cited in *Moore v. Los Angeles etc. Co.*, 89 Fed. 76, construing Civil Code, section 2777. Case is also cited in *People v. Van Cleave*, 187 Ill. 134, as defining "any"; *Lewis v. Johns*, 34 Cal. 633, but distinguished in that that case was an action by the parties whose property was wrongfully taken, against the sheriff and both attaching creditors as joint trespassers; quoting also from the principal case (p. 255), there explaining what the case decides, and concluding: "Whether this is sound doctrine need not be considered here"; *Fury v. White*, 2 Idaho, 641, with reference to the same case (15 Cal. 75), where the court declared the case before it to be a widely different one; but the sheriff in that case sold the property under execution in the first suit, and received an indemnifying bond against loss under the second attachment. All the proceeds were paid to the first attaching creditor, and a third party claimant recovered the value of the property sold, and it was held that the sheriff could not recover under the bond; also, that the second attaching creditor was not liable under the complaint or proof; *Lee v. Maxwell*, 98 Mich. 501, giving at length the conclusions

of the court numbered 1, 2, 3, and 4, in the opinion in the principal case (pp. 253, 254), and declaring that notwithstanding 15 Cal. 75, the opinion has "force, reason, and justice to commend it." But it was also said that the principal case differed from that one in that the property levied on was a single article, while in that case there were several articles, and the plaintiff in the absence of a mortgage, would not have been justified in levying on more than sufficient to satisfy the claim.

Sheriff is entitled to separate bonds of indemnity as independent securities, from each of several creditors, and each creditor is compelled to indemnify or relinquish the levy, pp. 252, 259.

Cited, *Davidson v. Dallas*, 15 Cal. 78, where the principal case is fully considered and doubted, but the question was left open for review; extended note 16 Am. Dec. 554; note 19 Am. Dec. 668. See also last heading herein.

8 Cal. 260-268; 68 Am. Dec. 318. **PAYNE v. BENSLEY.**

Note Taken before maturity as collateral security for a pre-existing debt is not subject to equities or defenses between the original parties, p. 266.

Cited, *Robinson v. Smith*, 14 Cal. 98, in affirmance; *Naglee v. Lyman*, 14 Cal. 454, holding the same; but it is said upon the point of pre-existing indebtedness as a consideration that the court in the principal case "only intimated its opinion; the decision was placed on another ground"; *Frey v. Clifford*, 44 Cal. 342, to the point that a pre-existing debt is a valuable consideration. This was a case of a mortgage security; *Davis v. Russell*, 52 Cal. 616, 28 Am. Rep. 650, to the same point as the last in a case of a warehouse receipt; so, also, in *Sackett v. Johnson*, 54 Cal. 109, a case of negotiable paper; *Manning v. McClure*, 36 Ill. 495, as dictum only, to the effect that the indorsee of a negotiable note who has taken it merely as collateral security for a precedent debt takes it discharged of latent equities between antecedent parties; *Shufeldt v. Pease*, 16 Wis. 661, distinguishing between cases where the purchaser surrenders a former security and a case where he merely receives the property on a verbal agreement that it shall be in payment of a prior debt, and holding that a purchaser taking in payment of a pre-existing debt without notice of fraud is a purchaser bona fide; *The Elmbank*, 72 Fed. Rep. 618, as cited there by counsel in support of the point that a pre-existing debt is a valuable consideration, but the case is distinguished in this that the question in that case did not concern negotiable instruments, and it was declared that the rule did not apply to non-negotiable paper; notes 9 Am. Dec. 273, as to who is a bona fide holder, and the point of what is a valuable consideration; 12 Am. Dec. 137; 71 Am. Dec. 499; 73 Am. Dec. 88; extended note 84 Am. Dec. 405; note 89 Am. Dec. 411; extended note 32 Am. St. Rep. 713.

Mortgage is a mere security for a debt; and the legal title remains in the mortgagor until foreclosure and sale, p. 267.

Cited, notes 56 Am. Dec. 348, 362; 63 Am. Dec. 135.

General Citation.—Frey v. Clifford, 44 Cal. 341, as sustaining the proposition that the right to process of attachment constitutes a valuable consideration, but the principal case only so intimates, and Russ etc. Mill Co. v. M. etc. Water Co., 120 Cal. 532.

8 Cal. 268-271. CHIPMAN v. HIBBARD.

Injunction.—Courts of co-ordinate jurisdiction cannot restrain judgments of each other, p. 271.

Cited, Pixley v. Huggins, 15 Cal. 134, but held not to apply to a proceeding brought, not to stay execution, against the property of the judgment debtor, but to prevent a sale of the property of the plaintiff under the claim that it is the debtor's property; Crowley v. Davis, 37 Cal. 269, in affirmance of the principal case, subject to the exception that the court rendering the decree is unable by reason of its jurisdiction to afford the relief sought; De Godey v. Godey, 39 Cal. 162, but distinguished since in that case one suit concerned the division of community property and the other the dissolution of the marriage tie.

Cross-reference.—Anthony v. Dunlap, 8 Cal. 26; Rickett v. Johnson, 8 Cal. 34; Revalk v. Kraemer, 8 Cal. 66; Phelan v. Smith, 8 Cal. 521.

8 Cal. 271-275; 68 Am. Dec. 322. LASSEN v. VANCE.

Homestead is subject to a mortgage for purchase money, although the wife does not sign the mortgage. The deed and mortgage being simultaneous are parts of the same transaction, and neither husband nor wife had any legal or equitable right to the premises, p. 274.

Cited, Blaisdell v. McDowell, 91 Cal. 287, 25 Am. St. Rep. 190, a chattel mortgage to secure purchase money; (but see Van Loben Sels v. Bunnell, 120 Cal. 683, where mortgage not one for purchase money); Blevins v. Rogers, 32 Ark. 260, a case where the note given for the purchase money was paid by another, who took a mortgage and note, and it was held merely a transfer of the original lien; Christy v. Dyer, 14 Iowa, 442, 81 Am. Dec. 496, to the same points as the principal case; Burnap v. Cook, 16 Iowa, 154, 85 Am. Dec. 509, but distinguished, and holding that husband and wife must concur in a mortgage of the homestead, and that the homestead right is subordinate to that of the vendor for unpaid purchase money, but that the lien is waived or merged by taking a mortgage as security, and also considering when the mortgagee is not subrogated to the vendor's rights as to the purchase money; Nichols v. Overacker, 16 Kan. 59, to the same point as the principal case under very similar facts; Howell v. Bush, 54 Miss. 445, merely as a case cited on a petition for rehearing, but the

principle in that case was that a mere change in the form of indebtedness will not operate to discharge a lien given to secure a debt unless it is apparent that the parties intended to extinguish the lien; *Roby v. Bismarck Nat. Bank*, 4 N. Dak. 162, 50 Am. St. Rep. 637, that a like mortgage as in the principal case need not be signed by the wife, the deed and mortgage being simultaneous acts and parts of the same transaction; *Lamb v. Mason*, 50 Vt. 351, to the same point, in a case of subrogation to the mortgagee of purchasers of a mortgage covering the homestead; notes 79 Am. Dec. 361; 81 Am. Dec. 497; 85 Am. Dec. 513; 87 Am. Dec. 257; 99 Am. Dec. 575, 576; extended note 45 Am. St. Rep. 386.

A Transitory Seisin conveys no title, p. 274.

Cited, note 55 Am. Dec. 782, as citing *Stephens v. Sherrod*, 6 Tex. 294; 55 Am. Dec. 776.

8 Cal. 275-280. THOMPSON v. LEE.

Water Rights.—Notice of intent to appropriate is not of itself sufficient evidence of possession, p. 280.

Cited, extended note 43 Am. Dec. 280; note 65 Am. Dec. 533.

8 Cal. 281-287. STILL v. SAUNDERS.

Verdict in equity cases is only advisory, and the whole record will be examined in the supreme court to see if there is error in the final decree, pp. 286, 287.

Cited, *Duff v. Fisher*, 15 Cal. 381, holding that findings of the jury in equity cases are conclusive if not objected to on motion for a new trial or set aside of the court's own motion, and the facts cannot be questioned for the first time in the supreme court; *Sweetser v. Dobbins*, 65 Cal. 531, in affirmance of the principal case, but holding otherwise as to erroneous instructions, where the chancellor of his own motion sets aside the verdict; *Mantle v. Noyes*, 5 Mont. 287, to the point that findings of a jury in equity cases are merely advisory. This case quotes at length from *Basey v. Gallagher*, 20 Wall. 679, which is noted below under this heading; *Smith v. Richardson*, 2 Utah, 427, to the point that the court may modify or disregard the findings of a jury in equity cases, the verdict being merely advisory: *Basey v. Gallagher*, 20 Wall. 681, holding that findings of the jury in equity cases are not conclusive, though no application is made to vacate them, if the court believes them not supported by the evidence. This last case is quoted from at length in *Mantle v. Noyes*, noted above under this heading.

Payment.—Burden of Proof of, is on defendant, p. 287.

Cited in *Melone v. Ruffino*, 129 Cal. 519, 79 Am. St. Rep. 131, applying rule, although complaint affirmatively alleged nonpayment.

8 Cal. 288-291. PEOPLE v. McDERMOTT.

Perjury.—The matter sworn to must be material to the issue to constitute perjury, p. 290.

Cited, extended note 85 Am. Dec. 492.

"Value Received" in a promissory note does not change its legal effect, p. 291.

Cited, Culbertson v. Nelson, 93 Iowa, 197, 57 Am. St. Rep. 273, to the point that said words do not prove an intent to make a negotiable instrument, and that they express only what the law implies.

General citation: People v. Jones, 123 Cal. 302.

8 Cal. 291-293. WINANS v. HARDENBERGH.

Error in Refusing to instruct the jury, as in case of a nonsuit is cured by the introduction of evidence by the defense, p. 293.

Cited, Schlessinger v. Mallard, 70 Cal. 334, to the same point; Elmore v. Elmore, 114 Cal. 520, as so deciding, but held not to sustain the contention that the appellant there "waived the point of variance between the complaint and the evidence, because having made that point on a motion for a nonsuit he afterward introduced evidence in the case."

8 Cal. 294-296. CHAPIN v. BOURNE.

Title to Water Lots passed out of the United States to California on her admission by virtue of her sovereignty, p. 295.

Cited, Wright v. Seymour, 69 Cal. 126, to the point that "the lands under water where the tide ebbs and flows belong to the state by virtue of her sovereignty and, in the absence of an express showing to the contrary it will not be presumed that the government of the United States intended to convey it." This was a case of a patent from the United States; Pacific Gas Imp. Co. v. Ellert, 64 Fed. Rep. 433, reviewing the principal case as to the points decided.

Registry in some book of record in the possession and control of the recorder of San Francisco was necessary in the case of alcalde grants of beach and water lots, p. 296.

Cited, Mumford v. Wardwell, 6 Wall. 429, by counsel, but that case holds, under a requirement of registry in a "book," that the word covers copies of deeds on sheets folded, indorsed, and classified, but not bound or fastened together; each class being in a separate bundle, and such sheets being bound a few years thereafter according to the class.

Beach and Water Lots.—The act of 1851 granted to the city of San Francisco certain beach and water lots for ninety-nine years, and alcalde grants could not pass title to such lots except as conceded by said act, p. 296.

Approved in *United States v. Mission Rock Co.*, 189 U. S. 405, order of President reserving for naval purposes Mission Rock in San Francisco bay was not an appropriation of surrounding tide lands; *Pacific Gas Imp. Co. v. Ellert*, 64 Fed. Rep. 432, 433, to the point that the act of 1851 came up for construction in the principal case, which is fully reviewed, and the acts of March 11, 1858, and of April 25, 1862, relating to streets over tide waters were construed.

New Trial—Court has discretion to require the remitting of a portion of excessive damages as a condition of refusing a new trial, p. 296.

Cited, *Clanton v. Coward*, 67 Cal. 375; *Davis v. Southern Pac. Co.*, 98 Cal. 17; *Brooks v. San Francisco etc. Ry. Co.*, 110 Cal. 176—all in affirmance; *Chicago etc. Co. v. O'Marr*, 25 Mont. 253, sustaining similar order.

8 Cal. 297-300; 68 Am. Dec. 323. **HAIGHT v. GAY.**

Appellate Power of the supreme court is derived from the constitution, and it cannot be impaired by the legislature, p. 300.

Cited, *In re Jessup*, 81 Cal. 477, in dissenting opinion, but by virtue of this doctrine, the case holds that section 45 Cal. Code Civ. Proc., as to orders for rehearings being in writing and signed by five judges, is unconstitutional; *People v. Bingham*, 82 Cal. 242, to the same point as the principal case.

If Appeal is Given by Statute, that remedy is exclusive and must be by statute, p. 300.

Cited, *Miliken v. Huber*, 21 Cal. 169, in affirmance of the same principle; *Sacramento etc. R. R. Co. v. Harlan*, 24 Cal. 336, quoting from the principal case (p. 300); *Willoughby v. George*, 4 Colo. 23, to the same point; notes 72 Am. Dec. 405; 83 Am. Dec. 103, 141; 86 Am. Dec. 796.

Writ of Error will only lie in cases where no appeal is given by statute, p. 300.

Cited, *Nowland v. Vaughn*, 9 Cal. 52, where a writ of error was dismissed on authority of the principal case (in opinion of a line and a quarter); *Sacramento etc. R. R. Co. v. Harlan*, 24 Cal. 336, quoting from the principal case; *Freas v. Engelbrecht*, 3 Colo. 383, to the same point in connection with the question whether the discontinuance of an appeal ought not to be treated as an affirmation of the judgment; extended note 91 Am. Dec. 196; note 3 Am. St. Rep. 106.

Distinguished in *Estrel v. Diehle*, 6 Kan. App. 246, holding writ to lie under local statute; *State v. Reed*, 3 Idaho, 558, order denying change of venue in criminal case reviewable only on appeal from final judgment.

8 Cal. 301-303. PEOPLE v. McALLA.

Criminal Law.—Each defendant in a joint indictment has the option to receive a separate trial, but if he waives right and is tried jointly, challenges should be joint and not several, p. 303.

Cited, *People v. O'Loughlin*, 3 Utah, 143, to the same point, and extending the doctrine to the defense being joint.

8 Cal. 303-305. PLACER COUNTY v. ASTIN.

Estoppel of Agent.—Sheriff collecting taxes improperly levied is estopped to deny the right of the county to receive them, since the sheriff collects such money as agent or trustee, p. 305.

Cited, *McKee v. Monterey County*, 51 Cal. 277, where the principle is applied to a county treasurer; *People v. Bunker*, 70 Cal. 215, where the principle is applied to an immigration commissioner; *San Bernardino County v. Davidson*, 112 Cal. 505, but declared not in point as that case was one of a county recorder, and it was held that moneys received for recording notices of mining claims were not fees for which he or his bondsmen were accountable to the county; *Mason v. Board*, 104 Ga. 45, holding treasurer estopped under facts stated from asserting that funds were not held by him officially; *State v. Ewing*, 116 Mo. 135, to the same point as the principal case.

8 Cal. 306-322. ADAMS v. WOOD. S. C. 8 Cal. 152.

Appeal.—One who is not a party to the record may appeal where he is a party aggrieved, and one who would have had the thing but for the erroneous judgment is "aggrieved," but the right must be immediate, and not the remote consequence of the judgment, had it been differently given, p. 315.

Cited, *Estate of Boland*, 55 Cal. 312, holding that appellant, to whom property had been sold by the administratrix and the sale confirmed, was aggrieved by an order directing a resale of said property; *People v. Pfeiffer*, 59 Cal. 91, holding that one not a party or privy to a judgment, or not prejudiced thereby was not aggrieved; *Goldtree v. Thompson*, 83 Cal. 422, to the point that trustees under a will have no concern as to who shall bear the costs of litigation, and cannot litigate any question which arises only between the real parties in interest, and are not aggrieved by an order of court allowing an attorney and guardian ad litem fees for his services in a case of construction of the will; *Manhard etc. Co. v. Rothschild*, 121 Mich. 661, denying right of party to appeal; *Daniels v. College*, 20 Tex. Civ. App. 564, quoting *Peavy v. Goss*, 90 Tex. 93; *State v. Eves*, 6 Idaho, 148, where court fails to render judgment as provided in Revised Statutes, section 1266, in action on contract providing for illegal interest, state may move for modification of judgment, and may appeal from order therein; *Peavy v. Goss*, 90 Tex. 93, construing "any person aggrieved" to mean

"any person having an interest recognized by law in the subject matter of the judgment, which he considers injuriously affected by the action of the court."

Order Appealed from must be one of those specified in the third division, section 336, of the Practice Act, p. 315.

Cited, *Rochat v. Gee*, 91 Cal. 256, where the order not being one specified in subdivision 3 of section 939, Code Civ. Proc. (same as section 336, division 3 of the Practice Act) was held not appealable, so also, as to subdivision 3 sections 939 and 963, Code Civ. Proc.

Receiver is an indifferent person as between the parties; he is an officer of the court, appointed on behalf of all the parties who may establish rights in the cause, p. 315.

Cited, *First Nat. Bk. v. Barnum W. & I. Works*, 60 Mich. 499, to the same effect, and also declaring that he should exercise the strictest impartiality among creditors, and remain unbiased, or be removed.

Receiver should not retain as counsel one employed by any of the parties to the suit, pp. 319-322.

Cited in *Strong v. International etc. Union*, 183 Ill. 103, quoting opinion S. C. 82 Ill. App. 426, and denying compensation to attorney for services rendered party to action; *Geyser etc. Co. v. Bank*, 16 Utah, 168, but sustaining allowance of compensation to such counsel when appointment not objected to; *Speiser v. Bank*, 110 Wis. 517, denying credit to receiver for moneys paid such attorney. *Farwell v. Great Western Tel. Co.*, 161 Ill. 611, 613, where the rule is applied to the misconduct of a receiver in retaining a creditor as counsel, such fact being held a sufficient excuse for suing the receiver and insolvent corporation; *Merchants' etc. Bk. v. Kent*, Judge, 43 Mich. 297, to the point that a receiver should not appoint a solicitor in his own case as counsel; *Shainwald v. Lewis*, 8 Fed. Rep. 880, to the point that the receiver should not be removed because he employed the complainant's counsel, although the complaint was related to the receiver, where the bankrupt had admitted that he was party to a fraudulent concealment and transfer of his property.

General Citations.—*Rosenberg v. Frank*, 58 Cal. 405, as using "pro rata" in the opinion; *Randol v. Garoutte*, 78 Mo. App. 613.

8 Cal. 323-324. LEIGH COMPANY v. INDEPENDENT DITCH COMPANY.

Water Rights.—One locating and appropriating public lands is entitled to the natural flow of the waters as against subsequent appropriators, pp. 323, 324.

Cited, extended note, 43 Am. Dec. 280.

8 Cal. 325-327. HOWE v. SCANNELL.

Vendor cannot Impeach his own sale, except where evidence is introduced showing a collusion between the vendor and purchaser to defraud the creditors of the former, when he is a competent witness against the vendee, p. 327.

Cited, extended note, 90 Am. Dec. 300. Overruled, *Waugenheim v. Childs*, 23 Cal. 446, as to the exception.

8 Cal. 327-336; 68 Am. Dec. 325. BEAR RIVER ETC. MINING CO. v. THE NEW YORK MINING COMPANY.

Water Rights may be acquired by appropriation, p. 336.

Cited in *Montecito V. Co. v. Santa Barbara*, 144 Cal. 594, on point that corporation may acquire such rights in same manner as individual.

Water Rights.—First appropriator of water for mining purposes is entitled to have the water flow without material interruption in its natural channel. He is entitled to the water undiminished in quantity so as to leave sufficient to fill his ditch as it existed when locations were made above, and to its deterioration in quality by reason of use for mining, this is *damnum absque injuria*, p. 336.

Cited, *Hill v. King*, 8 Cal. 339, upon rehearing, as expressing the views of the court and modifying the former ruling in that case, especially as to deterioration; *Mokelumne etc. Mining Co. v. Woodbury*, 10 Cal. 187, where instructions in substance contrary to the above heading were held erroneous; *Pilot Rock C. C. Co. v. Chapman*, 11 Cal. 162, where the court says: "It has nowhere been held that a defendant is not responsible for injuries done the ditch of another by the deposit of mud and sediment in it." The doctrine of the principal case "probably went quite as far as it ought to have gone"; *Phoenix Water Co. v. Fletcher*, 23 Cal. 488, to the same points as the principal case, except as to deterioration in quality; *Lux v. Haggin*, 69 Cal. 359, as to deterioration of quality, but the doctrine of appropriation was fully discussed; *Atchison v. Peterson*, 1 Mont. 568, in affirmance of the doctrine that the first appropriator is entitled to the flow of water in its natural channel without material interruption; extended note 43 Am. Dec. 279, 281, 282; note 76 Am. Dec. 479; extended note 79 Am. Dec. 639; notes 85 Am. Dec. 73, 150; 90 Am. Dec. 541; 91 Am. Dec. 692. Examine *Hill v. Smith*, 27 Cal. 476, as to deterioration in quality. See, also, *Hill v. King*, 8 Cal. 336, next following herein.

8 Cal. 336-339. HILL v. KING.

Water Rights.—Same heading as the preceding case herein, as the decision here was modified on rehearing to accord therewith, p. 339.

Cited, *Bear River etc. Mining Co. v. The New York Mining Co.*, 8 Cal. 334, 68 Am. Dec. 328, where the case is referred to and the ques-

tions left open, as the rehearing had not then been disposed of; *Phoenix Water Co. v. Fletcher*, 23 Cal. 488, to the same points except as to deterioration in quality; *Junkans v. Bergin*, 67 Cal. 269, where the court says: "They had no right, however, by their mining operations to destroy or fill up the appellants' dam or ditch, or to materially diminish the quantity or deteriorate the quality of the water, and if they did that an action might have been maintained against them for damages and to restrain their works"; *Lux v. Haggin*, 69 Cal. 359, 446, where the question of deterioration of the quality of the water and the right to appropriate waters are fully considered. That case was one, however, of riparian proprietors; *De Necochea v. Curtis*, 80 Cal. 405, to the point that the right has always been recognized here to appropriate water on public lands for mining, agricultural, and other useful purposes; also, that this right has always been upheld against subsequent appropriators not having rights derived from the government; extended note 43 Am. Dec. 279, 282; notes 65 Am. Dec. 533; 68 Am. Dec. 331.

Water Rights.—Legislation concerning water rights amounts to a general license to all, p. 338.

Cited, *Lux v. Haggin*, 69 Cal. 446, quoting from the principal case; *Gold Hill Q. M. Co. v. Ish*, 5 Oreg. 106, to the point that there is such a presumption of license as to give miners a right against all but the general government; that the right of mining is a franchise, and the attending circumstances raise the presumption of a general grant from the sovereign.

8 Cal. 339-340. **DEIDESHEIMER v. BROWN.**

Special Appearance may be made to dismiss a defective summons, and is not an appearance to the action, even though after motion to dismiss is overruled the party answers, pp. 339, 340.

Cited, *Gray v. Hawes*, 8 Cal. 569, to the point that appearance for the purpose of objecting to a prior void proceeding does not cure it; *Lyman v. Milton*, 44 Cal. 635, following the principal case; *Black v. Clendenin*, 3 Mont. 49; *Miner v. Francis*, 3 N. Dak. 553, and *Benedict v. Johnson*, 4 S. Dak. 392—all asserting the same rule. The principal case is also cited in *Paul v. Armstrong*, 1 Nev. 98, but to a point not involved in the principal case. Referred to in *McDonald v. Agnew*, 122 Cal. 450.

Overruled in *In re Clarke*, 125 Cal. 392, holding appearance general, notwithstanding reservations, when relief sought thereon presupposes that moving person is party to the action.

8 Cal. 340-341. **FRANKLIN v. REINER.**

Appeal.—Transcript must show that the undertaking was filed in due time, and that notice of appeal was duly served, pp. 340, 341.

Cited in *Pacific Mut. Life Ins. Co. v. Edgar*, 132 Cal. 198, dismissing appeal; *Seattle etc. Co. v. Simpson*, 19 Wash. 633, on point that service and filing of notice are both necessary to perfection of appeal; *Adams v. McPherson*, 3 Idaho, 721, record must affirmatively show service of notice of appeal on adverse party; *Whipley v. Mills*, 9 Cal. 641, holding that notice of appeal must be filed and served; *Hastings v. Halleck*, 10 Cal. 31, to the same points as the principal case; *Hildreth v. Gwindon*, 10 Cal. 491, holding that the record must affirmatively show that a copy of notice of appeal has been duly served; *Wakeman v. Coleman*, 28 Cal. 59, to the point that appellant must show affirmatively that the required undertaking has been given; *People v. Alameda T. Co.*, 30 Cal. 184, to the same point as the principal case; *Reed v. Allison*, 61 Cal. 468, holding that the record must show that notice of appeal was served according to law; *Tootle v. French*, 2 Idaho, 747, to the same points as the principal case; *Payne v. Davis*, 2 Mont. 382, by counsel to the same points; *Pardee v. Murray*, 4 Mont. 37, following the principal case.

8 Cal. 341-344. **PEOPLE v. PAYNE.**

Trespass.—The owner of property in possession thereof has the right to use such force as is necessary to prevent a forcible trespass, and a killing in so doing is justifiable, p. 343.

Cited, *People v. Henshell*, 10 Cal. 87, in approval; *State v. Matthews*, 148 Mo. 196, 71 Am. St. Rep. 600, reversing conviction of murder under facts stated; *Sims v. State*, 36 Tex. Cr. App. 171, and S. C. on second appeal, 38 Tex. Cr. App. 646, holding instructions erroneous; *Stamper v. Raymond*, 38 Or. 29, in action for malicious prosecution for assault committed in resisting attempt to remove grain in plaintiff's possession, and each party claimed possession under contract, contract admissible to show malice; *Ross v. State*, 10 Tex. App. 466, 38 Am. Rep. 645, in affirmance of the principle; *Wallace v. United States*, 162 U. S. 474, where the court says: "A person cannot repel a mere trespass on his land by the taking of life, or proceed beyond what necessity requires. When he uses in the defense of such property a weapon which is not deadly, and death accidentally ensues, the killing will not exceed manslaughter; but when a deadly weapon is employed it may be murder or manslaughter, according to the circumstances"; extended note 70 Am. Dec. 184.

When a trespasser goes with the intent and means to commit a felony if necessary to accomplish the end intended, the owner of the property may repel force with force, p. 344.

Cited, *People v. Flanagan*, 60 Cal. 4, 44 Am. Rep. 53, holding that homicide in defense of one's property is justifiable when necessary to prevent a felonious aggression thereon; *People v. Hecker*, 109 Cal. 461, in affirmance; *People v. Lewis*, 117 Cal. 194, approving the rule in the case of an assault committed on one's own premises; *Page v. State*,

141 Ind. 241, to the point that in homicide committed in resistance of felonies the duty of retreating is not mentioned, and the rule as to resisting force with force is stated; Parrish v. Commonwealth, 81 Va. 16, to the same effect, but holding also that the justification must depend upon the circumstances as they appeared to the accused; extended note 82 Am. Dec. 675.

Criminal Procedure.—Instructions of the court must be in writing, and an oral modification is erroneous, p. 344.

People v. Woppner, 14 Cal. 438, to the point that oral instructions are a fatal error; People v. Chares, 26 Cal. 79, in affirmance of the rule that oral instructions without the accused's consent are erroneous, and that his consent cannot be presumed from his presence and failure to object; People v. Trim, 37 Cal. 276, in approval, where it did not appear that the accused consented to the oral charge; People v. Sanford, 43 Cal. 35, holding the same as People v. Chares, noted under this heading; People v. Hersey, 53 Cal. 575, holding that when the jury returns for further instructions it is error to orally instruct, in the absence of the phonographic reporter (section 1093. Penal Code, as amended in 1874), without consent of counsel; State v. Potter, 15 Kan. 316, to the point that instructions must be in writing; State v. Porter, 35 La. Ann. 536, that the refusal to deliver a charge in writing upon request is error; People v. Bonds, 1 Nev. 36, in approval of the rule, and adding that the consent of accused must affirmatively appear. Swaggart v. Territory, 6 Okla. 347. Boggs v. United States, 10 Okla. 447.

General Citation.—People v. Acosta, 10 Cal. 196, where the court says the principles governing the principal case are applicable, but the case does not show in what respect.

8 Cal. 344-347. **MONTROSE v. CONNER.**

Mechanic's Lien.—Notice must correctly describe and locate the property. The location of a lot on a certain street between two others, without giving the number of the lot, is insufficient, even though the party owned no other building on that street, p. 347.

Cited, Gordon v. South Fork etc. Co., McAllister, 521, where the description, "the works known as the South Fork Canal, near Placer-ville in El Dorado County," was held sufficient, as sufficiently identifying the object intended.

8 Cal. 347-353. **COOK v. KLINK.**

Action—Homestead.—Both husband and wife must be parties in action to determine homestead right, p. 353.

Cited, Building and Loan Assn. v. Chalmers, 75 Cal. 334, 7 Am. St. Rep. 174, in affirmance of the rule, holding that a judgment of foreclosure against the surviving wife, sued solely as executrix of her

deceased husband, does not affect her individual rights in the home-
stead; *Larson v. Reynolds*, 13 Iowa, 584, 585, 81 Am. Dec. 448, 449,
where the court declares that the principal case goes "much beyond
what we regard as the correct rule under our statute, in holding that
if the husband alone is made a party and defends, his rights are not
concluded"; and the case holds that the wife is not a necessary party,
but that, if not a party to a foreclosure of a mortgage executed by
her husband alone, she is not estopped by the decree; note 68 Am. Dec.
309.

8 Cal. 353-359. **NAGLE v. HOMER.**

If a Draft is Conditionally Accepted, the question whether the con-
tingency has happened on which the payment depends is for the jury,
p. 358.

Cited, *Carlisle v. Hooks*, 58 Tex. 421; the contingency in this case was
that the bill was to be paid so soon as the acceptor should find himself
in funds, and it was held that "funds" meant money, and it must be
alleged and proved that the acceptor had "funds."

8 Cal. 359-362. **PEOPLE v. GEHR.**

Criminal Law—Challenge.—The formation or expression by a juror
of an unqualified opinion as to the guilt of accused requiring proof to
change, is a ground of challenge for cause, notwithstanding the juror
says that he can try the case impartially, p. 362.

Cited in *Quill v. Southern Pacific Co.*, 140 Cal. 269, holding challenge
for actual bias improperly disallowed; *Polk v. State*, 45 Ark. 170, in
affirmance under like facts; *State v. Barton*, 71 Mo. 301, in dissenting
opinion, quoting from the principal case, but under the same facts the
juror was held competent; *Territory v. Kennedy*, 3 Mont. 526, where
the principle is affirmed, but the fact of an expression of opinion was
not known until after the verdict; *Rothschild v. State*, 7 Tex. App.
545, sustaining the rule; note 53 Am. Dec. 101.

8 Cal. 363-376. **MITCHELL v. STEELMAN.**

Pleadings.—In an action to foreclose a mortgage, plaintiff is only
required to state enough to show that the particular defendant claims
an interest in the mortgaged property, p. 369.

Cited, *Horton & Co. v. Long*, 2 Wash. 439, 26 Am. St. Rep. 868, hold-
ing that a complaint in foreclosure need not allege the character of
the interest of a codefendant.

Record of Mortgage on a vessel in the custom-house of her home port
is sufficient notice and a valid lien against a subsequent purchaser,
irrespective of our statute of frauds. The power of Congress to regu-
late commerce is exclusive, and the act of Congress of July 29, 1850,

Notes Cal. Rep.—26.

authorizing such records and notice supersedes said statute of frauds, pp. 369-376.

Cited, *Foster v. Chamberlain*, 41 Ala. 167, to the point that said act comes within the power of Congress to regulate commerce. This case was one of the registration of a mortgage on a vessel; *People v. Raymond*, 34 Cal. 498, approving the principles as to the regulation of commerce; *Lawrence v. Hodges*, 92 N. C. 677, 679, 53 Am. Rep. 437, 440, declaring the same doctrines; *White's Bank v. Smith*, 7 Wall. 656, holding the same doctrines under the same act of Congress.

Mortgage.—A subsequent purchaser with actual notice is not protected, though the prior mortgage was not recorded under the registry act, p. 375.

Cited, *Tolbert v. Horton*, 31 Minn. 523, to substantially the same effect, the actual notice there being a recital in the mortgage to the junior mortgagee.

8 Cal. 376-378. **MANLOVE v. WHITE.**

Statute.—Supplementary act passed next day to repealing act, and excepting certain subjects from the operation of the latter, is a part thereof, and must be given the same effect, p. 378.

Cited, *In the Matter of Clayton Gannett*, 11 Utah, 287, to the point that two enactments, having been approved and having taken effect on the same day and referring to the same subject, may be treated as parts of the same statute.

8 Cal. 378-384. **UPHAM v. SUPERVISORS.**

Statute is not Unconstitutional, on the ground of delegation of legislative power, which authorizes the location of a county seat to be determined by popular vote, pp. 382-384.

Cited, *People v. Nally*, 49 Cal. 480, and applying the same principle to an act which submits to a popular vote the question of annexation of adjacent territory; *People v. McFadden*, 81 Cal. 494, 15 Am. St. Rep. 69, where the same principle was applied to an act submitting to vote of the people the question of the creation of a new county; *Territory ex rel. v. Scott*, 3 Dak. Ter. 413, quoting from the principal case (p. 382) in a case of relocation of the capital; *Moore v. Packwood*, 5 Oreg. 328, where the principle of delegation of powers of the legislature in certain matters is applied to the question of leaving the supreme court to designate the day upon which it shall commence its terms, after the legislature has provided the mode by which the time may be fixed.

8 Cal. 384-389. **PALMER v. BOLING.**

Taxation.—Assessment may be made of a tract of land included within a larger tract, where the survey and segregation were made

four days before the expiration of the time allowed for the completion of the annual assessment, p. 388, 389.

Cited, *Patten v. Green*, 13 Cal. 328, holding that property is sufficiently described on the assessment roll, where the same description if in a deed would pass title, and is properly taxable by such description, although no "metes and bounds" were given; *High v. Shoemaker*, 22 Cal. 372, in approval, as being within the principal case; *People v. Crockett*, 33 Cal. 157, in affirmance under substantially the same facts.

Injunction.—Tax deed is prima facie evidence of what it contains, and this changes the rule as to the right to invoke the aid of chancery where property is about to be illegally sold for taxes. The deed, being the only evidence necessary, would operate as a cloud upon the title, p. 388.

Cited, *Bucknall v. Story*, 36 Cal. 73, though that case is declared not to fall within the principle, and the tax deed was held not prima facie evidence of title, it having been executed under a sale for the non-payment of an assessment for widening a city street; but it was held that an injunction would not lie to restrain a sale for taxes; *Lent v. Tillson*, 72 Cal. 435, in approval, as to injunction not lying; *Huntington v. Central Pac. R. R. Co.*, 2 Sawy. 514, to the point that it is only necessary to introduce the deed to make out title, but also that the court will interfere by injunction to prevent a cloud on title; note 56 Am. Dec. 355, as to when injunction will be granted; extended note 69 Am. Dec. 201, as to what are grounds for equitable interference.

8 Cal. 390-392. PEOPLE v. HURLEY.

Insanity—Homicide.—Mere weakness of mind is not such insanity as will excuse crime, p. 390.

See note to *Knights v. State*, 76 Am. St. Rep. 87, on general subject.

Justifiable Homicide.—Assault or assault and battery, not amounting to felony, will not justify homicide, unless killing appears absolutely necessary to prevent great bodily injury, and the apprehension of bodily danger must be reasonable, p. 391.

Cited, *State v. Donnelly*, 69 Iowa, 707, 58 Am. Rep. 236, holding that where one is feloniously and dangerously assailed he is bound to retreat if he can do so without danger; *State v. Stewart*, 9 Nev. 129, following the rule of the principal case.

If an Instruction is refused for the reason that equivalent instructions had been or would be given, the refusal should be placed strictly on that ground, p. 392.

Cited, *People v. Ramirez*, 13 Cal. 173; *People v. Williams*, 17 Cal. 148; and *Clough v. State*, 7 Neb. 343—all in express affirmance; *State v. O'Connor*, 11 Nev. 426, where it is said that the doctrine has in the

later California cases been quietly ignored and a contrary rule is stated.

8 Cal. 392-398. **TUOLUMNE WATER CO. v. CHAPMAN.**

Injunction—Pleadings.—Plaintiff's right to an injunction is not prejudiced by an allegation that the defendants wrongfully claim some pretended and fictitious right to the use of the water, p. 397; In *Fabian v. Collins*, 3 Mont. 224, the complaint was the same, and the principal case was followed.

Cited, note 68 Am. Dec. 274, to the same point. Cited, *Hewitt v. Story*, 64 Fed. Rep. 524, to the same point.

Watercourse.—Diversion of a watercourse is a private nuisance, p. 397.

Injunction.—Equitable remedy can be had where injury for diversion of watercourse is continuing, but not for a mere past diversion, p. 397.

Followed, *Kettle v. Pfeiffer*, 22 Cal. 491, to the extent of holding that injunction is the proper remedy to stay a threatened injury to right of way; so in *Bahl v. Kehl*, 87 Cal. 507, the doctrine of the principal case is also followed in the matter of water rights. In *Fabian v. Collins*, 3 Mont. 224, the doctrine is also approved. Cited, *Patten Paper Co. v. Kaukauna etc. Co.* 70 Wis. 668, to the point that a court of equity has power to afford relief in questions of water rights.

8 Cal. 398-406. **WALKER v. SEDGWICK.** S. C. 5 Cal. 192.

Estoppel.—One who enters into possession of land under another, and in subordination to his title, is estopped from denying it, p. 402.

Cited, *Hicks v. Lovell*, 64 Cal. 20, 49 Am. Rep. 682, in affirmance; *Bowdish v. City of Dubuque*, 38 Iowa, 345, to the same effect; *Haile v. Smith*, 128 Cal. 419, further considering right of vendee to recover for value of improvements made during such possession; notes 52 Am. Dec. 295; 56 Am. Dec. 326.

Execution.—Return of nulla bona is only one mode of proving insolvency; any other competent proof is equally efficient, p. 403.

Cited, extended note 90 Am. Dec. 288, as to prerequisites of a creditor's suit; note 65 Am. Dec. 521.

Vendor's Lien is not waived by bringing suit on notes given for purchase price, p. 403.

Cited in *Selna v. Selna*, 125 Cal. 363, 73 Am. St. Rep. 51, holding lien not waived by presentation and allowance of probate claim on such notes.

Offset.—Legal and equitable remedies may be united in one suit; so, also, as to defenses; and where a vendor of land has taken notes of the

purchaser in payment, if the defendant has a legal offset to the notes he may plead it in a suit in equity for a foreclosure, pp. 403-405.

Cited, *Hobbs v. Duff*, 23 Cal. 627, where the principle is followed; *First N. Bk. v. Bews*, 2 Idaho, 1181, to the point of equitable and legal defenses being available, quoting from the principal case (p. 405); extended note 40 Am. Dec. 335, as to recoupment in contracts for sale of realty.

8 Cal. 406-411; 68 Am. Dec. 331. **PEOPLE v. BORING.**

Ex-Sheriff must complete execution of all final process which he had begun to execute, including conveyances to purchasers, p. 407.

Cited, *Anthony v. Wessel*, 9 Cal. 104, to the same effect; *Moore v. Willamette Transportation etc. Co.*, 7 Oreg. 370, holding that a sheriff's deed may be executed by the incumbent of that office at the time the deed is due, after the time has expired for redemption; but the statute of that state differs from the California statute; note 7 Am. Dec. 731; extended note 36 Am. Dec. 705, 706; notes 77 Am. Dec. 579; 83 Am. Dec. 76; 88 Am. Dec. 462.

Sheriff.—Power to sell land carries with it the necessary authority to complete the sale, p. 407.

Cited, note 33 Am. Dec. 723.

Deed.—Court may appoint a suitable person to make and deliver the deed, in the enforcement of its judgment and that final process may be completed, p. 411.

Cited, *Head v. Daniels*, 38 Kan. 11, to the same effect.

General citation: *In re Pingree's Estate*, 100 Cal. 80.

8 Cal. 412-418. **PRICE v. WHITMAN.**

Computation of Time.—"Sundays" is in the plural in the constitution, article IV, section 7, on file in the office of the secretary of state—not "Sunday" in the singular, as found in the printed copy, p. 415.

Cited, *Ex parte Newman*, 9 Cal. 522, to the same point.

Same.—As to return of a bill, by the governor, the ten days allowed by the constitution exclude the day on which the bill was presented, intervening Sundays not being counted, pp. 415-417.

Cited in *Scoville v. Anderson*, 131 Cal. 594, 597, holding rule of computation of time to exclude first day; *State v. Michel*, 52 La. Ann. 941, 78 Am. St. Rep. 368, construing similar local statute; *Taylor v. Palmer*, 31 Cal. 245, but declared not in point; that case holding that Sundays are included in the "ten days" required for the publication of a resolution of supervisors of San Francisco declaratory of an intention to perform street work; *Iron Min. Co. v. Haight*, 39 Cal. 542, in affirmance of the rule of exclusion of the day of presenting the bill;

Taylor v. Brown, 5 Dak. Ter. 349, to the point that "from" is exclusive, but may be construed as inclusive to prevent forfeitures and uphold bona fide transactions.

8 Cal. 418-423. **FISHER v. WHITE.**

Lien on Vessels attaches as soon as service is had in the action against them and not when the liability was incurred, p. 423.

Cited, *Price v. Frankel*, 1 Wash. Tr. (N. S.), 42, in approval.

8 Cal. 423-424. **PEOPLE v. DEMINT.**

Criminal Law.—Instructions must be given in writing, unless the parties consent otherwise, p. 424

Cited, *People v. Woppner*, 14 Cal. 437; *People v. Chares*, 26 Cal. 79; *People v. Trim*, 37 Cal. 276; *People v. Sanford*, 43 Cal. 35, all in express affirmance; *People v. Hersey*, 53 Cal. 575, affirming the rule where the oral instructions were given in the absence of the phonographic reporter (section 1093 of the Penal Code as amended in 1874, subdivision 6); *State v. Potter*, 15 Kan. 316, in affirmance; *State v. Bennington*, 44 Kan. 585, where oral instructions were held erroneous, though taken down by the stenographer and afterward delivered by copy to the jury; *People v. Bond*, 1 Nev. 36, in affirmance. *Swaggart v. Territory*, 6 Okla. 347. *Boggs v. United States*, 10 Okla. 447.

8 Cal. 424-435. **LEE v. EVANS.**

Mortgage.—Parol evidence is not admissible to show that a deed absolute upon its face was intended as a mortgage, without alleging and proving fraud, accident, or mistake, pp. 428-435.

Cited, *Low v. Henry*, 9 Cal. 548, 552, in affirmance; *Gray v. Palmer*, 9 Cal. 640, where the principle is approved in connection with articles of partnership constituting the sole evidence of the parties' relations; commented on, *Arguello v. Edinger*, 10 Cal. 160-167; overruled, *Pierce v. Robinson*, 13 Cal. 124, 127. Cited, notes 7 Am. Dec. 503; 34 Am. Dec. 213.

Admissions in Answer bind defendant, p. 434.

Cited in *Western Ranches v. Custer Co.*, 89 Fed. 579, also holding that plaintiff may rely upon such admissions.

If a Mortgage at the beginning, the instrument always remains a mortgage, p. 434.

Cited, *Smith v. '49 & '56 Quartz Min. Co.*, 14 Cal. 247, where the court says: "The transaction being a loan, a clause of foreclosure for non-payment, or a provision that the mortgagee might take the property for the debt, would not make the instrument less a mortgage."

General Citation.—*People v. Whitman*, 10 Cal. 45, to the point that

even when a statute assumes to point out certain exceptions to a general rule of its own, a court cannot say that other exceptions were intended, though not mentioned; *Perkins v. Thornburgh*, 10 Cal. 191, to the effect that where a statute assumes to specify the effects of a certain provision, it must be presumed that all the effects intended by the lawmaker were stated.

8 Cal. 435-443. PEOPLE v. BUTLER.

Grand Jury.—Indictment may be found by fourteen grand jurors, p. 439.

Cited, *People v. Gatewood*, 20 Cal. 148, in affirmance, the indictment being found in that case by thirteen; *People v. Hunter*, 54 Cal. 67, in approval, in a case where the indictment was found by twelve.

Evidence.—Where the record does not contain all the evidence given at the trial, the court will presume that the testimony was such as to authorize a claimed inadmissible question, provided it was admissible at all under any state of case, p. 440.

Cited, *People v. Brotherton*, 47 Cal. 405, in support of the point that the bill of exceptions should show the evidence, and also that the excluded testimony was material to the accused and that he was injured thereby; although it is also declared that when the action of the court below is manifestly erroneous, under any and every conceivable state of facts, it will be reviewed, though the evidence may not have been brought up.

Homicide.—No words of reproach, howsoever grievous, are sufficient provocation to reduce the offense of an intentional homicide with a deadly weapon from murder to manslaughter, p. 441.

Cited, *People v. Murback*, 64 Cal. 371, in affirmance; so, also, with approval in *Smith v. United States*, 1 Wash. Ter. (N. S.), 271.

8 Cal. 443-445; 68 Am. Dec. 338. WHITE v. TODD'S VALLEY WATER COMPANY.

Water Rights.—Extent of appropriation is determined by capacity of the ditch and not by the quantity of water first turned in, if the capacity is adjusted in a reasonable time, otherwise the appropriation is limited to the water actually diverted, pp. 444, 445.

Cited, *Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 153, 70 Am. Dec. 773, where the question was one of analogous character, and it was declared that the courts would adjust questions of water rights on a basis of justice to all parties; *Nevada etc. Canal Co. v. Kidd*, 37 Cal. 314, as to the principle that even the preliminary inchoate right to acquire in the future a right to water, which when it becomes perfected and fully vested will date by relation to the first act for the purpose of priority, may be lost by want of diligence in pursuing the work and

perfecting the right, so that another party, more diligent although commencing subsequently, may obtain the first right by actual appropriation and possession of the water; extended note 43 Am. Dec. 231; note 76 Am. Dec. 479; extended note 79 Am. Dec. 639; notes 90 Am. Dec. 541; 91 Am. Dec. 692; 43 Am. St. Rep. 658; note 60 Am. St. Rep. 814, 815, on general subject.

Verdict will not be Disturbed on appeal, where testimony is conflicting, p. 444.

Cited, notes 72 Am. Dec. 324; 80 Am. Dec. 347; 87 Am. Dec. 74.

8 Cal. 445-446. SWIFT v. MUYGRIDGE.

Findings of facts admitted by the pleadings are not necessary; findings are required only upon issues raised by the complaint and controverted by the answer, p. 445.

Cited, *Anderson v. Alsette*, 8 S. Dak. 244, in approval.

Findings of fact by the court are like a special verdict of a jury. They must be taken in connection with the pleadings to support the judgment, p. 446.

Cited, *Lucas v. City of San Francisco*, 28 Cal. 596, *Kennedy etc. Lumber Co. v. S. S. Const. Co.*, 123 Cal. 586, and *Barnes v. Sabron*, 10 Nev. 248, all in approval.

8 Cal. 446-448. GINACA v. ATWOOD.

Replevin Bond.—Liability of sureties in case of a nonsuit is limited to the extent of the judgment and damages for failure to return the property, but not for damages for the original taking and detention, the value of the goods not having been found by the jury, p. 448.

Cited, *Mills v. Gleason*, 21 Cal. 280, to the effect that the Practice Act, sec. 177, did not apply to cases where the action is dismissed by the plaintiff before trial; *Cleary v. Roland*, 24 Cal. 150, commenting upon the principal case; but that case also holds that there must be an allegation that the value of the property was found by the jury, and that alternative judgment was rendered.

General Citation.—*Meigs v. Keach*, 1 Wash. Ter. (N. S.), 307, where it is said: "It is settled law that where in an action for the recovery of personal property a statutory bond is given by the plaintiff to prosecute and the plaintiff discontinues even with the consent of the defendant, and a fortiori even without defendant's consent, the defendant can sue upon the bond and recover for the breach."

8 Cal. 449-461. KANE v. COOK.

Judgment in rem by publication without personal service against a defendant out of the state binds the property subjected, but is a nullity

as a personal claim, and is not *res adjudicata* nor of validity as a plea of former recovery, pp. 455-457.

Cited, *Melhop v. Doane*, 31 Iowa, 403; 7 Am. Rep. 152, quoting from the principal case (p. 456), also in affirmance; *Howard v. Coon*, 93 Mich. 445, in approval; *Payne v. O'Shea*, 84 Mo. 137, holding that the rule applies strictly to proceedings in rem, and not where there has been personal service of process on defendant, nor where he appears; *National B'k. v. Peabody*, 55 Vt. 498; 45 Am. Rep. 637, holding that a judgment obtained in another state against a nonresident, upon constructive notice and without appearance, does not merge the cause of action in that state; *Green v. Van Buskirk*, 7 Wall. 149, where it is said: "The distinction between the effect of proceedings by foreign attachments when offered in evidence as the ground of recovery against the person of the debtor, and their effect when used in defense to justify the conduct of the attaching creditor, is manifest and supported by authority"; extended notes, 2 Am. Dec. 45; 26 Am. Rep. 29.

Statute of Limitation.—Fraudulent concealment, by an agent, of a cause of action may be shown in avoidance of a plea of the statute, pp. 459-461.

Cited, *Perry v. Smith*, 31 Kan. 427, where it is said that the "statute of limitations does not commence to run in favor of an agent and against his principal until his principal has knowledge of some wrong committed by the agent inconsistent with the principal's rights."

8 Cal. 461-469; 68 Am. Dec. 340. **BRYAN v. RAMIREZ.**

Acknowledgment.—Certificate must state the fact of acknowledgment, p. 466.

Cited, *Henderson v. Grewell*, 8 Cal. 584, in affirmance; *Edwards v. Thom*, 25 Fla. 255, to the point that the rule is that a substantial compliance with the recording act is sufficient, but that substantial defects cannot be supplied by intendments or presumptions, and holding that a record of an insufficiently executed mortgage is not notice; extended note 41 Am. Dec. 177; notes 73 Am. Dec. 497; 30 Am. St. Rep. 125.

Estoppel will arise where one knowingly though passively looks on and suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, p. 467.

Cited, *Grattan v. Wiggins*, 23 Cal. 37, where the rule is followed; *Moran v. Palmer*, 13 Mich. 377, and *Cleland v. Casgrain*, 92 Mich. 153—both also in affirmance; *Baldwin v. Howell*, 45 N. J. Eq. 532, where the principle is applied to a sale by the sheriff, where a stranger although having a claim, stands by and permits the sale; notes 68 Am. Dec. 313; 77 Am. Dec. 519; 80 Am. Dec. 172, 406; 85 Am. Dec. 171; 5 Am. St. Rep. 412; 33 Am. St. Rep. 118.

Notice.—Possession under an equitable claim affects the purchaser of the legal title with notice of the equity, p. 467.

Cited, *Woodson v. McCune*, 17 Cal. 304, where the rule as to possession being notice of a sale or conveyance was held not confined to the case of an unrecorded deed but to apply as well to any other title consistent with the possession; notes 71 Am. Dec. 421; 73 Am. Dec. 549; 74 Am. Dec. 178; 77 Am. Dec. 459; 9 Am. St. Rep. 467; 31 Am. St. Rep. 506.

To Prove Actual Fraud the evidence should be strong and decisive, p. 468.

Cited, notes 82 Am. Dec. 758; 12 Am. St. Rep. 254.

General citation: *Stonesifer v. Kilburn*, 122 Cal. 664.

8 Cal. 469-499; 68 Am. Dec. 345. **BOSWELL v. LAIRD.**

Negligence.—*Respondeat superior* only applies to the relation of superior and subordinate and not to those employing independent contractors. The relation of master and servant does not exist between the latter and the owner of land, and the contractor alone is liable, pp. 488-499.

Cited in *Stewart v. California etc. Co.*, 131 Cal. 129, holding city not liable for negligence of servant of independent contractor; *Louthan v. Hewes*, 138 Cal. 118, holding party not a servant; *Reynolds v. Merchants' etc. Co.*, 168 Mass. 504, on point that master is not liable for result of breakage of machinery purchased after careful examination. See, also, note to *Covington etc. Co. v. Steinbrock*, 76 Am. St. Rep. 386, 388, 390, 395, 399, 404, 409, 410, on general subject; *Swackhamer v. Johnson*, 39 Or. 386, where promoter contracted with agent to furnish laborers to work on railroad at such times and places as directed by promoter, and promoter assigned subsidy contract to secure agent, laborers were servants of promoter; *Fanjoy v. Seales*, 29 Cal. 249, where the rule is stated; but in that case the building had been accepted and the owner was held liable; *Baker v. Kinsey*, 38 Cal. 634; 99 Am. Dec. 439, holding that the master is liable for such acts of his servants only as are within the line of his duty; *Du Pratt v. Lick*, 38 Cal. 692; *O'Hale v. Sacramento*, 48 Cal. 214; *Aston v. Nolan*, 63 Cal. 275; *Barton v. McDonald*, 81 Cal. 267—all in affirmance of the doctrine; *Williams v. Fresno Canal Co.*, 96 Cal. 16; 31 Am. St. Rep. 173—holding, however, that if the carrying out of a contract is necessarily injurious to a third person, the doctrine of *respondeat superior* applies. In that case the contractor plowed up the land of a third person, using part thereof in repairing a canal, and the employer was held liable; *Colgrove v. Smith*, 102 Cal. 223, affirming the doctrine, but excepting that case from the rule; so, also, where the superior has been guilty of contracting with an unfit person; *Donovan v. Oakland etc. R. T. Co.*, 102 Cal. 249, in affirmance; *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga.

166; 27 Am. St. Rep. 234, making the exception where the injury is caused by defective construction which was inherent in the original plan of the employer, in which case the employer would be liable; *Stephani v. Brown*, 40 Ill. 436, holding that a party who makes the streets of a city unsafe creates a nuisance, and he is liable, and not the city, for injury sustained by another therefrom—applying, also, the principle as to contractors; *Kansas etc. Ry. Co. v. Fitzsimmons*, 18 Kan. 38, to the point that a railroad is not liable for the negligence of contractors in constructing a road, they having exclusive possession; so, also, that the relation of master and servant does not exist in such a case; *Robinson v. Webb*, 11 Bush (Ky.), 475, 480, where the principle was applied to a contractor building a house, who was held not a servant of the lot owner, said contractor alone being declared liable; *Gorham v. Gross*, 125 Mass. 240, 28 Am. Rep. 227, affirming the rule, but holding the employer liable for the results of unsafe construction after he had accepted the constructed work; *Meyer v. Midland etc. R. R. Co.*, 2 Neb. 342, where a railroad was held not liable for the negligence of contractors for the construction of the road, they having control until acceptance of the work; *Vogel v. Mayor etc. of New York*, 92 N. Y. 19, 44 Am. Rep. 354, holding that an employer who accepts work, which is a nuisance by reason of the manner in which it has been done, is responsible; extended notes 51 Am. Dec. 202; 55 Am. Dec. 317, 318; notes 71 Am. Dec. 65; 72 Am. Dec. 599; 80 Am. Dec. 82; 86 Am. Dec. 346, 347; 91 Am. Dec. 428; 1 Am. St. Rep. 744; 24 Am. St. Rep. 378; 27 Am. St. Rep. 242; 31 Am. St. Rep. 175.

8 Cal. 499-501. **HOUSE v. KEISER.**

Forcible Entry and Detainer.—To maintain the action one must show a possession, actual, peaceable, exclusive and uninterrupted, p. 501.

Cited, *Dickinson v. Maguire*, 9 Cal. 48; *Cummins v. Scott*, 20 Cal. 84; *Hoag v. Pierce*, 28 Cal. 191; *Valencia v. Couch*, 32 Cal. 344; 91 Am. Dec. 593; *Castro v. Tewksbury*, 69 Cal. 564—all in affirmance.

8 Cal. 501-506. **BREWSTER v. BOURS.**

Acceptance of a Note payable at a future time for a pre-existing debt, does not extinguish the debt, but suspends the right to recover till the maturity of the note. Such note is no payment except it be so expressly agreed, p. 506.

Cited, *Brown v. Olmsted*, 50 Cal. 166; *Compton D'Escompte v. Dresbach*, 78 Cal. 20; *Tolman v. Smith*, 85 Cal. 287; *Knox v. Gerhauser*, 3 Mont. 275—all to the same point in approval.

8 Cal. 507-510. **IN RE BUCHANAN'S ESTATE.**

Common Property of Husband and Wife cannot be disposed of by will, and this includes property acquired by the husband after mar-

riage, under the Mexican law, prior to the act of 1850, as well as that acquired subsequently under our statute, pp. 509-510.

Cited, *Smith v. Smith*, 12 Cal. 225; 73 Am. Dec. 536; *Scott v. Ward*, 13 Cal. 470—with approval; *Gimmy v. Doane*, 22 Cal. 638, to substantially the same effect as applied to a homestead impressed upon the common property; *Mabie v. Whittaker*, 10 Wash. 662, to the point that the community system makes the man and wife partners as to property acquired after marriage; note 63 Am. Dec. 128.

Descent.—A Posthumous Child is entitled to one-half the separate and common property, where no provision is made for such child by will of the father, and there is no express intention of the testator contra. p. 509.

Cited, extended note, 12 Am. St. Rep. 99.

Homestead is not common property, but a sort of joint tenancy with the right of survivorship, p. 509.

Cited, *Gimmy v. Doane*, 22 Cal. 638, and explained; *Brennan v. Wallace*, 25 Cal. 114, in connection with the question of abandonment; extended notes 60 Am. Dec. 615; 65 Am. Dec. 483; note 68 Am. Dec. 309.

8 Cal. 510. **ADAMS v. CITY OF OAKLAND.**

Notice of Motion for New Trial must have the statutory affidavit or a statement of the grounds intended to be relied on, p. 510.

Cited, *Wing v. Owen*, 9 Cal. 247, in affirmance.

8 Cal. 511-512. **WELCH v. SULLIVAN.**

Ejectment.—Improvements by defendant claiming in good faith under color of title are allowed to be set off against the damages either in the original action or in action for mesne profits, pp. 511, 512.

Cited, notes 1 Am. Dec. 116; 15 Am. Dec. 351.

8 Cal. 512-514. **WHITE v. CLARK.**

Execution must issue within five years when upon a judgment in a justice's court. In the contemplation of the statute there is no judgment after that time, p. 513.

Cited, *Kerns v. Graves*, 26 Cal. 157. *McMann v. Superior Court*, 74 Cal. 108; *Cortez v. Superior Court*, 86 Cal. 278; 21 Am. St. Rep. 38, in affirmance; *Rollins v. McIntire*, 87 Mo. 509, holding that the issuance of an execution under the statute without complying with its provisions is not a mere irregularity but a matter of substance, without which a sheriff's sale and deed were nullities; *Williams v. Rice*, 6 S. Dak. 15, as cited by appellant as supporting the point that nothing is added to the life of a justice's judgment by its being transcribed and docketed in the circuit court, but declared not controlling since the statute of California differed.

8 Cal. 514-517; 68 Am. Dec. 360. **WHITNEY v. STARK.**

Trover.—All parties in interest should join in this action. If the defect of nonjoinder does not appear upon the face of the complaint, advantage should be taken by answer or apportionment of the damages. In equity objection should be by answer or demurrer, and a failure to join, the action being in form *ex delicto*, may be by plea in abatement, p. 516.

Cited, notes 77 Am. Dec. 77, 107.

Statute of Frauds.—Actual delivery and continued change of possession are necessary to validate as against creditors' sales of personal property, p. 517.

Cited, extended note 12 Am. Dec. 470; notes 72 Am. Dec. 634, 730; 82 Am. Dec. 556; 90 Am. Dec. 550.

8 Cal. 517-519. **PEOPLE v. FREELON.**

On Appeal from a Justice Court to the county court on questions of law alone, a new trial if ordered should take place in the county court, pp. 517-519.

Cited, *Curtis v. Superior Court*, 63 Cal. 436, in affirmance; *Myrick v. Superior Court*, 68 Cal. 100, holding that if such appeal be upon questions of law and fact the superior court cannot try the action *de novo* unless a trial upon the issues of fact as made in the justice's court had been had in that tribunal; *Acker v. Superior Court*, 68 Cal. 246, holding that on appeal on questions of law and fact the superior court cannot remand the cause to the justice's court for a trial *de novo*, but must proceed with the trial.

8 Cal. 519-520. **PEOPLE v. MURRAY.**

Indictment for Burglary should specify the value of the goods intended to be stolen, as burglary can only be committed with intent to commit a felony, pp. 509-520.

Cited, *People v. Thompson*, 28 Cal. 218, but distinguished as to the language of the statute in that case, the charge there being one of entering a dwelling-house in the daytime with intent to steal, and such offense was held complete if the value of the property intended to be stolen was less than fifty dollars; *People v. Stickman*, 34 Cal. 245, noting the fact that the statute was amended in 1858 so as to include the case of an intent to commit petit larceny; *Harwick v. State*, 49 Ark. 516, holding that intent is necessary to constitute burglary; *Wood v. State*, 18 Fla. 969, holding that an indictment for breaking and entering in the night-time with intent to steal must aver an intent to commit a felony; *People v. Stapleton*, 2 Idaho, 53, holding that the value of the property intended to be stolen need not be alleged; *Territory of Montana v. Duncan*, 5 Mont. 482, holding that an indictment for

burglary in the daytime must allege a breaking and entering with intent to commit a felony, and that the value of the property must be averred; *United States v. Cannon*, 4 Utah, 130, to the point that it is sufficient to charge an offense in the language of the statute; *Hale v. State*, 48 Wis. 690, holding that the value of the goods intended to be stolen need not be averred; *v. State*, 2 Wyo. 327, to the point that in burglary it is usual to charge an actual larceny.

8 Cal. 520. **PHELAN v. SMITH.**

Injunction.—State Court cannot enjoin proceedings of federal court, p. 521.

Cited in *Prugh v. Bank*, 48 Neb. 418, holding injunction unauthorized and stating exceptions to rule.

8 Cal. 521. **SHAW v. MCGREGOR.**

Court Loses all Control over its judgments after adjournment of the term unless its jurisdiction is saved by some motion or proceeding at the time; except when the summons has not been served, p. 521.

Cited, *De Castro v. Richardson*, 25 Cal. 52; *Casement v. Ringgold*, 28 Cal. 337—in affirmance in both cases; *Norton v. Atchison etc R. R. Co.*, 97 Cal. 392; 33 Am. St. Rep. 201; where the court says: "Under our present system terms of court are abolished, and a motion to set aside a judgment would have to be made within a reasonable time"; *Brckett v. Banegas*, 99 Cal. 626; in affirmance of the rule, but noting also the statutory changes; *Kidd v. Four-twenty Mining Co.*, 3 Nev. 384, where the judgment was by default irregularly and erroneously entered, and it was held that application should have been made during the time for relief, and that appeal was the proper remedy; *Daniels v. Daniels*, 12 Nev. 121, in affirmance of the principal case; note to *Furman v. Farman*, 60 Am. St. Rep. 639, on general subject.

8 Cal. 522-538. **MARZIOU v. PIOCHE.** S. C. 10 Cal. 545.

Powers are Irrevocable when expressly given by a principal to collect debts for the purpose of providing the means to return advances made by the agent, pp. 535, 536.

Cited, *Hawley, Admr. v. Smith*, 45 Ind. 208, as to when death revokes the power, but also, that a power coupled with an interest survives the grantor of the power except where the interest is only in the proceeds of the thing.

Creditor cannot split up an entire demand and maintain separate actions on each part, p. 536.

Cited, *Grant v. Aldrich*, 38 Cal. 519; 99 Am. Dec. 424, with approval; *Little v. City of Portland*, 28 Ore. 243, to the same effect.

Appeal lies from an order denying a new trial as well as from the judgment alone, p. 537.

Cited, *Wambole v. Foote*, 2 Dak. Ter. 28, to this point, but it was not decided by the court.

General citation: *Thiesen v. McDavid*, 34 Fla. 445.

8 Cal. 538-539. PEOPLE v. SHEA.

Criminal Law.—Threats communicated to prosecuting witness are admissible to explain his motive in buying a pistol to use on defendant, p. 539.

Cited, *State v. Harris*, 76 Mo. 364, holding that evidence is admissible of threats made by deceased against the accused; *Upthegrove v. State*, 37 Ohio St. 664, to the point that it is competent to show the prosecuting witness's character as a dangerous man in a case of assault upon said witness with intent to kill; extended note 95 Am. Dec. 68.

8 Cal. 540-545. NAGLEE v. MINTURN.

Pending Proceedings for Dissolution of a partnership and until a receiver is appointed, creditors may resort to adverse proceedings, and gain preference over other creditors, p. 544.

Cited, *Marye v. Jones*, 9 Cal. 337, in affirmance, note 68 Am. Dec. 317.

General Citation.—*Rosenberg v. Frank*, 58 Cal. 405, as a case where the opinion uses "pro rata."

General citation: *State v. Barnes*, 25 Fla. 307.

8 Cal. 545-547. KNOX v. WOODS.

An Account Audited against San Francisco, but not paid before the consolidation act took effect, need not be again audited to entitle to payment, p. 546.

Cited, *Morgan v. Menzies*, 60 Cal. 347, as so deciding, that case being one construing section 1058, Code Civ. Proc., and the words "any county, city, or town," holding that "city" includes city and county.

8 Cal. 547-549. PEOPLE v. McMAKIN.

Assault exists where one draws a pistol on another with a threat to use it unless the other leaves the spot, even though the pistol is not pointed at said person, pp. 548-549.

Cited, *People v. Honshell*, 10 Cal. 87, as to the extent of force one may use in repelling a trespasser.

8 Cal. 548-551. SWAIN v. GRAVES.

Appeal Bond will be so construed as to effectuate the obvious intent of the parties, p. 551.

Cited, *Dore v. Covey*, 13 Cal. 509, but only generally as to the construction of appeal bonds.

8 Cal. 552-554. **ALLEN v. BRESLAUER.**

Arrest and Bail.—Surrender of defendant within ten days after execution is sufficient to discharge sureties, p. 554.

Cited, *Ex parte Bergman*, 18 Nev. 340, to the same effect, quoting from the principal case; extended note, 99 Am. Dec. 223.

8 Cal. 554-562. **VANCE v. BOYNTON.**

Sale of Personal Property must be followed by an actual and continued change of possession, p. 562.

Cited, *Whitney v. Stark*, 8 Cal. 517; 68 Am. Dec. 361; *Bacon v. Scannell*, 9 Cal. 273—both cases in affirmance; note 60 Am. Dec. 617.

8 Cal. 562-569. **GRAY v. HAWES.**

Execution Sale under void judgment passes no title, but if the judgment is voidable the sale is good, p. 568.

Cited, *Hazard v. Cole*, 1 Idaho, 287, in affirmance.

A Personal Judgment depends upon the court's jurisdiction of the subject matter and of the person. Where there is no jurisdiction the defect is not cured by an appearance for the purpose of vacating the judgment, pp. 568, 569.

Cited, *Lyman v. Milton*, 44 Cal. 635, to the point that defendant may appear for the purpose of moving to dismiss a defective summons, and that the error is not cured by a subsequent appearance and answer; *Melhop v. Doane*, 31 Iowa, 400; 7 Am. Rep. 150, to the point that the court must have jurisdiction of the subject matter and the parties; *Godfrey v. Valentine*, 39 Minn. 338; 12 Am. St. Rep. 659, to the point that a void judgment is not validated by appearance of the party; *Black v. Clendenin*, 3 Mont. 49, to the same point; *Sharman v. Huot*, 20 Mont. 557, 63 Am. Rep. 647, holding statutory provisions as to form of summons mandatory.

Judgment.—Presumption in favor of is rebutted when whole record shows lack of jurisdiction, p. 569.

Cited in *Smith v. Montoya*, 3 N. Mex. 42, construing local statutes.

8 Cal. 570-573. **DIXEY v. POLLOCK.**

Attachment.—Stranger cannot interfere on the ground of irregularity. In contests between creditors all the equities favor the most diligent, p. 573.

Cited, *Fridenberg v. Pierson*, 18 Cal. 155, 79 Am. Dec. 164, holding that a junior attaching creditor cannot take advantage of irregularities

in the affidavit or bond given by a prior attaching creditor of a common debtor; *McComb v. Reed*, 28 Cal. 287, 87 Am. Dec. 120, where the point is raised, but not decided as to whether a junior attaching creditor can successfully attack the validity of a prior attachment on the ground that the complaint did not state a cause of action; *Leppel v. Beck*, 2 Colo. App. 394, in affirmance; *Mentzer v. Ellison*, 7 Colo. App. 322, to the same effect; also, in dissenting opinion at pp. 327, 331; *Moresi v. Swift*, 15 Nev. 220, in approval.

Sheriff.—Application of attaching creditor may be made by motion to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, p. 573.

Cited, *Davis v. Eppinger*, 18 Cal. 381; 79 Am. Dec. 185, holding that judgment creditors of a defendant in an attachment suit may intervene for the purpose of setting aside the attachment because void as to them; *Speyer v. Ihmels*, 21 Cal. 287, 81 Am. Dec. 158, to the same effect as the principal case; *Lewis v. Harwood*, 28 Minn. 435, 436, to the point that a motion is a proper proceeding.

8 Cal. 575-580. TURNER v. McILHANEY.

Partnership cannot be proven by the opinion or inference of a witness. Common report is only admissible in corroboration of to show knowledge of the plaintiff, pp. 578, 579.

Cited, *Cross v. National Bank*, 17 Kan. 337, but only generally on the point; note 38 Am. Dec. 482.

Defect of Proof may be cured by testimony introduced by the adverse party, p. 579.

Cited, *Marziou v. Pioche*, 8 Cal. 534, with approval.

Evidence.—A party calling upon an adverse party to testify makes him his witness and waives his incompetency to be heard for himself or for his codefendant or coplaintiff, p. 580.

Cited, *Helms v. Green*, 105 N. C. 262; 18 Am. St. Rep. 899, to the same effect; also, holding that the right is waived of impeaching said witness by attacking his credibility, although the privilege exists of contradicting him by testimony of other witnesses inconsistent with his.

8 Cal. 580-581. HARWOOD v. MARYE.

Administrator is entitled to possession of all real and personal property of the estate of deceased, and is a necessary party to all suits relating thereto, p. 581.

Cited, *Robertson v. Burrell*, 110 Cal. 576, holding that the heirs are not proper parties to an action for accounting and settlement of a partnership between decedent and surviving partners; *Scott v. Lloyd*, 16 Fla. 155, to the same effect as the principal case; *Kelsey v. Welch*,

Notes Cal. Rep.—27.

8 S. Dak. 262, to the point that the administrator is a necessary party; *Anrud v. Scandinavian etc. Bank*, 27 Wash. 22, under Ballinger's Code, section 4640, in foreclosure of mortgage given by ancestor, heirs are indispensable parties.

8 Cal. 581-584. **HENDERSON v. GREWELL.**

Acknowledgment.—Exact form of certificate in the statute need not be followed; a substantial compliance is sufficient; but the fact of acknowledgment and the identity of the person must be stated, pp. 583, 584.

Cited, *Einstein's Sons v. Shouse*, 24 Fla. 495, to the point that a substantial compliance with the statute is sufficient; *Overman Min. Co. v. American Min. Co.*, 7 Nev. 318, where the rule is applied to a certificate of the judge to a statement for a new trial; *Johnson v. Badger, M. & M. Co.*, 13 Nev. 353, to same point in approval; extended note 41 Am. Dec. 169, 175, 176, 178; note 68 Am. Dec. 345.

8 Cal. 585-593. **THE CALIFORNIA S. N. CO. v. WRIGHT.** S. C.
6 Cal. 258.

Pleading.—Answer should specially aver want of capacity of plaintiff to sue. The general issue is insufficient, p. 590.

Cited, *Bank of Shasta v. Boyd*, 99 Cal. 605; *Steamship Company v. Rodgers*, 21 S. C. 33—both cases being in affirmance.

Distinguished in *Brown v. Curtis*, 128 Cal. 195, holding plea of general issue sufficient to put plaintiff to proof of assignment pleaded, not being question of capacity to sue; and see *Whelan v. Railway Co.*, 111 Fed. 329, discussing character of plea in abatement under Montana codes.

Restraint of Trade.—A covenant which is specific, definite and certain to exclude from the trade certain vessels of defendants, and also all other vessels that might thereafter belong to him within the stipulated period of three years, is valid, p. 591.

Cited, *Webster v. Buss*, 61 N. H. 45, 47; 60 Am. Rep. 318, 320, holding that an agreement to relinquish a business and not carry it on thereafter in the vicinity of a named place is not invalid, though unlimited as to time.

Same.—Such agreements are assignable even though the holder promises not to assign, p. 591.

Cited, *Hedge v. Lowe*, 47 Iowa, 141, to the point that such agreements are assignable.

Vendor seeking to set aside sale for fraud must offer to return the price and to place the vendee in statu quo, p. 592.

Cited, *Cowan v. Fairbrother*, 118 N. C. 417; 54 Am. St. Rep. 740, with approval.

8 Cal. 593-598. McDEVITT v. SULLIVAN.

Rent.—Purchaser under mortgage sale can compel tenant to pay rent over again, although the latter has paid the rent in advance under a lease for a term of years from the owner, pp. 595, 596, 598.

Cited in *Whithead v. Elevator Co.*, 9 N. Dak. 227, noted under *Reynolds v. Lathrop*, 7 Cal. 43; *United States Mortgage Co. v. Willis*, 41 Or. 484, reaffirming rule; *Harris v. Foster*, 97 Cal. 295, 33 Am. St. Rep. 189, with approval.

Same.—After a foreclosure sale and before the term of redemption has expired, the purchaser is entitled to collect the rents, pp. 595-598.

Cited, *Knight v. Truett*, 18 Cal. 115; *Walls v. Walker*, 37 Cal. 431; 99 Am. Dec. 295; *Walker v. McCusker*, 71 Cal. 596; *Otis v. McMillan*, 70 Ala. 55; *Clement v. Shipley*, 2 N. Dak. 433; *Rudolph v. Herman*, 4 S. Dak. 296, in dissenting opinion; *Hardy v. Herriott*, 11 Wash. 461—all of said cases to the same effect as the principal case.

8 Cal. 603-609. HERR v. BARKER. S. C. 6 Cal. 489; 8 Cal. 609; 11 Cal. 393—covering, also, other points.

Warehouseman.—Delivery by accepted orders upon a warehouseman is sufficient if property is segregated, and a change of warehouse receipts changes possession where all the goods are sold, though sold to different purchasers, pp. 607-609.

Cited, *Hill v. Colorado Nat. Bk.*, 2 Colo. App. 327, holding that an existing indebtedness is a good consideration, and a pledge by way of collateral security for money advanced is effectual to pass the title as in other cases, and the transfer and delivery of the certificate is as effectual to pass the title as actual manual delivery; *Citizens' etc. Co. v. Peacock*, 103 Ga. 181, holding warehouse receipts quasi negotiable instruments; *Rice v. Cutler*, 17 Wis. 358; 84 Am. Dec. 751, to the point that such delivery will pass the title though the receipt is without indorsement, but recites that the property is "deliverable to bearer."

Goods Sold must be separated and identified so as to be distinguished from the bulk or mass with which they are mixed, or the sale is incomplete, p. 607.

Cited, *McLaughlin v. Piatti*, 27 Cal. 463, and *Blackwood v. Cutting Packing Co.*, 76 Cal. 217; 9 Am. St. Rep. 203, in affirmance; *Kingman v. Holmquist*, 36 Kan. 739, 59 Am. Rep. 606, holding that where a certain number of articles are sold from an ascertained lot, identical in kind and value, a separation is not essential to pass title.

Cross-reference. See next case herein.

8 Cal. 609-615. **HORR v. BARKER.** S. C. 6 Cal. 489. 8 Cal. 603; 11 Cal. 393—also, covering other points.

Warehouseman.—Delivery of warehouseman's receipt passes title prima facie, p. 614.

Cited, *Ghirardelli v. McDermott*, 22 Cal. 541; *Davis v. Russell*, 52 Cal. 615; 28 Am. Rep. 649; *Allen etc. Co. v. Maury & Co.*, 66 Ala. 18; *Broadwell v. Howard*, 77 Ill. 308; *Newcomb etc. Co. v. Cabell*, 10 Bush (Ky.), 470—all in affirmance of the rule; note 55 Am. Dec. 299; extended note 97 Am. Dec. 348.

Cross-reference.—See case next preceding herein.

8 Cal. 617-619. **REYNOLDS v. HARRIS.**

Findings of a court signed and filed with the clerk is a matter of record, and copies may be sufficiently authenticated by the clerk's certificate, p. 619.

Cited, *Lucas v. City of San Francisco*, 28 Cal. 595, and *Kennedy etc. Lumber Co. v. S. S. Const. Co.*, 123 Cal. 585, in affirmance; *Howard v. Richards*, 2 Nev. 138, to the same effect. Contra, *Imperial S. M. Co. v. Barstow*, 5 Nev. 253, 254, holding, also, that there is no appeal on findings unless by statement; *Barnes v. Sabron*, 10 Nev. 248, holding that such findings are like a special verdict of the jury, and should be taken in connection with the pleadings to support the judgment.

8 Cal. 619-626. **PORTER v. HERMANN.**

Notice in Summons that a money judgment will be taken will not support a judgment for fraud. A radically defective summons will not support a judgment by default, per *Burnett, J.*, p. 625.

Cited, *Keybers v. McComber*, 67 Cal. 398, to the point that a defective summons will not support a judgment by default; *Atchison etc. R. R. Co. v. Nicholls*, 8 Colo. 191, holding that an attempted amendment of a summons after entry of default without notice and in defendant's absence, was futile, such amended summons having never been served on defendant; *Dyas v. Keaton*, 8 Mont. 499, to the point that a defective summons will not support a judgment by default and that the failure to insert the notice required made the summons defective.

8 Cal. 626-638. **McFARLAND v. PICO.**

Stare Decisis.—Rule of does not apply when former decision palpably erroneous, p. 631.

Cited in *Truxton v. Fait etc. Co.*, 1 Penne. (Del.) 509, 73 Am. St. Rep. 97 (and note, 102), and *Kimball v. Grantsville*, 19 Utah, 397, declining to follow former decisions.

Negotiable Paper.—Presentment must be made at any time within reasonable hours on the last day of grace, pp. 631-634.

Cited, note 39 Am. Dec. 575, as approving *Dana v. Sawyer*, 22 Me. 244; 39 Am. Dec. 574, which holds to the same effect.

Same.—For the purpose of fixing the liability of indorsers, the note or bill is payable on demand at any time during reasonable hours on the last day of grace, but the maker has the whole day for payment, and the holder must wait until the next day for the purpose of sustaining an action, pp. 631, 634.

Cited, *Davis v. Eppinger*, 18 Cal. 381, 79 Am. Dec. 185, holding that a note payable one day after date without grace cannot be sued on the day after its execution; *Farmers' etc. Bank v. Salina etc. Co.*, 58 Kan. 209, holding maker of note payable at bank to have entire day of maturity for payment, irrespective of banking hours. Distinguished in *Sabin v. Burke*, 4 Idaho, 119, note without grace made payable in a bank placed and remaining therein for collection until due may be sued upon after banking hours of day it falls due; notes 11 Am. Dec. 218; 58 Am. Dec. 412, as citing and explaining *Wilcombe v. Dodge*, 3 Cal. 260; 58 Am. Dec. 411, which holds that a suit on a note the day it falls due is premature.

Same.—Certificate of protest by a notary public is prima facie evidence of the facts stated therein, pp. 635, 637.

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General Citations.—*Stanley v. McElrath*, 86 Cal. 456, as to what constitutes a sufficient delivery of a notice of protest, it having been duly served on a person of discretion acting for the indorser; extended note 43 Am. Dec. 216, as to the definition and object of a protest, 43 Am. Dec. 219, that protest is unnecessary by the law merchant.

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By ALBERT RAYMOND.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

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Cited, as to first proposition, *Piercy v. Sabin*, 10 Cal. 30, 70 Am. Dec. 698; *Hubbard v. Barry*, 21 Cal. 325, as to pueblo lands; *Richardson v. McNulty*, 24 Cal. 348, holding further that such title may be shown when strict legal title involved, but not in ejectment for mining claim; *Harris v. McGregor*, 29 Cal. 129; *Bradley v. Lee*, 38 Cal. 370, following also *Richardson* case, *supra*; *Foot v. Murphy*, 72 Cal. 106, and note to *Anderson v. Gray*, 23 Am. St. Rep. 699. Distinguished in *Dyson v. Bradshaw*, 23 Cal. 536, in cases where outstanding title was derived from plaintiff. And see note to *Griffin v. Sheffield*, 77 Am. Dec. 651, and to *Mallett v. Uncle Sam etc. Co.*, 90 Am. Dec. 497.

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Cited in *Partridge v. McKinney*, 10 Cal. 183, as to this point; *Sears v. Taylor*, 4 Colo. 43, holding further that possession of mining claim shows presumptive compliance with local laws regulating such possession; *Bagley v. Kennedy*, 85 Ga. 706, that possession affords a presumption of title; *Parker v. Fort Worth etc. Co.*, 71 Tex. 134, that in actions of trespass to try title, possession alone will warrant recovery against mere trespasser; note to *Keane v. Cannovan*, 82 Am. Dec. 746, and to

Hicks v. Coleman, 85 Am. Dec. 124, on prior possession as evidence of title; note to Austin v. Bailey, 86 Am. Dec. 707, as to necessity of plaintiff's possession in action of ejectment; and note to Gent v. Lynch, 87 Am. Dec. 562, as to like necessity in action for trespass.

9 Cal. 7-13. **LUDLUM v. FOURTH DISTRICT COURT.**

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9 Cal. 13-15. **BARRETT v. TEWKSBURY.** S. C. 15 Cal. 354.

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Cited, Maclay v. Love, 25 Cal. 374, 85 Am. Dec. 135, and Bodley v. Ferguson, 30 Cal. 518, on point that wife can convey property only in mode prescribed by the statute; Dow v. Gould & Curry S. M. Co., 31 Cal. 645, to same effect, holding that wife must join with husband in her deed and make statutory acknowledgment; Leonis v. Lazzarovich, 55 Cal. 58, to same effect as Maclay v. Love, supra; holding further (p. 59) that equity will not correct descriptions in wife's deed; Wedel v. Herman, 59 Cal. 512, to effect of principal case, holding, however, that under the code such a certificate can be corrected; Montana Nat. Bank v. Schmidt, 6 Mont. 611, and note to Tiernan v. Poor, 19 Am. Dec. 235, and to Gardner v. Moore, 21 Am. Rep. 460, 461, as part of opinion in Leonis v. Lazzarovich, supra; note to Jordan v. Corry, 52 Am. Dec. 523, stating rule before and under the code; note to Rindskoff v. Malone, 74 Am. Dec. 369, following principal case, and also on the point that wife's deed is void unless authenticated by notarial seal; Dentzel v. Waldie, 30 Cal. 142, on point that prior to act of April 3, 1863, married woman could not convey her property by attorney in fact. Distinguished, Love v. Watkins, 40 Cal. 562, 6 Am. Rep. 630, holding that specific performance may be decreed of binding contract of sale made by married woman; and, also, Stevens v. Holman, 112 Cal. 351, 53 Am. St. Rep. 218, to same effect, holding that such a binding contract may be reformed by equity; also, Savings & Loan Soc. v. Meeks, 66 Cal. 373, holding reformation allowable of clerical errors in wife's mortgage, where otherwise binding. Principal case was also distinguished in Miller v. Newton, 23 Cal. 566, holding that equity would charge wife's separate estate with her debts, but latter case was overruled in Maclay v. Love, 25 Cal. 375. See note to Williams v. Hamilton, 65 Am. St. Rep. 512, on reformation of deed of married woman.

9 Cal. 15-16. **PHELAN v. SUPERVISORS.** S. C. 6 Cal. 631; 20 Cal. 39.

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Appellate Court will not determine question not involved in motion, p. 16.

Cited, *Clark v. Hershy*, 52 Ark. 480, on point that court will not decide question as to amendment not before it for decision.

9 Cal. 18-19. **FREMONT v. MERCED MINING COMPANY.**

Injunction—Motion to Dissolve.—Where injunction is granted ex parte, motion to dissolve it may be made without notice, p. 19.

Cited, *Alpers v. Bliss*, 145 Cal. 572, upholding order striking from files supplemental cross-complaint in partition suit obtained on ex parte order; *Hefflon v. Bowers*, 72 Cal. 276: "The report of that case is not very full, but evidently the application to dissolve was based on affidavits. . . . This practice has, I believe, always prevailed in this state, as also in the state of New York."

Mandamus—Remedy by Appeal.—When right of appeal given, mandamus will not lie, p. 19.

Cited, *Clark v. Crane*, 57 Cal. 634, as to order after final judgment striking statement on motion for new trial from files.

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9 Cal. 19-21. PEOPLE v. JUDGE OF 10th JUDICIAL DISTRICT.

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9 Cal. 21-23. KRITZER v. MILLS.

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9 Cal. 23-24. ORTMAN v. DIXON. S. C. 13 Cal. 33.

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Cited, *Heinlen v. Cross*, 63 Cal. 47, on point that such decree is not suspended by appeal and disobedience pending appeal may be punished as contempt; *State v. Field*, 37 Mo. App. 99, that order removing assignee for benefit of creditors is not suspended by notice for new trial, or except by supersedeas.

Mandamus lies to compel court to punish violation of injunction, as a contempt, p. 24.

Distinguished, *State v. Horner*, 16 Mo. App. 199, holding that final order refusing to punish for contempt of decree cannot be revised by mandamus, the order being appealable. Cited in *Cahill v. Superior Court*, 145 Cal. 46, granting mandamus to compel superior court to hear motion to modify order setting apart probate homestead; *Crocker v. Conrey*, 140 Cal. 219, noted under *Merced M. Co. v. Fremont*, 7 Cal. 130; *Montgomery v. Palmer*, 100 Mich. 439, that when in contempt proceedings the question for determination is whether there is jurisdiction to try question of fact involved, mandamus will lie on order quashing proceedings.

9 Cal. 24-30. **ADAMS v. WOODS.** S. C. 8 Cal. 152; 15 Cal. 206; 18 Cal. 30; 21 Cal. 165.

Partnership—Receiver.—Creditors of a partnership may secure liens on property in hands of receiver in dissolution suit, before judgment, p. 26.

Cited to same effect in note to *Adams v. Wood*, 68 Am. Dec. 317; *Ross v. Titaworth*, 37 N. J. Eq. 337, holding, also, that after decree for dissolution the creditors may be enjoined. Distinguished in *Jackson v. Lahee*, 114 Ill. 298, and priority denied over other creditors where creditor recovered judgment pending dissolution suit and filed creditor's bill on day of ordering of notice to all creditors to prove their claims before master, especially when sharing in distribution. Cited, also, in *Ackerman v. Ackerman*, 50 Neb. 60, discussing but not deciding character of sheriff's possession pending application for receiver.

9 Cal. 30-32. **PEOPLE v. WALLACE.**

Indictment—Murder.—Essentials of indictment for murder stated, p. 31.

Cited, *People v. Cox*, 9 Cal. 32, and *People v. Coleman*, 10 Cal. 335, to same effect; *Ball v. United States*, 140 U. S. 133, that at common law time and place of death and of the injury were essential averments. Modified, *People v. King*, 27 Cal. 509, 87 Am. Dec. 96, holding that under Criminal Code strictness of pleading was unnecessary; and to same effect in *State v. Millain*, 3 Nev. 465.

9 Cal. 32-33. **PEOPLE v. COX.**

Indictment—Manlaughter.—Indictment held sufficient under authority of *People v. Wallace*, 9 Cal. 30; *People v. Lloyd*, 9 Cal. 54.

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9 Cal. 33-39. **CURTIS v. RICHARDS.**

Verified Complaint.—Answer to, cannot be on information and belief when facts are within defendant's knowledge, p. 37.

Cited, *S. F. Gas Company v. San Francisco*, 9 Cal. 473, holding, further, that answer to verified complaint must be specific, and applying the rule to corporations; *McCormick v. Bailey*, 10 Cal. 232, as to insufficiency of answer upon information and belief to verified complaint in trespass; *Ord v. Steamer Uncle Sam*, 13 Cal. 371, as to like insufficient denial of contract; *Brown v. Scott*, 25 Cal. 196, as to like denials of defendant's purchase at execution sale; holding, further, that defendant must show how he was without knowledge, when he so pleads; *Loveland v. Garner*, 74 Cal. 300, applying the rule to corporations, and holding that judgment on pleadings may be had on such

denials; *Mulcahy v. Buckley*, 100 Cal. 488, as to denial for want of information, etc., of recording of mechanic's lien; *State v. Butte Water Co.*, 18 Mont. 203-4, 56 Am. St. Rep. 575-6, as to like denials of tenancy of relator; *Lay G. M. Co. v. Falls etc. Mfg. Co.*, 91 N. C. 75, as to denial of his making a complaint; note to *Humphreys v. McCall*, 70 Am. Dec. 629, 631, 632, as to propriety of use of denial upon or for want of information and belief. Distinguished, *Oregonian etc. Co. v. Oregon etc. Co.*, 10 Sawy. 468, 22 Fed. Rep. 247, holding defendant not bound to inform himself as to truth of allegation of which he had no knowledge—the contents of instruments made and registered in Great Britain—and may deny for want of information, etc.

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Indebtedness.—Denial of is merely conclusion of law and raises no issue, p. 38.

Cited in *Swanholm v. Reeser*, 2 Idaho, 1169, holding denial necessary of facts showing indebtedness.

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Cited, to same effect, *Tissot v. Darling*, 9 Cal. 285; *Drouilhat v. Rottner*, 13 Oreg. 495; *State v. California Min. Co.*, 13 Nev. 213, upon sufficiency of undertaking on appeal though not in statutory form; *Storz v. Finklestein*, 50 Neb. 186, as to attachment bond, and holding plaintiff not liable thereon when not having signed it; Cited in *Spokane etc. Co. v. Loy*, 21 Wash. 504, construing local statute; note to *Howell v. Alma Milling Co.*, 38 Am. St. Rep. 704, upon liability of sureties on defective appeal bond. Distinguished, *City of Sacramento v. Dunlap*, 14 Cal. 423, holding official bond, joint in form, invalid unless signed by principal; and *Ney v. Orr*, 2 Mont. 564, holding sureties released by failure of principal to sign joint undertaking on appeal, when common-law bond in form.

Undertaking on Appeal—Sureties.—Such undertaking is independent contract on part of sureties, p. 38.

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9 Cal. 45-46. HUNT v. HIS CREDITORS.

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Cited, *In re Chope*, 112 Cal. 633, to the point that the allegation of insolvency in petition may be controverted by any creditor, and, if so, must be established by debtor as a fact.

9 Cal. 46-51. **DICKINSON v. MAGUIRE.**

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Cited, *Thompson v. Smith*, 28 Cal. 532, to effect that under claim of such entry the good faith of the entry must be inquired into; *Shelby v. Houston*, 38 Cal. 422, that an unlawful entry is a forcible entry made in bad faith; *Ely v. Yore*, 71 Cal. 132, and *Bank v. Taafe*, 76 Cal. 630, holding that under facts stated there was a forcible entry; and *Romero v. Gonzales*, 3 N. Mex. 8, holding aliter upon evidence. Distinguished, *Colton v. Onderdonk*, 69 Cal. 157, as to allegations of possession in complaint.

Title, when Involved.—When the question of title becomes involved in such an action in justice's court, it must be certified to the district court.

Cited, *Henderson v. Allen*, 23 Cal. 520: "It is doubtful whether in an action purely for a forcible entry or detainer the title can be involved in the controversy, the question being one relating solely to the possession. This court seems to have held both ways upon this point."—Citing principal case and *Larue v. Gaskins*, 5 Cal. 507.

9 Cal. 52-54. **WATSON v. ROBEY.**

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9 Cal. 54-56. **PEOPLE v. LLOYD.**

Indictment—Murder.—Indictment must allege manner and means of death, p. 55.

Cited, *People v. Cox*, 9 Cal. 32, where indictment was held defective; *People v. Ah Woo*, 28 Cal. 211, where indictment for forgery was held sufficient, though containing only a translation of the Chinese instrument forged. Modified, *People v. King*, 27 Cal. 509, 87 Am. Dec. 96, holding that Criminal Code had relaxed strictness in pleading required at common law; and *State v. Millain*, 3 Nev. 465, to same effect.

Indictment—Degree of Murder.—Indictment need not state degree of murder charged, p. 55.

Cited, *State v. Hamlin*, 47 Conn. 117, holding that allegation of homicide "feloniously, willfully and of his malice aforethought" would sustain verdict of murder in first as well as second degree; Territory

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9 Cal. 59-64. **HUMPHREYS v. McCALL.** 70 Am. Dec. 621.

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Cited, *S. F. Gas Co. v. San Francisco*, 9 Cal. 473, holding that answer of corporation to such complaint must be specific; *McCormick v. Bailey*, 10 Cal. 232, as to defendant's denial of his trespass; *Ord v. Steamer Uncle Sam*, 13 Cal. 371, and *Hanna v. Barker*, 6 Colo. 308, as to denial of contract; *Davanay v. Eggenhoff*, 43 Cal. 397, as to denial of nonpayment of note, holding further that general denial of unverified complaint on note puts nonpayment in issue and prevents judgment on pleadings; *Walker v. Buffandeau*, 63 Cal. 314, as to denial of priority of mortgage, but holding that sufficiency cannot be first questioned in supreme court; *Mills' Estate*, 40 Or. 433, applying rule where petition for removal of administrator charged that administrator made certain admissions showing disobedience of an order of court; note to 70 Am. Dec. 629, as to sufficiency of denials upon or for want of information and belief; note to *Montour v. Purdy*, 88 Am. Dec. 95, as to sufficiency of denials; note to *Hayward v. Grant*, 97 Am. Dec. 231, as to verification of pleadings. Distinguished in *Vassault v. Austin*, 32 Cal. 607, allowing denial on information and belief by husband and wife, of recovery of judgment against husband; and *Hagman v. Williams*, 88 Cal. 150, allowing like denials of statements of contents of recorded mechanic's lien.

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9 Cal. 64-67. CHASE v. STEEL.

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Cited, to same effect, in *Campbell v. Jones*, 41 Cal. 518; in *Purdy v. Steel*, 1 Idaho, 217, holding that where no motion or statement is properly made, judgment will be affirmed if judgment roll is regular; and to same effect in *Washington & I. R. Co. v. Osborne*, 2 Idaho, 530.

9 Cal. 71-72. HILL v. KEMBLE.

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9 Cal. 73-74. SHAW v. ANDREWS.

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Cited, to same effect, *Uhlfelder v. Levy*, 9 Cal. 615 (as "*Toombs v. Gorham*"); *Crowley v. Davis*, 37 Cal. 269, holding that such application should be made in the original court unless jurisdiction will not allow it to afford the relief; and *Platto v. Deuster*, 22 Wis. 496, as to enjoining writ of assistance. Distinguished, *Pixley v. Huggins*, 15 Cal. 135, holding that co-ordinate court may enjoin sale of plaintiff's property on execution as being that of judgment debtor; and in *De Godey v. Godey*, 39 Cal. 162, authorizing injunction by co-ordinate court to prevent divorced husband from disposing of community property not included in divorce decree, in suit for its division.

9 Cal. 78-81. STROUT v. NATOMA W. & N. COMPANY.

Corporate Stock—Transfer.—Delivery of certificate in pledge without transfer on books is invalid as against attaching creditor of assignor, without notice, p. 80.

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9 Cal. 81-85. ROBINSON v. MAGEE. 70 Am. Dec. 638.

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Cited to same effect in note to *Phinney v. Phinney*, 10 Am. St. Rep. 275; note to *People v. Common Council*, 37 Am. St. Rep. 567; and note to *State v. Carew*, 91 Am. Dec. 262, upon general subject.

Impairment of Remedy may impair obligation, p. 84.

Cited to same effect in *McCauley v. Brooks*, 16 Cal. 33; note to *Goshen v. Stonington*, 10 Am. Dec. 136, and note to *Von Baumbach v. Bade*, 76 Am. Dec. 293, as to laws affecting remedy; note to *Holloway v. Sherman*, 79 Am. Dec. 538; *Coffman v. Bank*, 90 Am. Dec. 320; *Hope Ins. Co. v. Flynn*, 90 Am. Dec. 441; and *Penrose v. Erie Canal Co.*, 93 Am. Dec. 782, as to legislative control over remedies. Distinguished, *Tuttle v. Block*, 104 Cal. 449, holding that legislature may reduce period of limitation for tax deed if reasonable.

Contracts.—Existing law forms part of, without express stipulation, p. 84.

Cited to same effect in *Orr v. Lisso*, 33 La. An. 478, and *Anderson v. Creditors*, Id. 1161.

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Cited to same effect in *People v. Bond*, 10 Cal. 572, and *Rose v. Estudillo*, 39 Cal. 274, as to funding acts; *McCauley v. Brooks*, 16 Cal. 32, as to contract with prison commissioners; note to *Goshen v. Stonington*, 10 Am. Dec. 135, as to impairment of vested rights; and *Lawson v. Jeffries*, 47 Miss. 706, 10 Am. Rep. 354, holding void ordinance of constitutional convention granting new trial in certain cases.

9 Cal. 85-89. **PEOPLE v. FOWLER.**

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Cited, *People v. Johnson*, 30 Cal. 101, denying appellate jurisdiction to supreme court in certain cases; *Robinson v. Fair*, 128 U. S. 80, as to jurisdiction of probate courts in California in partition proceedings.

Special Cases.—Legislative power to confer jurisdiction in "special cases" restricted, p. 89.

Cited, note to *Parsons v. Tuolumne County W. Co.*, 63 Am. Dec. 78, as to jurisdiction of county courts in "special cases."

9 Cal. 89-93. **FAIRBANKS v. DAWSON.**

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Approved, *Pena v. Vance*, 21 Cal. 149. Cited to same effect in *Heinlin v. Castro*, 22 Cal. 103, a foreclosure suit; *Wilcox v. Williams*, 5 Nev. 215, holding that a verbal part payment is not a sufficient acknowledgment to affect the statute; and to same effect in *Kirk v. Williams*, 24 Fed. Rep. 449; Approved in *Kelly v. Leachman*, 3 Idaho, 636, written promise to pay interest on whole of pre-existing debt is acknowledgment of whole debt. Overruled, *Palmer v. Andrews*, McAll. 491, 492, 493, following English construction. Distinguished, *Auzerais v. Naglee*, 74 Cal. 69, and *Reed v. Smith*, 1 Idaho, 535, upon question of written acknowledgment. Distinguished, also, on same point in *Barron v. Kennedy*, 17 Cal. 578, and doubted. But see *Pena v. Vance*, and *Wilcox v. Williams*, *supra*.

9 Cal. 93-94. **HARVEY v. FISK.**

Execution Sale—Notice.—Failure of sheriff to give notice of sale does not affect validity of sale, and is no defense to action against purchaser for price, p. 94.

Cited, on first point in *Frink v. Roe*, 70 Cal. 302, and note to *Smith v. Randall*, 65 Am. Dec. 480; and as to remedies against purchaser, in note to *Mount v. Brown*, 69 Am. Dec. 365.

9 Cal. 94-95. **ESCOLLE v. MERLE.**

Appeal—Conflicting Evidence.—Verdict not disturbed on appeal, when any evidence to support it, p. 95.

Cited, *Caulfield v. Bogle*, 2 Dak. Ter. 486, on point that verdict not disturbed when evidence conflicting; and to same effect in *Kansas Pacific Ry. Co. v. Kunkel*, 17 Kan. 169, in cases where trial judge has denied new trial.

9 Cal. 96-97. **MARKS v. MARSH.**

Homestead.—Wife's rights in, cannot be concluded in suit to foreclose mortgage on, unless she is party, p. 97.

Cited, in *Adams v. Beale*, 19 Iowa, 68, on point that such rights not affected by husband's omission, neglect, or default; holding, further, such interest to be her "real property"; *Chase v. Abbott*, 20 Iowa, 161, on point that wife is necessary defendant in such suit, if sought to bind her by decree; referred to in *Houssels v. Taylor*, 24 Tex. Civ. App. 75; note to *Revalk v. Kraemer*, 68 Am. Dec. 309.

9 Cal. 103-104. **ANTHONY v. WESSEL.**

Execution Sale.—Title does not pass until execution and delivery of sheriff's deed, p. 104.

Cited to same effect in *Reynolds v. Harris*, 14 Cal. 680, 76 Am. Dec. 465, holding that purchaser has only lien or equity in meantime; in

dissenting opinion in *Glenn v. Caldwell*, 74 Miss. 53, on point that statute of adverse possession cannot run until execution of deed.

Deed.—Ex-sheriff who had made levy and sale and given certificate may execute deed, p. 10.

Cited to same effect in *Head v. Daniels*, 38 Kan. 11, holding further that when purchaser has gone into possession, defendant or his successor cannot question validity of deed; note to *Tukey v. Smith*, 36 Am. Dec. 706, and *People v. Boring*, 68 Am. Dec. 338. Distinguished in *Lone Jack etc. Co. v. Megginson*, 82 Fed. Rep. 92, as superseded by subsequent statute (stat. 1858, 95, 96); and *Moore v. Willamette etc. Co.*, 7 Oreg. 370, holding that under Oregon statute deed should be executed by then sheriff.

9 Cal. 104-107. **BIRRELL v. SCHIE.**

Mortgage—Subrogation.—A second mortgagee who contemporaneously with execution of his mortgage pays off the first, is entitled to be subrogated thereto, p. 106.

Cited to same effect in *Swift v. Kraemer*, 13 Cal. 530, 73 Am. Dec. 604; *Van Sandt v. Alvis*, 109 Cal. 169; 50 Am. St. Rep. 27; *Mulholland v. Tiffany*, 64 Md. 464, although the second mortgage was void as to creditors, no rights intervening; cited in *White v. Stevenson*, 144 Cal. 110, discussing power of court of equity to disregard release of mortgage executed under mistake; *State v. Orahood*, 27 Mo. App. 499, to effect that assignment of note given for purchase money of homestead carries preference of vendor over right of homestead of vendee; to same effect in *Hicks v. Morris*, 57 Tex. 664-5 (overruling *Malone v. Kaufman*, 38 Tex. 454); and note to *Magee v. Magee*, 99 Am. Dec. 575, as to assignment of vendor's lien on homestead.

9 Cal. 107-112. **WARE v. ROBINSON.**

Contempt.—Appeal lies from judgment or order of contempt, p. 111.

Cited, *State v. Schneider*, 47 Mo. App. 672, holding appeal allowable when contempt not direct and appeal causes no delay in main case; also, *Caro v. Maxwell*, 20 Fla. 18, holding, however, that no appeal lies and refusing mandamus to compel approval of appeal bond.

9 Cal. 112-115. **PEOPLE v. CROCKETT.**

Corporate Stock—Lien.—Corporation has no lien on stock for owner's debt to it, p. 15.

Cited to same effect in note to *Morgan v. Bank*, 11 Am. Dec. 581.

Corporate By-Laws—Stock Transfers.—Corporation cannot pass retrospective by-laws forbidding stock transfers until owner's debts to it are paid, p. 115.

Cited, *Pendergast v. Bank*, 2 Sawy. 116, 19 Fed. Cas. 138, to effect that such by-law is valid if prospective, and to same effect in note to *Bloede Co. v. Bloede*, 57 Am. St. Rep. 388; note to *Weston v. Bear River etc. Co.*, 63 Am. Dec. 121, as cited in *Pendergast* case, *supra*; note to *Sayre v. Louisville etc. Assn.*, 85 Am. Dec. 619, 621, as to validity of corporate by-laws; and note to *People's etc. Bank v. Superior Court*, 43 Am. St. Rep. 153, 154, 156, as to retrospective by-laws and upon main proposition.

Mandamus lies to compel transfer of stock on corporate books, p. 115.

Cited to same effect in *Green Mount. etc. Co. v. Bulla*, 45 Ind. 3; denied, *Freon v. Carriage Co.*, 42 Ohio St. 39, 51 Am. Rep. 797, and stated as overruled by *Kimball v. Union Water Co.*, 44 Cal. 173.

Doubted in *Second Nat. Bank v. Bank*, 8 N. Dak. 51, denying mandamus to compel transfer to pledgee.

9 Cal. 115-117. **PEOPLE v. GALVIN.**

Prisoner's Presence is not necessary at setting day for pronouncing sentence, p. 116.

Cited, note to *Warren v. State*, 68 Am. Dec. 226, as to presence at sentence, and *Stubbs v. State*, 49 Miss. 724, on point that rule as to necessity of presence should be followed in felonies from arraignment to final sentence; *State v. Woolsey*, 19 Utah, 494, as to presence at overruling of demurrer to indictment.

9 Cal. 117-119. **KNIGHT v. FAIR.**

Execution Sale—Redemption.—Purchaser may have lien prior to redemption, even if former is a creditor, p. 118.

Cited to same effect in *McMillan v. Richards*, 9 Cal. 413, 414, 70 Am. Dec. 66-7, and in dissenting opinion in *Parke v. Hush*, 29 Minn. 439; but overruled in *Simpson v. Castle*, 52 Cal. 646, under amendment to Practice Act. Distinguished, *Lloyd v. Hoo Sue*, 5 Sawy. 76, as to rights of assignee in bankruptcy as redemptioner. Cited, also, in *Page v. Rogers*, 31 Cal. 301, upon point that legal title does not pass on execution sale until delivery of sheriff's deed. Overruled in *Pollard v. Harlow*, 138 Cal. 392, holding rule under Practice Act superseded by its amendments and the codes.

9 Cal. 119-123. **McGREARY v. OSBORNE.**

Fixtures.—As between landlord and tenant, mill machinery in leased house fastened by bolts is removable, p. 121.

Cited, *Potter v. Cromwell*, 40 N. Y. 294, 100 Am. Dec. 490, on point of permanent structures. Distinguished, *Horne v. Smith*, 105 N. C. 325, 18 Am. St. Rep. 905, when as between vendor and vendee.

Mechanic's Lien attaches to whatever interest person ordering work had, p. 122.

Cited to same effect in *Mutual Aid etc. Co. v. Gashe*, 56 Ohio St. 296, as to lien on interest of vendee in possession under executory installment contract of sale; note to *Lyon v. McGuffey*, 45 Am. Dec. 678, as to estate subject to such lien.

9 Cal. 123-129. **BELLOC v. ROGERS.**

Mortgage.—Title under California system remains in mortgagor subject to foreclosure and sale, p. 125.

Cited to same effect in *McMillan v. Richards*, 9 Cal. 410, 70 Am. Dec. 663.

Foreclosure.—Jurisdiction to foreclose decedent's mortgage is in district court, unless claim is allowed in probate proceedings, p. 129.

Approved to same effect in *Willis v. Farley*, 24 Cal. 499. Cited, *Heusch v. Porter*, 10 Cal. 559, as to jurisdiction over probate claims; in note to *Deck v. Gerke*, 73 Am. Dec. 560, as to jurisdiction of probate courts in foreclosure; in note to *Clarke v. Perry*, 63 Am. Dec. 84, as to limited jurisdiction of probate courts. Overruled, *Cowell v. Buckelew*, 14 Cal. 642, upon point that foreclosure sale is invalid unless made under order of probate court. Cited in *Wickersham v. Johnston*, 104 Cal. 412, 43 Am. St. Rep. 120, upon point that sale of personal property of decedent is invalid unless ordered by probate court.

Foreclosure Sale.—Title of purchaser is that of mortgagor at time of mortgage, p. 129.

Cited to same effect in *Goodenow v. Ewer*, 16 Cal. 469, 76 Am. Dec. 545; in *Gutzeit v. Pennie*, 98 Cal. 329, holding personal representatives of deceased mortgagor not necessary defendants in foreclosure. Cited also, in *Rice v. Kelso*, 57 Iowa, 119, as to effect of mortgage on after-acquired title.

Statutory Construction.—When act specifies one exception to general rule, no other will be presumed intended, p. 128.

Cited, *Middle Creek etc. Co. v. Henry*, 15 Mont. 575, to same effect, as to specifying penalty.

9 Cal. 130-137. **CHASE v. SWAIN.**

Default will not be set aside because of defendant's ignorance of law, p. 136.

Cited to same effect in *Sundback v. Griffith*, 7 S. Dak. 112; cited in *Thompson v. Harlow*, 150 Ind. 455, holding showing insufficient to vacate default; in note to *Burnham v. Hays*, 58 Am. Dec. 398, as to setting aside default for surprise, etc.

Former Judgment is not bar against one not party thereto, p. 136.

Cited to same effect in note to *Hill v. Bain*, 2 Am. St. Rep. 876, as to estoppel by judgment of stranger thereto.

9 Cal. 137-142. **McKEON v. BISBEE.** 70 Am. Dec. 642.

Miner's claim is property and subject to execution, p. 142.

Cited in note to *McIlvaine v. Smith*, 97 Am. Dec. 315, as to execution sale of equitable estates; *State v. Moore*, 12 Cal. 70, on point that possessory interest in mining claim is "property" and taxable; *Hughes v. Devlin*, 23 Cal. 506, and *Aspen etc. Co. v. Rucker*, 28 Fed. Rep. 222, on point that it may be partitioned; note to *Merced Min. Co. v. Fremont*, 68 Am. Dec. 274, on nature of such right; *Gold Hill etc. Co. v. Ish*, 5 Oreg. 106, upon point that right to mine is franchise and raises presumption of general grant; *Phoenix etc. Co. v. Scott*, 20 Wash. 50, but holding locator's possessory right not to be community property; note to *Pippin v. Ellison*, 55 Am. Dec. 405, as to "property" passing by will.

9 Cal. 142-146. **WILLIAMS v. WALTON.**

Arbitration—Jurisdiction.—County court had no jurisdiction to enforce award under facts, p. 145.

Cited, note to *Parsons v. Tuolumne etc. Co.*, 63 Am. Dec. 78, as to jurisdiction in "special cases."

Award void in part is enforceable as to good part unless inseparable, p. 146.

Cited, note to *Muldraw v. Norris*, 56 Am. Dec. 317, as to awards void in part.

Arbitration.—When statutory method attempted but not followed, agreement cannot be enforced as common-law arbitration, p. 146.

Cited to same effect in *Hepburn v. Jones*, 4 Colo. 99, where arbitrators not sworn. Distinguished in *Kreiss v. Hotaling*, 96 Cal. 621, where manifest intention to make common-law arbitration.

General citation: *Semple v. Bank of British Columbia*, Fed. Cas. No. 12659.

9 Cal. 172-173. **BRANGER v. CHEVALIER.** S. C. 9 Cal. 351, 353.

Statement.—Certificate to, may be revoked during same term if erroneous, but not thereafter, p. 173.

Cited, note to *Rew v. Barker*, 14 Am. Dec. 518, on power of courts to amend erroneous records; *Casement v. Ringgold*, 28 Cal. 338, upon point that judgment cannot be vacated for surprise after term. Distinguished under present statutes in *Kaufman v. Shain*, 111 Cal. 20, 52 Am. St. Rep. 141, holding clerk's minute entry amendable at any time, and that judgment may be vacated within six months from entry. Cited, also, in note to *Bramlet v. Pickett*, 12 Am. Dec. 353, to effect that entry of judgment cannot be amended by evidence outside the record.

9 Cal. 173-175. WICKS v. LUDWIG.

Courts.—Judgment is invalid unless rendered by court of competent jurisdiction, at time and place and in form prescribed by law, p. 175.

Cited to same effect in *Stone v. Elkins*, 24 Cal. 127, holding invalid, judgment by supervisors as to title to office; *Norwood v. Kenfield*, 34 Cal. 333, and *Earle v. Earle*, 27 Kan. 543, as to judgment rendered at term not legal; *Williams v. Reutzel*, 60 Ark. 158, as to judgment rendered at place unauthorized by law; *Sedgwick v. Dawkins*, 16 Fla. 203, as to entry of judgment after term time; *Forcheimer v. Tarble*, 23 Fla. 102, as to setting aside in vacation default judgment entered in term; *Loesnits v. Seelinger*, 127 Ind. 427, holding void acts of county commissioners at unauthorized session; *Staab v. Atlantic etc. Co.*, 3 N. Mex. 611 (432), as to trial and judgment in vacation, although upon stipulation of counsel; and note to *Morrill v. Morrill*, 23 Am. St. Rep. 116, as to judgments rendered after term time. Explained and distinguished in *People v. Jones*, 20 Cal. 56, holding that legislature may authorize entry of judgment in vacation when trial regularly had; and distinguished in *Roy v. Horsley*, 6 Oreg. 386, where the testimony taken before referee, and trial concluded and judgment rendered in term time.

Appeal.—Judgment void because of lack of jurisdiction is not appealable, p. 175.

Cited to same effect in *Earle v. Earle*, 27 Kan. 543, holding, however, such judgment reviewable by writ of error; and *Staab v. Atlantic etc. Co.*, 3 N. Mex. 611 (432), as to judgment rendered in vacation, although trial then had by consent. Denied, *Skinner v. Beshoar*, 2 Colo. 386-7, holding that writ of error lies from judgment void because defective in form; and in *Fox v. Nachtsheim*, 3 Wash. 687, as to judgment rendered on Sunday; also stating main case to have been overruled by *Livermore v. Campbell*, 52 Cal. 75.

9 Cal. 177. SCANNELL v. STRAHLE.

Verdict—Appeal.—Supreme court will not disturb verdict when evidence conflicting, p. 177.

Cited to same effect in *Caulfield v. Bogle*, 2 Dak. Ter. 466.

9 Cal. 181-198. HALLECK v. GUY. S. C. 70 Am. Dec. 643.

Probate Sale is a judicial sale, p. 195.

Cited to same effect in *Noland v. Barrett*, 122 Mo. 189, 43 Am. St. Rep. 576, holding further that confirmation of sale by probate court cures any irregularity as to adjournment of sale; *Maul v. Hellman*, 39 Neb. 329, as to jurisdiction of probate court over purchaser; note to *Noland v. Barrett*, 43 Am. St. Rep. 580, defining "judicial sales"; and

Morrow v. McGregor, 49 Ark. 69, on point that order of sale is judicial act.

Probate Sales.—Confirmation is necessary before title passes, p. 195.

Cited to same effect in Knox v. Spratt, 19 Fla. 833; and note to Watson v. Tromble, 29 Am. St. Rep. 497, 498, 499, as to effect of confirmation on purchaser.

Probate Sale.—Purchaser's liability for bid does not depend on character of title. "Caveat emptor" is the rule, p. 197.

Cited to same effect in note to Burns v. Hamilton's Adm., 70 Am. Dec. 572, 585; note to Hamilton v. Pleasants, 98 Am. Dec. 552; note to Upham v. Hamill, 23 Am. Rep. 527; note to Neal v. Gillasky, 26 Am. Rep. 38—as to "caveat emptor" in judicial sales; Maul v. Hellman, 39 Neb. 329, and note to Watson v. Tromble, 29 Am. St. Rep. 497, 498, 499, as to effect of confirmation upon purchaser's liability.

Administrator's Deed conveys only title of deceased, p. 197.

Cited, note to Knowles v. Blodgett, 2 Am. St. Rep. 915, to same effect.

Probate Sale.—Substitution of one purchaser for another will not affect validity where confirmed to last, p. 197.

Cited, Knox v. Spratt, 19 Fla. 834, on point that bid may be assigned and conveyance had to assignee subject to any rights against original purchaser already vested.

9 Cal. 198-202. CANY v. HALLECK.

Employee.—Extra services of similar character need not be paid for in absence of express agreement, p. 201.

Cited to same effect in Voorhees v. Combs, 33 N. J. L. 497, as to extra services of housekeeper, necessitated by employer's illness.

General citation: Western Brass Mfg. Co. v. Boyce, 74 Mo. App. 363.

9 Cal. 204-207. MITCHELL v. REED. 70 Am. Dec. 647.

Estoppel.—Declaration to third person, not confidential, but general, acted on by others, creates an estoppel, irrespective of intention in making it, p. 206.

Cited to same effect in McGee v. Stone, 9 Cal. 606; Carpy v. Dowdell, 115 Cal. 687, as to estoppel of board of directors as to cashier's authority when there had been "tacit encouragement"; McGirr v. Sell, 60 Ind. 255, upon estoppel of owner by conferring indicia of ownership on others; Madden v. Louisville etc. Ry. Co., 66 Miss. 273, upon owner's estoppel by acts in condemnation proceedings; Horn v. Cole, 51 N. H. 294, 297, 12 Am. Rep. 119, 123, 124, upon main propositions, as to claim in attachment proceedings; Witty v. S. P. R. R. Co., 76 Fed. Rep. 222, holding that estoppel might be created without intentional fraud; note to Lincoln v. Purcell, 73 Am. Dec. 202, Thrall v. Lathrop, Id., 308,

Windle v. Canaday, 83 Am. Dec. 349, Stinchfield v. Emerson, Id. 526, Partridge v. Stocker, 84 Am. Dec. 675, and Davis v. Davis, 85 Am. Dec. 171, upon estoppel in pais generally; dissenting opinion in Ayer v. Younker, 10 Colo. App. 39, main opinion holding no estoppel shown under facts stated; Woff v. Hawes, 105 Ga. 158, holding wife estopped by representations to her vendor and his agent. Denied, Kinney v. Whiton, 44 Conn. 270, upon main proposition, holding intention of publicity necessary when declaration not made to plaintiff; and to same effect in Brickley v. Edwards, 131 Ind. 11.

9 Cal. 207-211. **DICKINSON v. VAN HORN.**

New Trial—Statement.—Irregularities in settlement are waived by appearance and argument of motion, p. 210.

Cited, Millard v. Hathaway, 27 Cal. 138, on point that submission of motion by consent precludes objection that statement was not filed in time.

New Trial—Presumptions.—When statement does not contain evidence, supreme court will presume order granting new trial warranted, p. 211.

Cited, Owen v. Morton, 24 Cal. 378, upon point that court will presume finding warranted by evidence when all not shown; and to effect of main point in dissenting opinion in Libby v. Dalton, 9 Nev. 28.

New Trial—Election Contests.—County court may grant new trial in, p. 211.

Overruled, Dorsey v. Barry, 24 Cal. 455, 456. Cited, Lord v. Dunster, 79 Cal. 483, as to "special cases," saying: "It must be admitted that the decisions bearing upon the question . . . are incongruous mixtures of opinion."

9 Cal. 211-212. **MUSGROVE v. PERKINS.**

Continuance is in reasonable discretion of court, p. 212.

Cited to same effect in Pilot Rock etc. Co. v. Chapman, 11 Cal. 162, holding, further, that supreme court will not interfere unless motion is made for new trial; Griffin v. Polhemus, 20 Cal. 181; People v. De Lacey, 28 Cal. 590, a criminal case, where the good faith of the application was doubtful; Kneebone v. Kneebone, 83 Cal. 647, holding that abuse of discretion must affirmatively appear from record; Barnes v. Barnes, 95 Cal. 177, divided court holding no abuse shown; note to Stevenson v. Sherwood, 74 Am. Dec. 141, upon discretionary nature of power; and Id. 143, upon lack of preparation for trial as ground for continuance.

9 Cal. 213-229. **PEABODY v. PHELPS.** S. C. 7 Cal. 53.

Referee's Report.—Unless special, is followed by entry of judgment, and time to set aside runs from this entry, p. 224.

Cited in *Hihn v. Peck*, 30 Cal. 285, upon question whether order of reference was special; *Terpening v. Holton*, 9 Colo. 312, upon right of clerk to enter judgment on general report. Distinguished, *Baker v. Baker*, 10 Cal. 527, holding general report improper in divorce cases. Cited, also, in *Allen v. Hill*, 16 Cal. 118, as to entry of judgment upon verdict.

Ejectment.—Judgment does not bind stranger without legal notice of action; knowledge is insufficient, p. 226.

Cited, *Ferreira v. Chabot*, 63 Cal. 568, holding parol notice to landlord by tenant sufficient; note to *Charles v. Hoskins*, 83 Am. Dec. 386, 388, as to effect of judgments on persons liable over to defendants; and *Vogel v. Brown Township*, 112 Ind. 301, 2 Am. St. Rep. 189, upon point that suit against township trustee by name will not support judgment against the township. Distinguished, *Sampson v. Ohleyer*, 22 Cal. 206, holding that transfer by tenant to landlord pending suit and defense thereof by latter, is such notice as binds landlord by the judgment.

False Representation as to fact of title is not actionable by purchaser who has taken possession under deed with express covenants, p. 226.

Doubted, *Wright v. Carrillo*, 22 Cal. 604, 605, and overruled in *Kimball v. Saguin*, 86 Iowa, 190. Cited, note to *Bostwick v. Lewis*, 2 Am. Dec. 77; but distinguished and doubted, *Id.*, pp. 78, 79.

Conveyances—Parol Evidence.—All prior representations are merged in conveyance in absence of fraud, p. 228.

Cited, *McDonough v. Martin*, 98 Ga. 684, as to parol promise to defend ejectment suit.

Vendee in Possession cannot retain possession and set up breach of warranty of title, p. 228.

Cited in *McLeod v. Barnum*, 131 Cal. 608, applying rule to case of like resistance to purchase money mortgage.

9 Cal. 230-234. PEOPLE v. BARBOUR.

Courts—Validity.—Legal presumption is in favor of the validity of a court, p. 233.

Cited, *People v. Robinson*, 17 Cal. 371, to effect that regularity of proceedings of courts of general jurisdiction is presumed, and party impeaching them must show their irregularities affirmatively, especially after jurisdiction of the person is shown.

Criminal Statute—Repeal.—Repeal of law creating criminal offense does not bar punishment for crime committed before repeal unless repealing act so declares, p. 234.

Cited, note to *People v. Tinder*, 19 Am. Dec. 550, on point that bail may be allowed where law repealed without reserving penalty for past offenses.

9 Cal. 234-236. PEOPLE v. WINKLER.

Stare Decisis.—Language of opinion must be held as referring to particular case, p. 236.

Cited, note to *Gee's Admr. v. Williamson*, 27 Am. Dec. 632, as to "obiter dictum."

Larceny.—Indictment must correctly describe thing stolen for purpose of identification, p. 236.

Cited, *State v. Hoffman*, 53 Kan. 705, holding "neat cattle" to include "steers."

9 Cal. 237-246. JONES v. JACKSON.

Mining.—Appropriation is not sufficiently shown by mere posting of location notices, p. 244.

Cited to same effect in *Hall v. Arnott*, 80 Cal. 358.

Right to Surface Ground for deposit of tailings exists when not interfering with prior rights, p. 244.

Cited in note to *McClintock v. Bryden*, 63 Am. Dec. 106, upon right to necessary surface ground. Denied in *Miser v. O'Shea*, 37 Or. 235, holding no rights predicable on such deposits when not continued for statutory period; *Ritter v. Lynch*, 123 Fed. 932, where owner of stamp-mill constructed reservoir for tailings on government ground, and after death heirs paid taxes on land and looked after land through agents, placer claim based principally on discovery of mineral in tailings is void.

Abandonment of tailings is shown by failure to confine them, in absence of local customs, p. 244.

Cited, note to *Wyman v. Hurlburt*, 40 Am. Dec. 466, on abandonment of mining claims; and note to *McClintock v. Bryden*, 63 Am. Dec. 104, upon effect of local mining customs and regulations.

9 Cal. 246-247. McCANN v. LEWIS.

Negotiable Instruments.—Ownership is *prima facie* shown by possession, p. 246.

Cited to same effect in *Meadowcraft v. Walsh*, 15 Mont. 550, holding further that until presumption is overcome, the holder is a bona fide purchaser for value, with right to sue, and real party in interest; in *Meadows v. Cozart*, 76 N. C. 453, applying same rule to indorsee; and in note to *Bedell v. Herring*, 11 Am. St. Rep. 323, upon burden of proof as to bona fide ownership of negotiable instruments.

Judgment.—Interest already accrued may be added as part of judgment and bear interest therewith, p. 247.

Cited to same effect in *Corcoran v. Doll*, 32 Cal. 88, holding it immaterial, where no default, that interest on judgment not asked in complaint.

9 Cal. 247. WING v. OWEN.

New Trial.—Specifications of Error must appear in statement or new trial is waived, p. 247.

Cited to same effect in *Hutton v. Reed*, 25 Cal. 488, and as having been affirmed in *Barrett v. Tewksbury*, 15 Cal. 354; defining further "specifically set forth" as to grounds of motion; and in *Caldwell v. Greely*, 5 Nev. 262, holding that where statement is thus deficient judgment will be affirmed without inquiry as to merits of motion.

9 Cal. 250-251. PEOPLE v. MACKINLEY.

Larceny does not include taking of one's own property, p. 250.

Cited, note to *State v. Holmes*, 57 Am. Dec. 278, upon stealing own property as larceny, and confining case to property in own possession.

9 Cal. 251-259. GERKE v. CALIFORNIA S. N. COMPANY. S. C. 70 Am. Dec. 650, and note 654.

Res Gestae.—Servant's declarations are not admissible against master unless part of *res gestae*, p. 256.

Cited to same effect in *Garfield v. Knight's Ferry etc. Co.*, 14 Cal. 38, where not part of *res gestae*; *Mayer v. Virginia etc. Co.*, 16 Nev. 345, to same effect, holding that declarations were not part of servant's duty; and note to *Mateer v. Brown*, 52 Am. Dec. 312, as to admissibility of agent's declarations.

Negligence—Spark Catcher.—Failure to provide steamboat with, is evidence of negligence, p. 258.

Cited to same effect in *Algier v. Steamer Maria*, 14 Cal. 171, holding that defective spark catcher was equivalent to none; note to *Radcliff v. Mayor*, 53 Am. Dec. 370, on injuries to another's property through use of one's own; note to *Fero v. Buffalo etc. Co.*, 78 Am. Dec. 185, as to liability of railroads for fires.

Negligence.—Province of court and jury discussed, p. 258.

Cited, note to *Todd v. Old Colony etc. Co.*, 80 Am. Dec. 53; and to *Illinois etc. Co. v. Bucker*, 81 Am. Dec. 284, upon same subject.

9 Cal. 259. MARLOW v. MARSH.

Statement on Appeal.—Amendments must be inserted in proper place in draft; separate papers will not be considered, p. 259.

Cited to same effect in *People v. Edwards*, 9 Cal. 291; *Skillman v. Riley*, 10 Cal. 30; *Baldwin v. Ferre*, 23 Cal. 462; *Fritsch v. Stampfi*, 117 Cal. 442. Cited, also, in *Kimball v. Semple*, 31 Cal. 661, to effect that appellant must furnish a complete, clean and properly arranged transcript, and the court will not piece two transcripts together.

9 Cal. 259-260. PEOPLE v. WILSON.

Assault—Verdict.—On charge of assault with deadly weapon with intent, etc., verdict merely of assault with deadly weapon is of a simple assault, p. 260.

Cited to same effect in *People v. Cozad*, 1 Idaho, 168; *People v. Holland*, 59 Cal. 364, upon point that superior court has jurisdiction to sentence on verdict of simple assault, when crime charged was within its jurisdiction; *Territory v. Conrad*, 1 Dak. Ter. 355, holding, however, that where lower court imposed sentence as for felony, the supreme court may modify it and remit cause accordingly. Distinguished, *People v. Congleton*, 44 Cal. 95, as to class of crime of assault when verdict finds intent to inflict injury.

9 Cal. 260. BASSETT v. HAINES.

Acceptance of Order must be signed by acceptor, p. 261.

Cited in *Erickson v. Inman*, 34 Or. 47, holding verbal acceptance of bill of exchange invalid.

9 Cal. 262-267. ROBERTS v. LANDECKER.

Attachment Proceedings are special, and statute must be strictly followed, p. 265.

Cited to same effect in *Gow v. Marshall*, 90 Cal. 567, as to garnishment of "debts," and in *McGehee v. Wilkins*, 31 Fla. 87, upon attachment of property not within the statute.

Garnishee—Liability.—After judgment the garnishee is liable to plaintiff to extent thereof for property or for its value, if converted, without being required to answer, p. 266.

Cited to same effect in *Robinson v. Tevis*, 38 Cal. 614; *Broadway etc. Co. v. Wolters*, 128 Cal. 168, but holding judgment against garnishee not procurable under sheriff's return alone; *Wilson v. Harris*, 21 Mont. 397, holding garnishment alone ineffectual under local statutes in case of property capable of manual delivery under fraudulent transfer. *Deering v. Richardson-Kimball Co.*, 109 Cal. 83, holding, further, that where several claimed property garnished, court could not, on supplemental proceedings, order it transferred to plaintiff; *Carter v. Los Angeles Nat. Bank*, 116 Cal. 372, holding, further, as to distinction between sections 544 and 717, Code Civ. Proc. Distinguished in *Matteson etc. Co. v. Conley*, 144 Cal. 486, denying right of judgment creditor to bring action against garnishee under facts stated; *Herrlich v. Kaufman*, 99 Cal. 276, 37 Am. St. Rep. 54, as to garnishment on execution, as to which see *Carter v. Los Angeles Nat. Bank*, 116 Cal. 373.

Remedy—Statute.—When statutory right is created, but no remedy prescribed, action at law will lie on the right, p. 267.

Cited to same effect in *Carter v. Los Angeles Nat. Bk.*, 116 Cal. 374.

9 Cal. 268-271. **GARNER v. MARSHALL.**

Complaint.—Aided by verdict, if containing terms sufficiently general to comprehend facts fairly and reasonably, p. 269.

Cited to same effect in *People v. Rains*, 23 Cal. 130, as to description of property in tax suit; *Alexander v. McDow*, 108 Cal. 29, as to aider by judgment of allegation as to averment of assignment; *San Joaquin Lumber Co. v. Welton*, 115 Cal. 4, as to averment of cessation of work; *Hershfield v. Aiken*, 3 Mont. 452, as to averment of nonpayment; and in *Nicolai v. Krimbel*, 29 Oreg. 84, as to averment of particulars as to sale. Distinguished, *Hentsch v. Porter*, 10 Cal. 559, holding entire absence of allegations as to presentation and rejection of probate claim not cured by default; and *Grosloui v. Northcut*, 3 Oreg. 405, to same effect as to absence of allegations as to property, in default divorce suit.

Ejectment.—Defendant must be in occupation of property, p. 270.

Cited to same effect in *Noe v. Card*, 14 Cal. 609, holding actual or constructive possession of defendant, when suit brought necessary; *Dutton v. Warschauer*, 21 Cal. 619, 82 Am. Dec. 766, and *Valentine v. Mahoney*, 37 Cal. 393, holding, further, as to right of landlord to defend when tenant sued; *Calderwood v. Braly*, 28 Cal. 98; *Hawkins v. Reichert*, 28 Cal. 536, holding, further that the question of nature of the occupancy was one of fact for the court, whose findings would not be disturbed when evidence conflicting; in *Frazier v. Lynch*, 97 Cal. 372, holding plaintiff not entitled to judgment unless showing defendant so to have had possession. Distinguished, *Bell v. Foxen*, 14 Sawy. 501, 42 Fed. Rep. 756, holding entry and adverse claim equivalent to personal presence on land when suit brought.

Ejectment.—Judgment affects only rights of occupants when suit brought, p. 270.

Cited, *Burke v. Table Mountain etc. Co.*, 12 Cal. 409, upon point that judgment does not conclude right of possession, but only fact of possession when suit brought.

Miscellaneous: *McLeod v. Lloyd*, 43 Or. 273, illustrating the expression, "exercise of acts of ownership."

9 Cal. 271-273. **BACON v. SCANNELL.**

Fraudulent Conveyance.—Change of possession must be continued without limit, p. 273.

Overruled, *Stevens v. Irwin*, 15 Cal. 506, 76 Am. Dec. 504, holding possession sufficient when bona fide and openly taken and continued long enough to give general advertisement of the change; and *Godchaux v. Mulford*, 26 Cal. 523, 85 Am. Dec. 182, approving *Stevens'* case, *supra*. Cited, note to *Clafin v. Rosenberg*, 97 Am. Dec. 341, as to sufficiency of change of possession.

9 Cal. 273-275. PEOPLE v. STEVENTON.

Indictment for Murder.—Essentials stated, p. 275.

Cited, *People v. Choiser*, 10 Cal. 311, holding description of weapon as "loaded pistol" sufficient; *People v. Judd*, 10 Cal. 314, allegation of place of wound immaterial, and allegation of death sufficient to show wound mortal; *Walker v. State*, 34 Fla. 172, 43 Am. St. Rep. 190, and *Wilkerson v. State*, 2 Tex. App. 265, as to allegations of place of wound; and *Brown v. State*, 18 Fla. 476, as to its extent; *People v. King*, 27 Cal. 510, 87 Am. Dec. 96, holding as unnecessary, allegations of means of death, or nature or extent or place of wound; *Hodge v. State*, 26 Fla. 14, as to allegations of size of wound; *People v. Cronin*, 34 Cal. 200, holding further that common-law restrictions as to form of indictment are abolished, and that the manner and means of death need not be stated, nor any fact beyond those employed in statutory definition of the crime; and to same effect in *State v. Millais*, 3 Nev. 465, and also as overruling earlier California cases upon this point; *Stutsman v. Territory*, 7 Okla. 493. Distinguished in *People v. Schmidt*, 63 Cal. 29, holding allegation of malice aforethought necessary.

9 Cal. 277-278. MEERHOLZ v. SESSIONS.

Orders by Consent—Appeal.—Orders entered by consent will not be reviewed on appeal, p. 278.

Cited, *Brotherton v. Hart*, 11 Cal. 405, on point that supreme court will not pass upon an order made by consent denying motion for new trial; and *Erlanger v. Southern Pacific Railroad Co.*, 109 Cal. 395, holding, further, that an appeal from a consent judgment will be dismissed on motion.

9 Cal. 278-286. TISSOT v. DARLING.

Appeal Bond.—Sureties on are liable on affirmance of judgment without issuance of execution if judgment not paid, p. 285.

Cited to same effect in *Murdock v. Brooks*, 38 Cal. 604, holding, also, demand on principal unnecessary; *Pieper v. Peers*, 98 Cal. 43, holding, further, dismissal of appeal equivalent to affirmance quoad this liability; *Babbitt v. Finn*, 101 U. S. 15, extending principle to judgment recovered in appellate court; *Davis v. Patrick*, 57 Fed. Rep. 912, holding, further, that sureties cannot stay suit on bond until attachment lien in main suit is satisfied. Cited, also, in *Perkins v. Barnes*, 3 Nev. 565, upon question of pleading; and note to *Howell v. Alma Milling Co.*, 38 Am. St. Rep. 714, upon remedies on appeal bonds.

Appeal Bonds.—Undertaking of sureties therein is an original and independent agreement, p. 285.

Cited in *Adler v. Staude*, 136 Cal. 184, quoting *Moffat v. Greenwalt*, 90 Cal. 371, holding sureties not exonerated by failure to justify.

Appeal Bonds—Signature.—Principal need not sign, p. 285.

Cited to same effect in note to *Howell v. Alma Milling Co.*, 38 Am. St. Rep. 704.

9 Cal. 286-294. **PEOPLE v. EDWARDS.**

Statement on Appeal.—Amendments should be incorporated with draft in one paper, p. 291.

Cited to same effect in *Skillman v. Riley*, 10 Cal. 300; *Baldwin v. Ferre*, 23 Cal. 462, holding that supreme court will not consider separate papers; and in *Kimball v. Semple*, 31 Cal. 661, applying rule to transcripts on appeal.

Official Bonds.—Defective approval is no defense against sureties, p. 292.

Cited in *Mendocino County v. Morris*, 32 Cal. 148, and *State v. Proudfoot*, 38 W. Va. 743, where wrong official approved bond; and to same effect in *People v. Huson*, 78 Cal. 157; *Irwin v. Crook*, 17 Colo. 19, applying rule to lack of formal approval of appeal bond; *Holt Co. v. Scott*, 53 Neb. 194, holding approval beyond statutory period no defense to sureties; *Eldridge v. Knight*, 11 N. Dak. 556, undertaking on appeal from justice court need not be approved and filed by district court clerk before same is served on appellee; *State v. Hays*, 2 Oreg. 319, applying rule to bail bonds; and in note to *Whitehurst v. Hickey*, 15 Am. Dec. 171, as to informalities in official bonds. Distinguished, *People v. Kneeland*, 31 Cal. 291, where no approval at all was had.

Sheriff.—When, also, ex-officio tax collector sureties on bond as sheriff are not liable for acts as tax collector unless statute provides, p. 292.

Cited to same effect in *Attorney General v. Squires*, 14 Cal. 16, holding sureties bound under Revenue Act of 1854; *Lathrop v. Brittain*, 30 Cal. 684; *People v. Ross*, 38 Cal. 77; *Redwood City v. Grimmstein*, 68 Cal. 514, 515; *People v. Burkhart*, 76 Cal. 606, holding that the two offices are distinct, although held by same person; and in *State v. Loughton*, 19 Nev. 205, holding that creation of ex-officio office does not merge it with the other; also, upon main point in *People v. Gardner*, 55 Cal. 306, holding bond as surveyor general not to cover acts as ex-officio register. Cited, also, in *Lawrence v. Doolan*, 68 Cal. 313, holding sureties on bond of tax collector liable for performance of duties as tax collector imposed by statute after execution of bond. Distinguished, *Wood v. Cook*, 31 Ill. 279, as to liability of deputy sheriff, holding that offices are not separate or distinct; cited, also, on main point, in *Cooper v. People*, 85 Ill. 418, holding sureties on sheriff's bond not liable where statute contemplates separate bonds; *White v. East Saginaw*, 43 Mich. 570; *Territory v. Ritter*, 1 Wyo. 333, where probate judge is also made ex-officio treasurer; and *Ex parte Bergman*, 3 Wyo. 405, further construing tenures of these offices; and further, in note to

Crawn v. Commonwealth, 10 Am. St. Rep. 855, as to liability of sureties where principal holds two offices; also, *State v. Rosenstock*, 11 Nev. 140, upon point that legislature may provide that two offices be held by one person, and *Johnson v. Hanscom*, 90 Tex. 328, holding that when county recorder is made ex-officio justice of the peace, the powers and duties of both offices and right to salary are not blended.

Though offices of sheriff and tax collector may, under statute, be held by one person two offices are not thereby blended into one, p. 292.

Approved in *Oakland v. Snow*, 145 Cal. 427, under Oakland charter incumbent of offices of auditor and assessor is entitled to but one salary and is liable to commissions retained on taxes collected.

Liability of Surety cannot be greater than amount for which he has bound himself, p. 293.

Cited to same effect in *City of Butte v. Cohen*, 9 Mont. 442, holding, further, judgment enforceable up to that amount against each surety till satisfied; and *Irwine v. Wood*, 7 Colo. 480, on point that several judgments must be rendered when liabilities on contract are several and differ in extent.

9 Cal. 294-298. MOUNT v. CHAPMAN.

Assignee of note after maturity takes it subject to existing equities, p. 295.

Cited in *Reynolds v. Harris*, 14 Cal. 680, 76 Am. Dec. 465, upon point that assignee of purchaser at execution sale acquires no title before sheriff's deed.

Judgment.—Interest may be added to principal in, and total amount bear interest thereafter, p. 297.

Cited to same effect in *Corcoran v. Doll*, 32 Cal. 88, holding further that, where no default, complaint need not ask for interest on judgment.

9 Cal. 298-313. PEOPLE v. PLUMMER.

Change of Venue.—Court may postpone motion on criminal case, until impanelment of jury is attempted, p. 309.

Cited to same effect in *People v. Goldenson*, 76 Cal. 340, holding further defendant's duty to renew motion; *People v. Fredericks*, 106 Cal. 558, holding that failure to call up such renewed motion amounts to waiver of right; *State v. Pruett*, 49 La. An. (pt. 1) 292; *State v. Millain*, 3 Nev. 461, holding principle in *Goldenson* case, supra, and, further, that refusal to change venue is rarely ground for reversal; *State v. Gray*, 19 Nev. 215, approving practice of postponement; *State v. Causey*, 43 La. Ann. 903, holding that fact of impanelment of proper jury is sufficient answer to motion; and note to *Shattuck v. Myers*,

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74 Am. Dec. 242, 244, as to change of venue because no impartial trial can be had.

Incompetency of Juror first raised after verdict is available on motion for new trial, p. 312.

Overruled in *People v. Fair*, 43 Cal. 146, 147.

Juror.—Incompetency held shown by declarations before trial as to defendant's guilt, p. 312.

Cited in *State v. Cleary*, 40 Kan. 299, and *Territory v. Kennedy*, 3 Mont. 526, ruling similarly under facts stated; *State v. Van Winkle*, 6 Nev. 349, discussing power of appellate court to review evidence; *State v. Morgan*, 23 Utah, 221, 227, 229, new trial granted where juror before trial had prejudiced case, but had given false answers on voir dire.

9 Cal. 313-315. **PEOPLE v. PETERSON.**

Bailee, Larceny by.—Indictment must state character of bailment and describe property, p. 315.

Cited as to alleging character of bailment in *People v. Poggi*, 19 Cal. 601; *People v. Johnson*, 71 Cal. 390, charge of embezzlement by bailee; *State v. Griffith*, 45 Kan. 145, where information for embezzlement was held defective in this respect. Denied, *State v. Chew Muck You*, 20 Oreg. 215, under local statute. Cited, also, in note to *Calkins v. State*, 98 Am. Dec. 149, defining "bailees" upon questions of larceny and embezzlement; at pp. 151, 153, upon necessity of allegations of nature of bailment, and at pp. 154, 155, and 156, as to allegation of description and value of property taken.

Juror—Bias.—Incompetency of for bias can be impeached after verdict, and court can grant new trial for such bias, p. 309.

Overruled as to bias as ground for new trial in *People v. Fair*, 43 Cal. 146.

Juror—Bias.—Facts and juror's declarations before trial held to show, p. 313.

Cited on similar facts in *State v. Cleary*, 40 Kan. 299; *Territory v. Kennedy*, 3 Mont. 526, when juror had expressed opinion before trial but testified as to lack of bias at the trial; and *State v. Greer*, 22 W. Va. 821—all reversing the judgment for this reason. Cited, also, in *State v. Van Winkle*, 6 Nev. 349, as to review of conflicting affidavits where juror's misconduct alleged.

9 Cal. 315-321. **ALDERSON v. BELL.**

Jurisdiction.—Presumption is in favor of, and of regularity of proceedings in absence of all evidence, p. 321.

Cited to same effect in *Hahn v. Kelly*, 34 Cal. 421, 94 Am. Dec. 761, and in note, p. 764; *Lyons v. Roach*, 84 Cal. 29, where it is stated

to have been "modified only with respect to those matters which are required to be shown in some part of the record other than the judgment itself"; *Peck v. Strauss*, 33 Cal. 684, where decree reciting due entry of default was held to have cured omissions in return of service of summons; *Blasdel v. Kean*, 8 Nev. 308, as to evidence of service of summons, which case was overruled, however, and principal case distinguished in cases of direct attack on judgment in *Lonkey v. Keyes S. M. Co.*, 21 Nev. 320. Distinguished in *Rowley v. Howard*, 23 Cal. 404, holding that no presumption attaches in favor of courts of special and limited jurisdiction.

Judicial Notice will extend to signatures of court officers, but not of parties to action, p. 321.

Cited to same effect as to acknowledgment of service of notice of appeal by party in *Moffitt v. McGrath*, 25 Oreg. 480; and upon both propositions in note to *Lanfear v. Mestier*, 89 Am. Dec. 683, and 687; *Fenton v. American etc. Co.*, 51 Neb. 396, applying rule to records of court, the signature of its clerk and the date of its proceedings.

Decrees.—Recitals of as to regular service of process are conclusive on collateral attack, p. 321.

Cited to same effect in *Hahn v. Kelly*, 34 Cal. 428, 94 Am. Dec. 764, as to service by publication; *Sharp v. Lumley*, 34 Cal. 616, as to default judgment on admission of service; *Meredith v. Santa Clara etc. Assn.*, 60 Cal. 622, as to service of order to show cause on sureties on appeal bond; *In re Newman*, 75 Cal. 220, 7 Am. St. Rep. 150, as to judgment in rem (divorce) on default after service by publication; *Burke v. Association*, 25 Mont. 321, as to default judgment, but not deciding question. Distinguished in *Heatherly v. Hadley*, 4 Oreg. 21, holding return showing mode of service not aided by recital of due service in decree.

Premature Judgment.—Question cannot be considered collaterally, p. 321.

Cited to same effect in *Woodward v. Baker*, 10 Oreg. 493.

Married Woman, when defendant, can bind herself by admission of service of summons, p. 321.

Cited in *Leonard v. Townsend*, 26 Cal. 445, sustaining judgment for costs against married woman when plaintiff.

9 Cal. 322-324. OWENS v. JACKSON.

Swamp and Overflowed Lands.—Under act of 1850, title to passed directly to state without patent, p. 324.

Cited to same effect in *Kernan v. Griffith*, 27 Cal. 89, holding further, question as to character of lands not determined by ex parte official surveys, but for jury in particular case; *Megerle v. Ashe*, 27 Cal. 327, 87 Am. Dec. 78, holding that patent is not conclusive as against claimant

under prior legislative grant; *Tubbs v. Wilhoit*, 73 Cal. 63, where "considered as settled law"; *Grosclous v. Northcut*, 3 Oreg. 399 (note), upon point that claimant under donation law has before patent a salable interest; *Gaston v. Scott*, 5 Oreg. 57, construing like grant to Oregon, and holding further title not lost by failure of state to make selections within time designated; *Miller v. Tobin*, 16 Oreg. 542, holding further that patentee from state has title superior to that of patentee from United States; *Wills v. Pennington County*, 2 S. Dak. 9, 39 Am. St. Rep. 763, applying rule to congressional grant of rights of way (Rev. Stat. 2477); *Savings Union v. Irwin*, 11 Sawy. 669, 28 Fed. Rep. 709, holding listing by secretary of interior unnecessary to pass title; and to same effect in *Wright v. Roseberry*, 121 U. S. 504. Distinguished, *Robinson v. Forrest*, 29 Cal. 322, as to doubtful land, holding state patent before listing to state not conclusive as to nature of land, but parol evidence admissible; and *Sherman v. Buick*, 45 Cal. 668, as to grant of sixteenth and thirty-sixth sections (acts Mar. 3, 1853, and May 30, 1862).

9 Cal. 325-328. **GRAY v. GARRISON.**

Assignment.—Agreement to pay money on withdrawal of suit is assignable, p. 328.

Cited in *Erickson v. Brookings County*, 3 S. Dak. 438, applying principle to assignment of claim for moneys paid at erroneous tax sale.

9 Cal. 328-335. **CLAY v. WALTON.**

Guaranty.—Consideration of original contract is insufficient for subsequent guaranty of its performance, p. 333.

Cited to same effect in *Ellison v. Jackson Water Co.*, 12 Cal. 553; *Tevis v. Savage*, 130 Cal. 413, construing Civil Code 1624, subdivision 2.

Statute of Frauds does not apply to guaranty for another where leading object is to subserve promisor's interest, p. 334.

Cited in *Gosliner v. Bank*, 124 Cal. 228, on point that incidental benefit may not be sufficient consideration; *Gerow v. Riffe*, 29 W. Va. 466, as to conditional acceptance of order for payment; and in note to *Nelson v. Boynton*, 37 Am. Dec. 153, and to *Packer v. Benton*, 95 Am. Dec. 252, 254, 255 and 258, upon main proposition, and as to distinction between original and collateral undertakings.

9 Cal. 338-341. **REYNOLDS v. HARRIS.** S. C. 14 Cal. 667.

Plea in Abatement.—When pendency of former action is insufficient plea, p. 340.

Distinguished, *Gamsby v. Ray*, 52 N. H. 516, holding mere fact of pendency sufficient plea, and fact of actual vexatiousness immaterial; and cited in note to *Smith v. Lathrop*, 84 Am. Dec. 453, among instances when plea not sustainable.

Statute of Frauds.—Money paid under contract void by is recoverable back, p. 340.

Cited in *Whyte v. Rosencrantz*, 123 Cal. 638, 69 Am. St. Rep. 94, applying rule to payment under void contract with minor.

9 Cal. 341-351. **MYERS v. ENGLISH.**

Legislative Action as to appropriations for salaries cannot be compelled by courts, p. 349.

Cited to same effect in *People v. Thompson*, 155 Ill. 475, as to district apportionment acts, but distinguished in *State v. Hickman*, 9 Mont. 378 (cited in *State v. Burdick*, 4 Wyo. 280), holding no legislative action necessary where salaries defined in constitution; and *State v. Burdick*, 4 Wyo. 280, 281, on same point; and *Shattuck v. Kincaid*, 31 Oreg. 389, where main case said to be opposed to tendency of recent adjudications.

Obligation of Contracts.—Rule forbidding impairment not applicable to salaries of state officers, p. 351.

Cited to same effect in *Cohen v. Wright*, 22 Cal. 320, on question of disbarment of attorney for failure to take "test oath"; and *Langford v. King*, 1 Mont. 39, upon general proposition that state contracts are not within rule as to impairment.

9 Cal. 351-352. **BRANGER v. CHEVALIER.** S. C. 9 Cal. 172, 353.

Statement on Appeal.—Certificate to correctness may be revoked during term if erroneous, p. 352.

Cited in *Fountain W. Co. v. Superior Court*, 139 Cal. 651, quoting *Sprigg v. Barber*, 118 Cal. 592; *Flynn v. Cottle*, 47 Cal. 527, holding further that when transcript filed before such revocation, the appeal is valid, and may be retained until the statement is settled and certified; and in *Sprigg v. Barber*, 118 Cal. 592, on point that motion for correction of bill or statement on new trial must be made within period limited by Code Civ. Proc., 473.

9 Cal. 353-363. **BRANGER v. CHEVALIER.** S. C. 9 Cal. 172, 351.

Instructions irrelevant to questions before jury are improper, p. 360.

Cited in *Richards v. Fanning*, 5 Oreg. 359, on point that instructions on abstract questions of law are improper.

Stated Account does not lose character as such although it contains "errors excepted," p. 360.

Cited to same effect in *Fleischner v. Kubli*, 20 Oreg. 338, as to use of "E. & O. E."; and note to *Lockwood v. Thorne*, 62 Am. Dec. 87, defining "account stated."

Stated Account not opened for error or mistake, not affecting all items, beyond items affected, p. 361.

Cited to same effect as to decree settling probate account in *McLeod v. Griffiths*, 51 Ark. 11; *Anderson v. Anderson*, 25 Utah, 166, party seeking to impeach settlement of partnership for fraud or mistake must set out in his pleading particular facts constituting fraud or mistake; note to *Lockwood v. Thorne*, 62 Am. Dec. 91, as to impeachment of accounts stated.

Referee's Report.—When conclusions of law are improper, report may be set aside and new trial ordered, p. 362.

Cited in *Austin v. Ahearne*, 61 N. Y. 12, holding, however, that the court may decide the questions of law without specifically setting report aside.

9 Cal. 363-365. **COFFEE v. MEIGGS.**

Breach of Contract.—Damages are to be measured by agreed price when not ascertainable otherwise, p. 365.

Cited to same effect in *Webb v. Trescony*, 76 Cal. 623, a contract of employment of attorney; *Pegram v. Stortz*, 31 W. Va. 239, upon point that punitive damages are not allowable for breach of contract. Distinguished, *Glaspie v. Glassow*, 28 Minn. 161, holding that measure of damages in action for breach of contract for services was actual damages sustained, not exceeding in all the contract price.

9 Cal. 365-421. **McMILLAN v. RICHARDS.** 70 Am. Dec. 655; 12 Cal. 467; and see *Marshall v. Shafter*, 32 Cal. 176.

Mortgage is mere security for debt, and default in payment does not change its character, p. 411.

Cited in *Lord v. Morris*, 18 Cal. 488, distinguishing between local effect and that at common law; *Heyland v. Badger*, 35 Cal. 413, quoting *Fogarty v. Sawyer*, 17 Cal. 592; *Warner v. Freud*, 138 Cal. 655, holding decree of "strict foreclosure" erroneous; *Norfor v. Busby*, 19 Wash. 454, discussing right to appointment of receiver in foreclosure action; *W. U. Tel. Co. v. Railroad Co.*, 90 Fed. 384, 61 U. S. App. 751, discussing rights of mortgagor under Michigan statute; note to *Provident etc. Co. v. Marks*, 68 Am. St. Rep. 354, on foreclosure; *London etc. Bank v. Dexter, Horton & Co.*, 126 Fed. 607, in action by mortgagee who purchased property at foreclosure to cut off right of redemption of defendant, who was not party to foreclosure, though bound by decree, general foreclosure and resale may be granted under prayer for general relief; *Nagle v. Macy*, 9 Cal. 428, 70 Am. Dec. 674, holding further that judgment on the debt did not change character of mortgage, and that mortgage was not assignable distinct from debt; *Haffley v. Maier*, 13 Cal. 14, holding further that foreclosure decree against mortgagor did not affect his transferee when not made a party; *Johnson v. Sherman*, 15 Cal. 293, 76 Am. Dec. 487, holding further that possession by mortgagee does not affect respective rights or interests

under the mortgage; *Goodenow v. Ewer*, 16 Cal. 467, 76 Am. Dec. 544; *Fogarty v. Sawyer*, 17 Cal. 592; *Witherall v. Wiberg*, 4 Sawy. 235, 236, 237, 30 Fed. Cas. 400, holding further that mortgagee has no right to possession even after default, unless so agreed; *Dutton v. Warschauer*, 21 Cal. 621, 623, 82 Am. Dec. 767, 769, 770, stating also (p. 621) general theory of the rule, and holding further that mortgagee's debt after default does not pass legal title; *Willis v. Farley*, 24 Cal. 498, holding further as to effect of presentation of probate claim for mortgage debt; *Bludworth v. Lake*, 33 Cal. 264, holding that mortgagee's lien is enforceable only by foreclosure, and following principle in *Haffley* case, *supra*; *Jackson v. Lodge*, 36 Cal. 39, 58, 59, holding principle to apply to deed absolute in form but intended as mortgage; *Mack v. Wetzler*, 39 Cal. 254, following, also, *Dutton* case *supra*, and holding further that mortgage passes by assignment of the debt, but not of the land; *Williams v. Santa Clara etc. Assn.*, 66 Cal. 201, allowing an interest in the land for taxation purposes, but holding that a mortgagee has no interest in the land under mechanic's lien law; *Sav. Soc. v. McKoon*, 120 Cal. 179; *Pueblo etc. Co. v. Beahoar*, 8 Colo. 34, that mortgagee cannot maintain action for trespass; *Everett v. Buchanan*, 2 Dak. Ter. 264, extending rule to chattel mortgages; *Rice v. Kelso*, 57 Iowa, 119, effect of mortgage on after-acquired title; *Ladue v. Detroit etc. Co.*, 13 Mich. 396, 87 Am. Dec. 763, upon point that mortgage is merely incident or accessory to debt; *First Nat. Bank v. Bell etc. Co.*, 8 Mont. 43, holding, however, that power of sale without foreclosure is valid, and is an irrevocable part of security; *Holland v. Commissioners*, 15 Mont. 461, upon subject of taxation of mortgagee's interest; note to *Godeffrey v. Caldwell*, 56 Am. Dec. 362; *Savage v. Dooley*, 73 Am. Dec. 682; *Wood v. Trask*, 76 Am. Dec. 232; *Johnson v. Sherman*, 76 Am. Dec. 488; *Boggs v. Fowler*, 76 Am. Dec. 566; *Blunt v. Walker*, 78 Am. Dec. 718; *Carroll v. Ballance*, 79 Am. Dec. 360; *Timms v. Shannon*, 81 Am. Dec. 639, and *Bank v. Anderson*, 83 Am. Dec. 396, upon general equitable theory of mortgage as mere security; also note to *Perkins v. Sterne*, 76 Am. Dec. 76, upon discharge of mortgage by bar of debt; and *Kidd v. Temple*, 22 Cal. 262, upon point that mortgage confers no right to possession except as incident to foreclosure and sale. Distinguished, *Green v. Butler*, 26 Cal. 602, holding that mortgagee's estate may be enlarged by separate contract with mortgagor after sale.

Mortgage.—Payment of debt operates as discharge of, p. 411.

Cited in note to *Douglas v. Stetson*, 38 Am. St. Rep. 445; *Bogert v. Bliss*, 51 Am. St. Rep. 689, and *German etc. Co. v. Humphrey*, 54 Am. St. Rep. 300, upon same subject; also, note to *Perkins v. Sterne*, 76 Am. Dec. 76, upon bar of debt as discharge of mortgage.

Redemption.—Right to exist in mortgage foreclosure cases, p. 411.

Cited to same effect in *Gross v. Fowler*, 21 Cal. 395; *Bennett v.*

Wilson, 122 Cal. 515, on point that judgment creditor under void judgment obtained by fraud cannot redeem. Cited, also, in Pollard v. Harlow, 138 Cal. 392, contrasting Practice Act and code provisions. Stout v. Macey, 22 Cal. 650, holding further that rule as to limitation of ordinary judgments applies to foreclosure decrees; Simpson v. Castle, 52 Cal. 647, 649, and Hays v. Merchant's Bk., 10 Wash. 577, upon point that legal title remains in mortgagor pending time for redemption; Martens v. Gilson, 13 Nev. 492, as to effect of sale and redemption on mortgage on homestead property; Parker v. Dacres, 130 U. S. 47, holding that statutory right of redemption exists in foreclosure cases, and statute conferring it is rule of property; note to Cranston v. Crane, 93 Am. Dec. 112, as to general nature of equity of redemption; and note to Bradbury v. Davenport, 55 Am. St. Rep. 105, upon right to waive equity of redemption by subsequent agreement. Cited, also, in Montgomery v. Tutt, 11 Cal. 317, holding right to redemption not affected by clause in decree foreclosing defendant's rights.

Judgment Lien.—Effect of, stated, p. 412.

Cited in *People v. Irwin*, 14 Cal. 434 (quoted in *Riley v. Nance*, 97 Cal. 205), on point that lien attaches only to property on which debtor has vested legal interest.

Execution Sale.—Title does not pass until conveyance, p. 415.

Cited to same effect in *Cummings v. Coe*, 10 Cal. 531; *Goodenow v. Ewer*, 16 Cal. 469, 76 Am. Dec. 546, upon point that when owner of estate has had his day in court the purchaser will take the mortgagor's title at date of mortgage; *Green v. Butler*, 26 Cal. 602, as to effect of separate agreement between parties after sale; *Page v. Rogers*, 31 Cal. 301; *People's Sav. Bk. v. Hodgdon*, 64 Cal. 98, holding that mortgagor's title at date of mortgage passes by the sale; *First Nat. Bk. v. Hendricks*, 134 Ind. 371, as to effect of sale for tax liens and deed thereon; *Baldwin v. Howell*, 45 N. J. Eq. 538, holding that foreclosure purchaser takes all interest of the mortgagee under its mortgage; *Simple v. Bank*, 5 Sawy. 99, 100 (21 Fed. Cases, 1068); and see *Lloyd v. Hoo Sue*, 5 Sawy. 76; 15 Fed. Cas. 718; and notes to *Curtis v. Millard*, 81 Am. Dec. 462; *Garrett v. Dewart*, 82 Am. Dec. 573, and *Hokanson v. Gunderson*, 40 Am. St. Rep. 357, as to title of purchaser at execution sale.

Payment Under Arrest, when recoverable back, p. 417.

Cited in *Shane v. St. Paul*, 26 Minn. 546, as to moneys voluntarily paid, though under protest, to redeem lands sold on void tax judgment; *Justice v. Robinson*, 142 Cal. 201, holding complaint to recover taxes in drainage district defective by reason of insufficient protest; *McMillan v. Vischer*, 14 Cal. 240, holding money paid for redemption a voluntary payment and not so recoverable; *Falkner v. Hunt*, 16 Cal. 170, that taxes illegally assessed may be recovered back when paid under protest; *Brumagim v. Tillingham*, 18 Cal. 274, 79 Am. Dec. 183,

and note 184, upon point that protest will not change character of payment where no compulsion exists; *Bucknall v. Story*, 46 Cal. 597, as to assessment paid on street widening proceedings; *Dear v. Varnum*, 80 Cal. 89, that payment of taxes is voluntary, though under protest, when no seizure or threat of seizure was made; *Shane v. St. Paul*, 22 Minn. 546 (cited in *Peebles v. Pittsburgh*, 101 Pa. St. 310), as to moneys voluntarily paid, although under protest to redeem lands sold on void tax judgment; and *Taylor v. Hull*, 71 Tex. 216, as to excessive official fees where the officer has no immediate power to enforce their collection. Cited, also, in notes to *Mayor v. Lefferman*, 45 Am. Dec. 163, and to *Detroit v. Martin*, 22 Am. Rep. 520, as to involuntary payments under protest. Distinguished, *Meek v. McClure*, 49 Cal. 627, holding that protest is unnecessary where money is paid under coercion to defendant for own use.

Certificate of Deposit—Garnishment.—When bank has issued it cannot be garnished for deposit covered by certificate, p. 418.

Cited, to same effect in *Gregory v. Higgins*, 10 Cal. 340 (as to which see note to *Hubbard v. Williams*, 55 Am. Dec. 69) as to garnishment of maker of note; *Mills v. Barney*, 22 Cal. 248, on point that certificate is same as note, as to liability of indorser; *Poorman v. Mills*, 35 Cal. 120, 95 Am. Dec. 91, on point of identity of certificate and note as to rights and liabilities thereunder; and notes to *Welton v. Adams*, 60 Am. Dec. 581; *Savings Fund Soc. v. Bank*, 78 Am. Dec. 399; and *Lindsey v. McClelland*, 86 Am. Dec. 788, as to the nature of certificates and similarity to notes.

Public Officers.—Venue in actions against, p. 420.

Cited in note to *Robinson v. Chamberlain*, 90 Am. Dec. 732, upon liability of public officers.

9 Cal. 421-422. PEOPLE v. YORK.

Statement on New Trial will not be considered on ground of insufficiency of evidence when not containing all material testimony, unless record states that substance appears, p. 422.

Cited, *People v. Roach*, 48 Cal. 382, where record set forth "substantially all the evidence"; *Territory v. Stone*, 2 Dak. Ter. 175, holding substance of testimony sufficient; and *People v. Lyman*, 2 Utah, 32, holding that, where neither appears the court will presume that other testimony sustaining verdict was given.

9 Cal. 422-423. DRUM v. WHITING.

Answer may be stricken out for nonverification in proper cases, and default entered, p. 423.

Cited, *Pence v. Durbin*, 1 Idaho, 552, holding that when plaintiff does not move for such order he waives objection to improper verification;

Nichols v. Jones, 14 Colo. 65, holding that when motion was granted but one defense was not stricken out specifically, it may be disregarded as raising no issue, and default be had thereon; and note to *People v. McCumber*, 72 Am. Dec. 524, on striking out verified answer because sham and practice thereon. Distinguished, *Abbott v. Douglass*, 28 Cal. 297, holding that answer cannot be stricken out when case is on trial and testimony introduced; and *Perras v. Denver etc. Co.*, 5 Colo. Ap. 23, holding further right to default not waived by delay in objection to form of answer.

9 Cal. 423-426. **SUBLETTE v. TINNEY.**

Fraud.—Complaint in action for is barred in three years from fraud, unless alleging discovery within that period, p. 425.

Cited in *Pierce v. Merrill*, 128 Cal. 472, 79 Am. St. Rep. 62, applying rule to written acknowledgment of indebtedness; *Boyd v. Blankman*, 29 Cal. 44, 87 Am. Dec. 161, holding, however, that where discovery is pleaded in replication and issue tried, the finding will be taken as if properly made on pleadings; *Carpentier v. Oakland*, 30 Cal. 444, applying same rule to answer alleging fraud; *Currey v. Allen*, 34 Cal. 257, upon point that statute does not run until discovery; *Smith v. Richmond*, 19 Cal. 481; *Pipe v. Smith*, 5 Colo. 117; *Arnett v. Coffey*, 1 Colo. App. 39, and *McCalla v. Daugherty*, 8 Sawy. 58, 11 Fed. Rep. 102; *Humphrey v. Carpenter*, 39 Minn. 217; *Arnett v. Coffey*, 1 Colo. App. 39, and *McCalla v. Daugherty*, 4 Kan. App. 414, upon necessity of alleging facts showing exception; *Bradbury v. Davis*, 5 Colo. 268, upon point that bar of statute runs from discovery; *Zieverink v. Kempel*, 50 Ohio St. 217, upon necessary allegations as to concealment and discovery of the fraud; and *McMillan v. Cheeney*, 30 Minn. 521, upon point that replication need not negative exceptions to plea of statute set up by defendant.

Statute of Limitations may be raised by demurrer when action barred on face of complaint, p. 245.

Cited to same effect in *Smith v. Richmond*, 19 Cal. 481; *McGehee v. Blackwell*, 28 Ark. 30, and *Walker v. Pogue*, 2 Colo. App. 154; *Kelley v. Kriess*, 68 Cal. 213, upon point that plea of statute is waived unless taken by answer or demurrer; *DeUprey v. DeUprey*, 23 Cal. 353, on form of demurrer on this ground; *Jenness v. Bowen*, 77 Cal. 311, holding, however, that demurrer may be sustained only when bar clearly appears on face of complaint; and in *Pipe v. Smith*, 5 Colo. 157, holding demurrer properly sustained when complaint shows action barred.

9 Cal. 426-430. **NAGLE v. MACY.**

Ejectment—Title.—Prior possession is sufficient evidence of title to support ejectment, p. 427.

Cited to same effect in *Leonard v. Flynn*, 89 Cal. 546, holding that

to support action plaintiff's adverse possession need not have ripened into perfect title; *L'Engle v. Reed*, 27 Fla. 361, holding, however, that plaintiff cannot recover unless by perfect title or prior actual possession of himself or grantor; *Bagley v. Kennedy*, 85 Ga. 706, where plaintiff's claim was derived through heirs and devisees of prior possessor, and defendant was a mere trespasser; *Parker v. Fort Worth etc. Co.*, 71 Tex. 134, holding that possession alone was sufficient evidence of title to sustain action of trespass to try title as against mere trespasser; *Burt v. Panjaud*, 99 U. S. 182, holding that possession or receipt of rent is sufficient in ejectment as against a trespasser; note to *Hutchinson v. Perley*, 60 Am. Dec. 579, on point of main case; *Winans v. Christy*, 60 Am. Dec. 599, and *Plume v. Seward*, 60 Am. Dec. 601, 602, on possession as evidence of title and as sufficient title to support ejectment.

Mortgage cannot be Assigned apart from debt, p. 428.

Cited to same effect in *Hyde v. Mangan*, 88 Cal. 327; *Meyer v. Weber*, 133 Cal. 684, on point that note and mortgage must be construed together as to negotiability of former; *McClammant v. Roberts*, 87 Tex. 244, holding further that administrator's sale of deceased mortgagee's interest in the property will not pass the mortgage unless such intention appears.

Jurisdiction—Collateral Attack.—Title of purchaser at sale cannot be attacked collaterally for irregularities at sale, p. 429.

Cited, in *Sharp v. Daugney*, 33 Cal. 512, on point that on collateral attack upon judgment of court of general jurisdiction, jurisdiction of defendant will be presumed to have been obtained unless contrary shown by record; and *Mathews v. Eddy*, 4 Oreg. 233, that when order of court confirms execution sale, it is a conclusive judicial determination of all questions of regularity in the execution.

Mortgage is mere security for debt, and confers no title on mortgagee, p. 428.

Cited to same effect in *Johnson v. Sherman*, 15 Cal. 293, 76 Am. Dec. 487 (cited in *Jackson v. Lodge*, 36 Cal. 42), holding further, that the rights of the parties are not changed by possession, and that possession by consent or contract confers rights independent of those in the mortgage; *Goodenow v. Ewer*, 16 Cal. 468, 76 Am. Dec. 544 (cited in *Dutton v. Warschauer*, 21 Cal. 621, 82 Am. Dec. 768), holding further, that mortgagee acquires no title except by foreclosure and deed thereunder; *Lord v. Morris*, 18 Cal. 488, holding further, that bar of debt by limitation discharges the mortgage; *Willis v. Farley*, 24 Cal. 498, following *Lord* case, *supra*, and holding further, that presentation and allowance of claim in probate does not bar right to foreclose the mortgage; *Jackson v. Lodge*, 36 Cal. 39, holding also, that rule is not affected if mortgage is deed absolute in form, and that parol evidence is admissible to show real transaction; *McGovney v.*

Gwillim, 16 Colo. App. 293, where action on note secured by mortgage is barred by limitation, action to foreclose mortgage is also barred.

Mortgagor's Death does not prevent foreclosure sale thereafter in case of default, p. 429.

Cited in *Cowell v. Buckelew*, 14 Cal. 641, holding that executrix takes only surplus after lien satisfied; *Fallon v. Butler*, 21 Cal. 33, discussing remedies of mortgagee after mortgagor's death.

9 Cal. 430-452. **BAGLEY v. McMICKLE.**

Secondary Evidence of Destroyed Instrument.—Rules of admissibility and as to motive of destruction stated, p. 446.

Cited in *Bagley v. Eaton*, 10 Cal. 149, holding that motive of destruction controls admissibility; *State v. Malo*, 42 Kan. 67, holding that when party voluntarily destroys writing he must show his innocence before he can introduce secondary evidence; cited in *Schlemmer v. Schendorf*, 20 Ind. App. 453, holding secondary evidence admissible notwithstanding voluntary destruction of note under circumstances stated; *Davis v. Teachout*, 126 Mich. 138, 86 Am. St. Rep. 533, holding secondary evidence competent; *Underwood v. Coolgrove*, 59 Tex. 170, upon point that withholding of written evidence without explanation warrants belief that it is unfavorable to its possessor; *Jackson v. Deslonde*, 1 Posey (Tex.), 681, upon point that sufficiency of preliminary proofs of secondary evidence is in discretion of judge, and its admission will be affirmed unless clearly erroneous; and in notes to *Edwards v. McKee*, 13 Am. Dec. 483, and to *Bade v. Noland*, 27 Am. Dec. 129, upon actions on destroyed notes and evidence thereon.

"Execution" imports "making" and "delivery," p. 452.

Cited on point of delivery in *Le Mesnager v. Hamilton*, 101 Cal. 539, 40 Am. St. Rep. 86.

9 Cal. 453-475. **SAN FRANCISCO GAS COMPANY v. SAN FRANCISCO.** S. C. 11 Cal. 42.

Answer.—Denial upon information and belief, when complaint verified is insufficient when facts presumptively within defendant's knowledge, p. 465.

Cited to same effect in *Ord v. Uncle Sam*, 13 Cal. 372; *Kuhland v. Sedgwick*, 17 Cal. 127, as to allegation of value of converted property; *Brown v. Scott*, 25 Cal. 196, as to allegation of purchase by defendant on execution, holding that defendant should admit or deny, or show how lack of knowledge occurred; *Curnow v. Blue Gravel etc. Co.*, 68 Cal. 265, as to defendant's ownership of certain property; *Loveland v. Garner*, 74 Cal. 300, applying rule to corporations, as to allegation that plaintiff was defendant's superintendent and that defendant's mine was operated, etc., and holding judgment on pleadings justified;

Mulcahy v. Buckley, 100 Cal. 489, as to allegation of filing of mechanic's lien, holding rule to extend to cases when defendant has means of ascertaining truth of allegations; *Hanna v. Barker*, 6 Colo. 308, as to defendant's execution of agreement alleged; and *State v. Butte Water Co.*, 18 Mont. 204, 56 Am. St. Rep. 576, as to relator's tenancy of premises supplied with water by defendant; *Law etc. Soc. v. Hogue*, 37 Or. 559, holding answer insufficient under local statute; *Mills' Estate*, 40 Or. 433, applying rule where petition for removal of administrator charges that administrator made certain admissions showing disobedience of order of court; note to *Humphreys v. McCall*, 70 Am. Dec. 625, 629, 631, 632, 633, and 634, as to sufficiency of answer on information and belief or for want thereof, and in *Crystal Springs etc. Co. v. Los Angeles*, 82 Fed. Rep. 124, on point that federal court will not retain jurisdiction of case when federal question arises from defendant's title when its answer disclaims as to title.

Municipal corporations may become liable on implied contract even though without ordinance, p. 469.

Cited to same effect in *Argenti v. San Francisco*, 16 Cal. 267, as to which see *infra*; Cited in *Water Co. v. Breed*, 139 Cal. 438, 440, holding city liable for water supplied to it; *Esberg etc. Co. v. Portland*, 34 Or. 291, 75 Am. St. Rep. 655, holding city liable for negligence of its agents in construction or maintenance of waterworks; *London etc. Co. v. Jellico*, 103 Tenn. 322, ruling similarly as to liability for street improvements, although contract void because improperly authorized; *Memphis v. Brown*, 1 Flipp. 197, 198, holding city liable on street improvement contracts; *Pike's Peak etc. Co. v. City*, 105 Fed. 11, quoting *Illinois etc. Bank v. City*, 76 Fed. 282; *Geer v. School Dist.*, 111 Fed. 687, holding defendant liable to refund money received on sale of void bonds; note to *In re Assignment etc.*, 70 Am. St. Rep. 165, 167, 174, on ultra vires contracts; *Pixley v. Western Pacific etc. Co.*, 33 Cal. 199 91 Am. Dec. 634, applying rule to trading corporations; *Carey v. Philadelphia etc. Co.*, 33 Cal. 696, as to appointment of agent by private corporation; *Brush etc. Co. v. City Council*, 114 Ala. 445, as to street lighting by electricity; *National Tube Works v. Chamberlain*, 5 Dak. Ter. 60, as to contract for building water works (and see *Higgins v. San Diego etc. Co.*, 118 Cal. 555, as to contract for water supply); *State Board v. Citizens etc. Co.*, 47 Ind. 413, 17 Am. Rep. 707, as to contract of street railway company to pay certain subscriptions to state fair; *Indianapolis v. Indianapolis etc. Co.*, 66 Ind. 407, as to contract for gas supply; *Pancoast v. Traveler's Ins. Co.*, 79 Ind. 178, on point that mortgagor cannot defeat foreclosure by alleging lack of power of mortgagee corporation to make loans; *Hutchinson etc. Co. v. Board of Commissioners*, 48 Kan. 79; 30 Am. St. Rep. 282, as to issuance of municipal bonds to aid railway; *Board v. Common Council*, 23 Mich. 239, 15 Am. Rep. 209, as to contract for constructing park, and further, as to legislative power over municipal corporations; Lum-

ber Co. v. East Jordan, 100 Mich. 205, as to contract with village for waterworks, limiting rule to cases where express statutory regulations have not been ignored in making the original contract; Feusier v. Mayor, 3 Nev. 70, as to rendition of services by sheriff; Cincinnati v. Cameron, 33 Ohio St. 366, as to erecting of city hospital, the court distinguishing between liability for governmental acts and for proprietary and private acts (as to which see, also, Dubuque v. Illinois etc. Co., 39 Ia. 65, and note to Commonwealth v. Cullen, 53 Am. Dec. 471, 472); Tyler v. Trustees, 14 Or. 491, as to contract for military instruction for college corporation; Portland etc. Co. v. East Portland, 18 Or. 33, as to contract for street work; Ward v. Forest Grove, 20 Or. 358, as to contract with physician for care of smallpox patients in city hospital; Gas Light Co. v. Memphis, 93 Tenn. 618, as to contract for supply of gas for streets; in San Antonio v. French, 80 Tex. 578. 26 Am. St. Rep. 766, as to contract for leasing rooms for municipal uses (see, however, Nichols v. State, 11 Tex. Civ. App. 336); and Illinois etc. Bank v. Arkansas City, 76 Fed. Rep. 282, 293, as to contract for constructing waterworks, where rule is stated to be that in exercising business powers a municipal corporation is governed by same rules as individuals or private corporations. Overruled, Zottman v. San Francisco, 20 Cal. 108, 81 Am. Dec. 106, as to improvement of public square, together with Argenti v. San Francisco, 16 Cal. 267, in which it was approved; in Fulton v. Lincoln, 9 Neb. 363, as to contract for grading street, where (p. 365) it is stated as overruled by Zottman case, supra; and Nichols v. State, 11 Tex. Civ. Ap. 336-337, as to contract with state for erection of public building. Distinguished in McDonald v. Mayor, 68 N. Y. 27, holding that charter inhibitions control, and that no implied liabilities can arise; and Mayor v. Hagan, 9 Bart. (Tenn.) 506, holding that use by city of patented machine does not imply agreement to pay for the patent right. Cited, also, in Hunt v. San Francisco, 11 Cal. 258, on point that municipal corporation may suffer judgment by default on common counts.

Purchase of gas by city involves only exercise of power of private corporation; it requires exercise of no political power, p. 468.

Approved in Earl v. Bowen, 146 Cal. 761, initial steps for letting of contract for printing for City of Los Angeles, under charter may be taken by order of the council without an ordinance.

9 Cal. 475-477. **WASHBURN v. WASHBURN.**

Divorce.—Failure to provide is not ground for, where wife has personal means of support, p. 476.

Cited to same effect in Rycraft v. Rycraft, 42 Cal. 446, denying divorce; and in Kikel v. Kikel, 25 Neb. 259, as to facts constituting desertion.

"Willful Neglect."—Facts held not to show, p. 476.

Cited in *Indianapolis v. Consumers etc. Co.*, 140 Ind. 255, upon point that "willful" neglect or failure implies ability of party to perform the act.

9 Cal. 477-479. **JUDSON v. ATWILL.**

Insolvency.—Act must be strictly followed; so held as to omission of names of creditors in schedule, p. 478.

Cited as to first proposition in *McDonald v. Katz*, 31 Cal. 169, holding no intendments in favor of jurisdiction, and note to *Dulaney v. Hoffman*, 28 Am. Dec. 212. Distinguished as to last proposition in *Barrett v. Carney*, 33 Cal. 538, holding absence of name sufficiently explained in petition.

9 Cal. 479-499. **WELLS v. STOUT.**

Articles of Separation are valid when made through intervention of trustee, and if separation has preceded or immediately follows, p. 494.

Cited in *King v. Mallohan*, 61 Kan. 690, and *Daniels v. Benedict*, 97 Fed. 373 (quoting *Walker v. Walker*, 9 Wall. 751), and page 378, sustaining agreement made between parties directly; to same effect in *Randall v. Randall*, 37 Mich. 572, holding, however, trustee unnecessary; in *Garbut v. Bowling*, 81 Mo. 220; *Squires v. Squires*, 53 Vt. 211, 38 Am. Rep. 669, holding further that such agreement executed after cause of divorce had arisen, and complied with by husband, was bar to wife's action for divorce; *Walker v. Walker*, 9 Wall. 751, holding further that such agreement is enforceable in equity, even though it provides for its continuance should the parties again come together; and note to *Stephenson v. Osborne*, 90 Am. Dec. 368, as to articles of separation. Distinguished in *Stebbins v. Morris*, 19 Mont. 120, holding agreement void when no sufficient necessity or cause for separation is shown.

Articles of Separation are Avoided by subsequent reconciliation and cohabitation, p. 498.

Cited to same effect in *Sargent v. Sargent*, 106 Cal. 546, holding, however, no resumption shown; *Smith v. Kehn*, 2 Dill. 60, 7 Bkrptcy. Reg. 105, holding no "condonation," as provided in agreement, shown; and note to *Stephenson v. Osborne*, 90 Am. Dec. 369, as to articles of separation.

Judicial Notice extends to laws in force at cession of California, p. 494.

Cited to same effect in note to *Lanfear v. Mestier*, 89 Am. Dec. 675, as to judicial notice of laws of mother country.

Fraudulent Conveyances.—Deed of husband to wife is not fraudulent as to subsequent creditors of husband if then solvent, p. 497.

Cited to same effect in *Kane v. Desmond*, 63 Cal. 465, as to verbal gift of personal property; *Emmons v. Barton*, 109 Cal. 671, holding consideration of love and affection sufficient where no intent to defraud creditors; *Walker v. Beal*, 3 Cliff. 168, holding gift by husband to wife valid if not prejudicial to creditors, without use of trustee.

Judgment of District Court not enforceable until signed by judge, p. 497.

Distinguished, *McCrea v. Haraszthy*, 51 Cal. 150, as to statute requiring probate judge to sign minutes.

9 Cal. 499-500. **WHITWELL v. THOMAS.**

Partnership.—Issue of defendants' partnership is immaterial, when liability as individuals admitted, p. 499.

Cited to same effect in *Wallace v. Baisley*, 22 Oreg. 573, action for goods sold.

9 Cal. 500-501. **WILLIAMSON v. BLATTAN.**

Attachment Bond.—Complaint in action on, is defective unless alleging release of property on delivery of undertaking, p. 501.

Cited in *Coburn v. Pearson*, 57 Cal. 308, that such defect can be attacked by general demurrer.

9 Cal. 502-529. **EX PARTE NEWMAN.**

Sunday Laws held void, p. 504.

Cited in *State v. Petit*, 74 Minn. 380 (affirmed, 177 U. S. 165), following dissenting opinion, and sustaining law as to barber shops; *Scougale v. Sweet*, 124 Mich. 317, and *State v. Powell*, 58 Ohio St. 340, 343, as overruled by *Ex parte Andrews*, 18 Cal. 685, and sustaining act forbidding baseball playing on Sunday; *Ex parte Dickey*, 144 Cal. 237, holding act limiting compensation of employment agents unconstitutional; *State v. Sopher*, 25 Utah, 322, citing to dissenting opinion and upholding Sunday closing law (Rev. Stats., sec. 4234) as applied to barber-shops. Distinguished in *State v. Nichols*, 28 Wash. 630, 634, unholding Ballinger's Code, section 7251, prohibiting business on Sunday with certain exceptions. Overruled, *Ex parte Andrews*, 18 Cal. 685, adopting dissenting opinion in main case at p. 518; *Ex parte Burke*, 59 Cal. 19, 43 Am. Rep. 237, as to Pol. Code, sec. 300; *Ex parte Koser*, 60 Cal. 193 (per Myrick, J.), as to same statute, though followed in dissenting opinions, pp. 202, 204, 205, 214; *Scales v. State*, 47 Ark. 482, 58 Am. Rep. 770, 771, and note 774, the case of a Seventh Day Adventist, and holding further, as to form of indictment for violation of statute; *People v. Griffin*, 1 Idaho, 480, holding that Sunday law is mere police regulation; *Thomasson v. State*, 15 Ind. 454, holding constitutional statute forbidding sale of liquors on Sunday; *State v.*

Judge, 39 La. An. 140, where main case is stated to be the only exception to the general course of decision; *State v. Ludwig*, 21 Minn. 206, as to Sunday saloon closing law; *People v. Havnor*, 149 N. Y. 202, 52 Am. St. Rep. 711, as to closing barber shops on Sunday (as to this, however, see contra, *Ex parte Jentzsch*, 112 Cal. 472, where such act was held void as "special legislation"); *Norfolk etc. Co. v. Commonwealth*, 93 Va. 761, 57 Am. St. Rep. 836, and *Hennington v. Georgia*, 163 U. S. 304, 305, as to law forbidding running of freight cars on Sunday, although applying to cars passing through the state; and in *State v. Baltimore etc. Co.*, 15 W. Va. 383, 36 Am. Rep. 813, holding corporations amenable to such statutes. Cited, also, in note to *City Council v. Benjamin*, 49 Am. Dec. 622, upon same subject.

Statutory Construction.—Rules for, stated, p. 521.

Cited in *Lin Sing v. Washburn*, 20 Cal. 582, on subject of resort to title to gather intent; and in *Lynn v. Polk*, 8 Lea (Tenn.), 233; in *Bledsoe v. International etc. Co.*, 40 Tex. 571; in note to *Flint River etc. Co. v. Foster*, 48 Am. Dec. 269, and to *Jones v. Jones*, 51 Am. Dec. 623, as to power of courts to annul statutes and to inquire into motives of the legislature in enacting them.

9 Cal. 529-538. **THRALL v. SMILEY.**

Libel.—Justification is insufficient unless averring truth of charge; otherwise plea of facts specially only available in mitigation, p. 536.

Cited in *Fenstermaker v. Tribune Pub. Co.*, 12 Utah, 463, holding further as to sufficiency of general allegation of truth; and in same case 12 Utah, 464, and 13 Utah, 538, as to use of facts in mitigation where truth of charge alleged.

Conversation—Evidence.—Whole conversation is to be taken together, p. 536.

Cited in note to *Rouse v. Whited*, 82 Am. Dec. 343, upon effect of admission of part of conversation.

Jury—Misconduct.—Perusal of papers not in evidence is not, when not prejudicial, p. 537.

Cited in *La Bonty v. Lundgren*, 41 Neb. 320, where, however, reading of such papers was held ground for reversal.

Juror—Objection to Qualification comes too late after verdict, p. 537.

Cited to same effect in *Green v. State*, 59 Md. 126 (juror too old), and applied in *Dakota v. O'Hare*, 1 N. Dak. 40, to irregularities in drawing jury.

9 Cal. 538-562. **LOW v. HENRY.**

Execution Sale will be enjoined in equity when it would cloud owner's title, p. 548.

Notes Cal. Rep.—30

Cited to same effect in note to *Pettit v. Shepherd*, 28 Am. Dec. 441, upon jurisdiction of equity as to clouds on title.

Parol Evidence is inadmissible to change deed absolute to mortgage unless upon proof of fraud, accident, or mistake, p. 548.

Overruled in *Pierce v. Robinson*, 13 Cal. 124, holding evidence admissible to establish equity superior to terms of deed.

Mortgage.—Deed and bond in suit held not to constitute, p. 548.

Cited in *Woodward v. Hennegan*, 128 Cal. 300, holding transactions between vendor and vendee to constitute more than a mortgage; *Burditt v. Burditt*, 62 Kan. 580, holding transaction not a mortgage; *Micon v. Ashurst*, 55 Ala. 614, construing agreement as executory contract of sale and not mortgage.

Pleading.—General allegations are controlled by particular allegations following and latter bind pleader, p. 551.

Cited in *Clark v. Phoenix Ins. Co.*, 36 Cal. 178, upon point of correspondence of allegata and probata.

Attachment.—Lien is not lost by entry of simple money judgment without express order of sale, p. 551.

Cited to same effect in *Anderson v. Goff*, 72 Cal. 71, 1 Am. St. Rep. 38, applying rule to judgments on service by publication against non-resident; in *Brown v. Tucker*, 7 Colo. 39, and in *State v. Eddy*, 10 Mont. 322, as to similar judgment after publication; and in *Iowa etc. Bank v. Jacobson*, 8 S. Dak. 299, holding lien preserved until entry of judgment.

Attachment Issued Before Summons is void, p. 552.

Cited to same effect in *Shannon v. Huot*, 20 Mont. 557, when summons was issued but was void for want of clerk's signature; and in *White v. Johnson*, 27 Oreg. 297, 50 Am. St. Rep. 735, holding further that under facts summons had not issued before levy.

General citation: *Henrietta Min. etc. Co. v. Gardner*, 173 U. S. 129.

9 Cal. 553-554. **GARDNER v. PERKINS.**

Injunction will be dissolved on motion made on bill and answer alone when equities denied by answer, p. 553.

Cited to same effect in *Burnett v. Whitesides*, 13 Cal. 158, and in *Lady Bryan Gold etc. Co. v. Lady Bryan Co.*, 4 Nev. 415, on point that injunction should be refused upon such bill and answer; modified in *Real etc. Co. v. Pond etc. Co.*, 23 Cal. 84, where complaint supported by additional affidavits.

9 Cal. 554-556. **SUMMERS v. DICKINSON.**

Legislative Grant operates as conveyance in praesenti without necessity of patent, p. 555.

Cited in *Scherman v. Buick*, 45 Cal. 668, discussing effect of congressional grant of sixteenth and thirty-sixth sections under act of March 3, 1853; to same effect in *Owens v. Jackson*, 9 Cal. 324, as to congressional grant of swamp and overflowed lands; in *Kernan v. Griffith*, 27 Cal. 89, holding further that ex parte survey could not determine whether land in suit was within grant—a question for each particular case; in *Megerle v. Ashe*, 27 Cal. 327, 87 Am. Dec. 78, holding further that U. S. patent is not conclusive against claimant by state patent under the prior legislative grant; in *Robinson v. Forrest*, 29 Cal. 322, holding, however, that state patent is not conclusive as to character of land as against prior pre-emptioner; in *Tubbs v. Wilson*, 73 Cal. 63, where stated to be settled law, and holding further that approval by U. S. Surveyor General of township plat wherein lands are described as swamp etc. estops the U. S. and claimant under it; in *Groslouis v. Northcut*, 3 Oreg. 399, as to like grant to Oregon; in *Blakesly v. Caywood*, 4 Oreg. 287, upon point that under Donation Act title passed at once subject to conditions specified therein; in *Gaston v. Stott*, 5 Oreg. 57, 58, holding further that state can make selections of and sell such land before issue of U. S. patent to it; in *San Francisco Savings Union v. Irwin*, 11 Sawy. 670, 28 Fed. Rep. 710, holding further that state title to such lands cannot be defeated or impaired by delay or refusal of U. S. to list and patent the lands, and in *Wright v. Roseberry*, 121 U. S. 505, discussing further the effect of listing and identification of land by Secretary of the Interior.

State Patent conveys no title unless authorized by law, p. 556.

Cited in *Doll v. Meador*, 16 Cal. 330, holding, however, that issuance of patent is conclusive as to the inclusion of land within Congressional grant as against one not claiming under U. S.; and in *Kile v. Tubbs*, 23 Cal. 441, holding that pre-emptioner is within exception to the rule last stated.

9 Cal. 556-557. **SWEETLAND v. HILL.**

Abandonment of Possession.—What constitutes, p. 557.

Cited in note to *Wyman v. Hurlburt*, 40 Am. Dec. 464, upon abandonment of property.

9 Cal. 557-562. **HARTMAN v. BURLINGAME.**

Surety is not Discharged by failure of creditor to sue when requested, p. 561.

Cited to same effect in *Dane v. Cordnan*, 24 Cal. 165, 85 Am. Dec. 56, holding general rule strengthened by Practice Act 527; Cited in *Mullvane v. Sedgeley*, 63 Kan. 126, quoting *Bull v. Coe*, 77 Cal. 60, 11 Am. St. Rep. 239, extending rule to failure of creditor to present claim against deceased debtor's estate; in *Smith v. Freyler*, 4 Mont. 493, 47 Am. Rep. 359, where debtor became insolvent after request made by surety; and in *Findley v. Hill*, 8 Oreg. 250, 34 Am. Rep. 580, upon

similar facts as to insolvency. Cited, also, in *Hayes v. Josephi*, 26 Cal. 543, holding, however, that sureties on bond on release from attachment are released by creditor's refusal to accept their tender of amount of the judgment.

9 Cal. 562-564. DOUGLASS v. KRAFT.

Conversion—Damages.—Where value fixed, measure of damages is that value and interest from conversion; otherwise, the highest market value between conversion and suit, p. 563.

Cited to same effect and followed upon stare decisis as to last proposition in *Hamer v. Hathaway*, 33 Cal. 119: "Some qualification of the rule may be found necessary when there has been an unreasonable delay in bringing suit or under certain special circumstances"; and holding further that place of conversion determined market value and interest runs from time of estimated value; in *Gay v. Moss*, 34 Cal. 132, action for conversion of pledge by pledgee; in *Page v. Fowler*, 39 Cal. 420, 2 Am. Rep. 467, following *Hamer* case, supra, upon stare decisis, and taking highest market value within reasonable time after conversion, with interest. Distinguished in *Cox v. McLaughlin*, 76 Cal. 70, 9 Am. St. Rep. 171, disallowing interest in action in quantum meruit for services.

Verdict.—Objections to cannot be first raised on appeal, p. 564.

Cited to same effect in *Campbell v. Jones*, 41 Cal. 519, as to objections to form of verdict or award of excessive damages; in *Johnson v. Visser*, 96 Cal. 314, as to form of verdict, where susceptible of construction which may have lawful and relevant effect; and in *Joseph v. Mady etc. Co.*, 13 Mont. 202, when verdict for plaintiff did not state amount but no application to correct informality or motion for new trial was made.

9 Cal. 565-568. BATTERSBY v. ABBOTT.

Statement.—Settlement is presumed to have been on regular notice unless contrary appears, p. 568.

Cited to same effect in *Steven v. North Western Stage Co.*, 1 Idaho, 606, holding, however, that such contrary evidence appeared; and in *Gomer v. Chaffe*, 5 Colo. 385, on point that due filing of motion is to be presumed from its argument without objection.

Charge of Court should not extend to questions of fact or as to weight of evidence, p. 568.

Cited in note to *State v. Whit*, 72 Am. Dec. 545, upon instructions as to weight of evidence.

9 Cal. 568-571. PACKER v. HEATON.

New Trial—Surprise.—Mistake of counsel as to competency of witness is not cause for new trial, p. 571.

Cited in *Klockenbaum v. Pierson*, 22 Cal. 163, to effect that such mistake or testimony of witness in stating conversation incorrectly is not surprise warranting new trial.

9 Cal. 571-573. **PEOPLE v. HARRIS.**

Justices' Courts are to be governed by general rules of proceeding in other courts when statute is silent, p. 572.

Cited to same effect in *Paul v. Armstrong*, 1 Nev. 100, holding however, that case was within express statutory provisions; and in *Kennedy v. Hamer*, 19 Cal. 386, holding that terms of special statute as to bond in forcible entry cases regulated practice in these courts.

Justice—Fees.—Justice may refuse to transmit papers on appeal until fees are paid, p. 572.

Distinguished in *Lick v. Madden*, 25 Cal. 211, holding that county clerk cannot refuse to issue attachment when he has not requested prepayment of fees; and in *Carbonate etc. Co. v. Ives*, 10 Colo. 83, holding that where justice has waived prepayment of fees opposing party cannot raise objection of their nonpayment.

9 Cal. 573-575. **HAYDEN v. DAVIS.**

Bailee.—Jus Tertii may be set up by, in action by bailor when latter's possession obtained by fraud, p. 574.

Approved and followed in *Palmtag v. Doutrick*, 59 Cal. 165, 168, 43 Am. Rep. 253, 256, the case of a pledge, holding further that bailee can set up another's title only when he defends on such title and by authority of that other; cited in *Jeffers v. Easton*, 113 Cal. 355, to same effect, allowing assignee of lease to show title in third person in action for consideration of assignment when there has been eviction after threat of suit and attachment; in *Matheny v. Mason*, 73 Mo. 683, 39 Am. Rep. 545, applying same rule as in *Jeffers* case, supra, to sale of personalty when vendee has paid real owner under threat of suit; and in note to *Kohn v. Richmond etc. R. R. Co.*, 34 Am. St. Rep. 732, upon duties of common carriers in cases of adverse claimants to goods.

9 Cal. 576-584. **PEOPLE v. DOLAN.**

Indictment for Murder may charge crime in first degree, p. 583.

Cited to same effect in *People v. Vance*, 21 Cal. 402; in *Potsdamer v. State*, 17 Fla. 903, upon point that such indictment will support verdict in second degree; and to same effect in *State v. Rover*, 10 Nev. 393, 21 Am. Rep. 748, holding, however, that verdict "guilty as charged" therein does not state degree of crime.

Indictment for Murder.—Requisites of under Criminal Code stated, p. 583.

Cited in *People v. King*, 27 Cal. 510, 87 Am. Dec. 96, holding indict-

ment sufficient and stating change in common law requirements; in *People v. Kelly*, 59 Cal. 377, upon question of certainty of allegations in indictment; and to same effect in *People v. Rozelle*, 78 Cal. 90, both holding indictment good; *State v. Millain*, 3 Nev. 465, following *People v. King*, *supra*; *Fitzpatrick v. United States*, 178 U. S. 309, construing Oregon statute and *Territory v. Bannigan*, 1 Dak. 461, sustaining indictments; *Davis v. Utah*, 151 U. S. 269, holding indictment sufficient to support verdict in first degree.

Indictment for Murder need not allege crime "deliberate" if "with malice aforethought," p. 583.

Cited to same effect in *People v. Murray*, 10 Cal. 310; in *Territory v. Bannigan*, 1 Dak. Ter. 443; in *People v. Ah Choy*, 1 Idaho, 319; in *State v. Thompson*, 12 Nev. 148; and in *State v. Hing*, 16 Nev. 309—all sustaining indictment.

Indictment—Statutory Form.—Charge is sufficient if made in language of act defining offense, p. 584.

Cited to same effect in *People v. Kelly*, 59 Cal. 378.

9 Cal. 584-588. **NASH v. HERMOSILLA.** 70 Am. Dec. 676.

Penalty and Liquidated Damages.—Rules as to distinction stated, p. 587.

Cited in *Keeble v. Keeble*, 85 Ala. 557, construing provision as one for liquidated damages; *Savannah etc. Co. v. Callahan*, 56 Ga. 338, bridge building contract; and *Trower v. Elder*, 77 Ill. 455, contract not to engage in business, with other covenants, both construing provision as penalty. See notes to *Graham v. Bickham*, 1 Am. Dec. 338; *Cal. S. N. Co. v. Wright*, 65 Am. Dec. 515; *Studebaker v. White*, 99 Am. Dec. 631, and to *Williams v. Vance*, 30 Am. Rep. 34, upon rules as to liquidated damages and penalty.

9 Cal. 589-591. **O'KEIFFE v. CUNNINGHAM.**

Mining Claim may be taken up for different purposes by different claimants if not conflicting, p. 591.

Cited to same effect in *Nevada County etc. Co. v. Kidd*, 37 Cal. 315, as to rights of way for different canals over same land.

Miner's Claim is subject to existing right for deposit of tailings, p. 591.

Denied in *Miser v. O'Shea*, 37 Or. 235, cited under *Jones v. Jackson*, 9 Cal. 237.

9 Cal. 591-593. **KENDALL v. MILLER.**

Guardian's Sale without order of court conveys no title, p. 592.

Cited in *Morse v. Hinckley*, 124 Cal. 158, quoting *De La Montagnie v. Union Ins. Co.*, 42 Cal. 293, as to sale of stock issued to guardian as

such; and *Schmidt v. Wieland*, 35 Cal. 345, holding that property assigned was not part of infant's estate. Distinguished, *Scarf v. Aldrich*, 97 Cal. 366, 33 Am. St. Rep. 194, holding that where court acquires jurisdiction to order sale of ward's real estate, latter cannot afterward collaterally attack sale for irregularities in the proceedings.

Married Woman's Acknowledgment is void without her privy examination, p. 592.

Cited to same effect in note to *Livingston v. Kettelle*, 41 Am. Dec. 180, upon private examination of wife.

9 Cal. 595-600. COLTON v. ROSSI.

Eminent Domain.—Compensation must be made in advance or fund provided to pay for property taken, p. 599.

Cited to same effect in *Martin v. Tyler*, 4 N. Dak. 293, applying principle to construction of drains by drainage commissioners. Distinguished in *Fox v. Western Pacific etc. Co.*, 31 Cal. 547, holding act constitutional which provides that railroads may proceed with survey and construction on private lands before compensation paid, and while condemnation proceedings pending, upon giving security for damages when ascertained.

9 Cal. 600-607. McGEE v. STONE.

Estoppel.—Intent to deceive not necessary to create, p. 606.

Cited to same effect in note to *Mitchell v. Reed*, 70 Am. Dec. 650, upon estoppel.

9 Cal. 607-615. UHLFELDER v. LEVY.

Injunction—Co-ordinate Courts.—Court will not enjoin proceedings in another of co-ordinate jurisdiction, p. 614.

Cited to same effect in *Hockstacker v. Levy*, 11 Cal. 76; *Crowley v. Davis*, 37 Cal. 269, as to execution sale (excepting cases where original court unable to afford relief sought), even where parties to new action are not same, and consent; *Judson v. Porter*, 51 Cal. 562, as to injunction of prosecution of ejectment suits; *Scott v. Runner*, 146 Ind. 16, 58 Am. St. Rep. 348, as to execution sale, even though judgment is void; *Platto v. Deuster*, 22 Wis. 486, as to writ of assistance, and *Spreckels v. Hawaiian etc. Co.*, 117 Cal. 382, as to actions in foreign country, except to avoid multiplicity of actions; distinguished, *Pixley v. Huggins*, 15 Cal. 134, as to execution sale which would cloud plaintiff's title to land levied on as judgment debtor's; and in *De Godey v. Godey*, 39 Cal. 162, as to injunction to prevent divorced husband's disposition of community property pending suit for division, divorce decree being silent as to property.

Distinguished in *Pixley v. Huggins*, 15 Cal. 134, holding rule inappli-

cable in action to prevent execution sale of plaintiff's property as being that of judgment debtor.

9 Cal. 616-641. **GRAY v. PALMER.**

Same Case.—See *Gray v. Eaton*, 5 Cal. 448; *Eaton v. Palmer*, 11 Cal. 341; *Gray v. Palmer*, 28 Cal. 416; *Gray v. Larrimore*, 4 Sawy. 638; 2 *Abbott* (U. S.) 542, 10 Fed. Cas. 1025; and *Gray v. Brignardello*, 1 Wall. 627. See, also, *Galpin v. Page*, 1 Sawy. 309, reversed 18 Wall. 350, and 3 Sawy. 93.

Appeal.—Interlocutory Decree in action for dissolution of partnership is not appealable, p. 634.

Cited to same effect in *Gimmy v. Doane*, 22 Cal. 637, holding that attempted appeal from such decree rendered on default does not bar appeal from final decree; and *Davie v. Davie*, 52 Ark. 228, 20 Am. St. Rep. 173, as to interlocutory decree in ejectment; cited, also, in *Thompson v. White*, 63 Cal. 509, as to power of court of equity to make such decree in dissolution actions; and in note to *Williams v. Field*, 60 Am. Dec. 428, 435, as to interlocutory decrees generally and in dissolution proceedings.

Probate Claim.—Held not to include demands for partnership accounting, p. 636.

Cited in *Harrison's Admr. v. Harrison's Distributees*, 39 Ala. 495, holding no claim necessary in proceedings by distributees against administrator for settlement of account; *Lusk v. Patterson*, 2 Colo. App. 311, applying principle to claim for services to estate rendered after decedent's death; *Toulouse v. Burkett*, 2 Idaho, 173-175, to claim for foreclosure of vendor's lien; and *Weill v. Clarke*, 9 Or. 391, to enforcement of trust agreement. Cited, also, in *Jones v. United States*, 13 Sawy. 347, 35 Fed. Rep. 565, construing "claim" under question of federal jurisdiction as extending to claim to have patent issued; *Bank v. State*, 18 Wash. 76, defining "claim"; *Barto v. Stewart*, 21 Wash. 615, construing local statute as to presentation of probate claims; and see dissenting opinion in *Board v. Holliday*, 150 Ind. 246, construing local tax laws; *Rice v. Rigley*, 7 Idaho, 133, term "claim or demand" in Revised Statutes, section 5957, embraces all rights of action for establishment of trust in land as well as claims or demands for debts or damages against estate of decedent.

Surviving Partner is entitled to possession and management of firm effects, p. 637.

Cited to same effect in note to *Shields v. Fuller*, 65 Am. Dec. 296, as to powers and duties of surveying partner (cited in *Hargadine v. Gibbons*, 45 Mo. Ap. 468), and *Id.* p. 302, as to lien on firm property as indemnity against firm debts, etc.

Minors.—Personal Service of complaint on is necessary, and service on guardian ad litem before minor served is bad, p. 637.

Cited in *Campbell v. Drais*, 125 Cal. 258, on point that attorney for minor heirs cannot waive service of notice in proceedings to sell real estate before service made upon them; to same effect in *Redmond v. Peterson*, 102 Cal. 599, 41 Am. St. Rep. 206, distinguishing, however, service on general guardian of incompetent; *Filmore v. Russell*, 6 Colo. 173, where infant was over fourteen; *Gray v. Larrimore*, 4 Sawy. 647, 2 Abbot (U. S.), 551-552, 10 Fed. Cas. 1029, holding that appearance of mother in own behalf or any request by her attorney for appointment of guardian, could not dispense with service; and see *Galpin v. Page*, 3 Sawy. 126, 9 Fed. Cas. 1139. It was held in *Galpin v. Page*, 1 Sawy. 309, Fed. Cas. 1113 etc. (see pp. 518, 320, 321, 336, 337, 339, 340) that the recital of due service in the order appointing such guardian was conclusive; but the decision was reversed in S. C. 18 Wall. 350 (See p. 372); and see S. C. further in 3 Sawy. 93, 9 Fed. Cas. 1126.

Partnership is contract to unite property, labor, or skill in joint business, and to share profits, p. 638.

Cited in *Laffan v. Naglee*, 9 Cal. 678, holding that sharing of profits and losses constitutes partnership for purchase etc., of property.

Oral Partnership for purchase and sale of lands is invalid, p. 639.

Overruled in same point in *Coward v. Clanton*, 79 Cal. 26; *Bates v. Babcock*, 95 Cal. 484, 29 Am. St. Rep. 138, where rule of main case stated as opposed to great weight of modern authority; *Meagher v. Reed*, 14 Colo. 367, where cited as overruled by *Coward* case, *supra*. Cited in dissenting opinion in *Hirbour v. Reeding*, 3 Mont. 32, holding parol partnership to locate quartz lode good; and note to *McCormick's Appeal*, 98 Am. Dec. 202, as to validity of such partnerships.

Partnership Realty, character and nature of discussed, p. 639.

Cited in notes on same subject to *Greene v. Greene*, 13 Am. Dec. 648; *Shields v. Fuller*, 65 Am. Dec. 300, and *McCormick's Appeal*, 98 Am. Dec. 198.

9 Cal. 641. WHIPLEY v. MILLS.

Notice of Appeal must be properly served, or appeal is ineffectual, p. 641.

Cited to same effect in *Hastings v. Halleck*, 10 Cal. 32, stating also steps necessary to constitute appeal; *In re Gold Street etc.*, 2 Dak. Ter. 40, holding further that omission cannot be supplied or rectified or the error waived by stipulation; *Toole v. French*, 2 Idaho, 747, holding further that due service and filing must appear affirmatively from record; *Pardee v. Murray*, 4 Mont. 37, as to filing of undertaking; and *Bank v. Savings etc. Co.*, 13 Utah, 199, stating also parties on whom notice should be served; *Seattle etc. Co. v. Simpson*, 19 Wash. 633, holding service insufficient under local statutes.

9 Cal. 642-643. **PEARKES v. FREER.**

Misjoinder of Actions.—Actions for damages and penalty against sheriff may be united, p. 642.

Distinguished in *State v. Yellow Jacket etc. Co.*, 14 Nev. 243, holding joinder not allowed of actions for several quarterly mining taxes.

Change of Venue.—Right to, may be waived either expressly or by implication, p. 643.

Cited to same effect in *Jones v. Frost*, 28 Cal. 246, where motion was made after demurrer to amended complaint; *Cook v. Pendergast*, 61 Cal. 75, upon point that under Practice Act application must be made in answer or contemporaneously with filing of answer or demurrer; *Hearne v. De Young*, 111 Cal. 376, where residence of defendant was admitted; and *Clarke v. Lyon County*, 8 Nev. 186, where defendant answered without objecting to jurisdiction. Distinguished in *Sheckles v. Sheckles*, 3 Nev. 406, holding that in divorce case right to move because of convenience of witnesses is not waived by answering to merits of action.

9 Cal. 643-662. **GUNTER v. JANES.**

Cestui Que Trust.—Remedies of on breach of trust discussed, pp. 658, 660.

Cited in *Lathrop v. Bampton*, 31 Cal. 23, 89 Am. Dec. 145, upon right of cestui to elect between personal liability and specific property; and *Moore v. Jones*, 63 Cal. 16, as to right to follow funds placed in hands of trustee and commingled with others.

Probate.—Claims for specific property need not be presented, p. 655.

Cited as to definition of "claim" in *Harrison's Admr. v. Harrison's Distributees*, 39 Ala. 495; and *Thompson v. Crockett*, 19 Nev. 244, 3 Am. St. Rep. 884, holding unnecessary to present claim for unpaid subscription to stock; cited in *Marshall v. Marshall*, 11 Colo. App. 510, 512, applying rule to enforcement of trust against mining stock held by decedent at time of death irrespective of identity of certificate; *Bramell v. Adams*, 146 Mo. 85, holding presentation unnecessary in case of fund in administrator's hands as result of conversion by decedent; *Hamilton v. Dooly*, 15 Utah, 306, ruling similarly as to enforcement of equitable claim against trust funds in executor's hands; *Estate of Dutard*, 147 Cal. 256, where claim shows demand for specific property held in trust by decedent for plaintiff who was an administrator and who proceeded no further than his appointment, additional demand for accounting does not change character of claim.

9 Cal. 662-683. **LAFFAN v. NAGLEE.** 70 Am. Dec. 678.

Lease.—Covenant of pre-emption is valuable and assignable, p. 676.

Cited in *De Rutte v. Muldrow*, 16 Cal. 513, to effect that such covenant is binding on lessor if lessee wishes to buy; *Menger v. Ward*, 87 Tex. 626, upon point that right to buy passes with assignment of lease; and note to *Jackson v. Schutz*, 9 Am. Dec. 202, upon force of such covenant. Distinguished, *Hitchcock v. Page*, 14 Cal. 444, holding that lessee or purchaser from him of part of the land cannot claim right to buy that part. Cited, also, in *Smith v. Phoenix Ins. Co.*, 91 Cal. 330, upon point that possession of tenant will be deemed to be under lease and not under agreement to purchase.

Partnership.—Facts stated held to constitute, p. 678.

Cited as to facts showing partnership in note to *Fitch v. Harrington*, 74 Am. Dec. 645; *Newbrau v. Snider*, 88 Am. Dec. 669; *Iliff v. Brazil*, 99 Am. Dec. 647.

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Cited to same effect in note to *Holmes v. Gilman*, 34 Am. St. Rep. 472, upon same subject.

9 Cal. 683-696. **ELLIG v. NAGLEE.**

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Cited in *Estate of Schandoney*, 133 Cal. 393, holding guardian not liable for failure to foreclose mortgage under facts stated; *Estate of Cousins*, 111 Cal. 449, holding guardian not liable for error in judgment in collecting moneys due the estate.

9 Cal. 697-736. **WARNER v. STEAMSHIP UNCLE SAM.**

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By ALBERT RAYMOND.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

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Cited to same effect in *Adams v. Knowlton*, 22 Cal. 289, where wife claimed as sole trader; also, in note to *Partridge v. Stocker*, 84 Am. Dec. 673, as to protection of wife's property from husband's creditors; *Coke v. Bremond*, 86 Am. Dec. 637, 639, as to presumption of community character, and its rebuttal; and *Shaw v. Hill*, 96 Am. Dec. 423, upon same subject.

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10 Cal. 17-18. **KENDALL v. CLARK.** 70 Am. Dec. 691.

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10 Cal. 19-20. **PEOPLE v. COUNTY COURT.**

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rior court; Nevada etc. Co. v. District Court, 21 Nev. 414, as departed from in Ketchum v. Superior Court, supra, and Kitts v. Superior Court, 62 Cal. 203. Cited also in Gage v. Maryatt, 9 Mont. 266, holding that default judgment will be affirmed where no motion to set aside made in justice's court, and complaint was sufficient; and in Paul v. Armstrong, 1 Nev. 96, on point that on appeal from justice's to probate court, only issues tried below can be retried. Italian Swiss Agr. Colony v. Bartagnolli, 9 Wyo. 207.

10 Cal. 20-21. **PEOPLE v. MULLINS.**

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10 Cal. 22-31. **PIERCY v. SABIN.** 70 Am. Dec. 692.

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Cited to same effect in Thomas v. Desmond, 63 Cal. 427, holding allegations as to right to property, insufficient; dissenting opinion in Perkins v. Barnes, 3 Nev. 565; main opinion holding complaint in replevin sufficient. Cited, also, in note to French v. Parker, 27 Am. St. Rep. 739, as to relief obtainable under system of code pleading and joinder of counts.

Pleading.—New Matter must be specially pleaded, p. 27.

Cited to same effect in Glazer v. Clift, 10 Cal. 304, as to justification by sheriff in action for seizure; Coles v. Soulsby, 21 Cal. 50, as to accord and satisfaction; Moss v. Shear, 30 Cal. 472, as to conveyance of land by plaintiff pending ejectment suit, no supplemental answer being filed; Michalitschke v. Wells, Fargo & Co., 118 Cal. 690, as to contract limiting carrier's liability, in suit against it; Atchison etc. Co. v. Washburn, 5 Neb. 123, 125 (cited in Bishop v. Stevens, 31 Neb. 791, and Prall v. Peters, 32 Neb. 833, as to defense that injury to live stock carried by defendant was caused by plaintiff's neglect to feed and care for it. Distinguished, Hawkins v. Borland, 14 Cal. 415, as to plea as to time for payment of indebtedness sued on. Cited, also, in Wilson v. California etc. Co., 94 Cal. 172, on point that burden is on defendant to prove his new matter, even though involving a negative; cited in Reed v. Insurance Co., 21 Utah, 312, as to defense of insolvency; note to Atteberry v. Powell, 77 Am. Dec. 583, and to Finley v. Quirk, 86 Am. Dec. 100, as to plea of new matter.

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affidavit; *Greenbaum v. Turrill*, 57 Cal. 287, 288; denying right to strike out where answer is verified and sets up sufficient defense, whether by denials or affirmatively; *Stokes v. Farnsworth*, 99 Fed. 838, holding answer not sham; *Foren v. Dealey*, 4 Oreg. 95, as to defense of want of consideration for note, holding striking out erroneous unless obviously false, or shown to be false and in bad faith. Cited, also, in note to *People v. McCumber*, 72 Am. Dec. 521, upon general subject.

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Ejectment.—Outstanding title in third person is no defense when action based on plaintiff's prior possession, p. 30.

Cited to same effect in *Mooney v. Olsen*, 21 Kan. 697, on point that prior possession is sufficient to maintain ejectment against subsequent entry without right. Distinguished in *Dyson v. Bradshaw*, 23 Cal. 536, where plaintiff relied on title to land. Cited, also, in note to *Bird v. Lisbros*, 70 Am. Dec. 620, among citations of that case upon general subject; *Mallett v. Uncle Sam etc. Co.*, 90 Am. Dec. 497, upon same subject; and *Allen v. Higgins*, 43 Am. St. Rep. 849, as to answers in ejectment.

10 Cal. 31-32. HASTINGS v. HALLECK.

Appeal—Notice and Undertaking.—Requisites as to service and filing stated, p. 31.

Cited in *Gordon v. Wansey*, 19 Cal. 82, and *Shissler v. Crooks*, 1 Idaho, 370, dismissing appeal because undertaking not filed within five days after filing notice; *Warner v. Holman*, 24 Cal. 229, where notice was served three days before filing; *Home etc. Associates v. Wilkins*, 71 Cal. 627 (cited in *Estate of Heydenfeldt*, 119 Cal. 349), where undertaking was insufficient in not specifying appeal, and denying motion to file new undertaking; *Alvord v. McGauhy*, 4 Colo. 97, where undertaking filed before filing notice; *In re Gold Street v. Newton*, 2 Dak. Ter. 40, where no notice of appeal—holding further, ineffectual, a waiver of notice by stipulation; *People v. Hunt*, 1 Idaho, 372, where undertaking was filed before filing and service of notice; *Slocum v. Slocum*, 1 Idaho, 590, and *Courtright v. Berkins*, 2 Mont. 405, where notice served before filing; and *Erickson v. Erickson*, 11 Wash. 77, applying same ruling to service and filing of statement under local statute. Cited, also, refusing to dismiss appeal, in *Wright v. Ross*, 26 Cal. 263, where service and filing held part of continuous transaction, and considering further effect of affidavits as to order of proceedings; *Bonds v. Hickman*, 29 Cal. 463, where transcript contains stipulation that notice was filed, holding, further, such stipulation conclusive as to fact of filing; and *Pardee v. Murray*, 4 Mont. 37, where record erroneous as to date of filing undertaking, remanding matter to lower court

for purposes of correction; *Seattle etc. Co. v. Simpson*, 19 Wash. 633, construing local statute as to appeal in land proceedings; *Johnson Co. Sav. Bank v. Joe Klaffki Co.*, 26 Mont. 385, undertaking on appeal must be filed within five days of service of notice on adverse party.

10 Cal. 32-37. **PEOPLE v. GLENN.**

Dying Declarations are admissible in evidence in homicide cases, p. 36.

Cited to same effect in *People v. Lawrence*, 21 Cal. 372, and in *Battle v. State*, 74 Ga. 105—holding, however, other statement of deceased contradicting such declarations, also admissible; *People v. Vernon*, 35 Cal. 52, 95 Am. Dec. 51, holding oral evidence admissible notwithstanding admission of written statement verified by deceased while in extremis; *People v. Corey*, 157 N. Y. 348, holding admission not to infringe defendant's right to be confronted with adverse witnesses; *State v. Kindle*, 47 Ohio St. 363, holding such written statement admissible; *State v. Waldron* 16 R. I. 194, on point that evidence of reputation is admissible, without testimony of persons from whom knowledge of reputation was gathered; and *Black v. State*, 1 Tex. Ap. 384, holding admissible evidence of witness (since deceased) on former trial of such dying declarations. Distinguished in *People v. Taylor*, 59 Cal. 648, holding inadmissible declarations made in extremis, but not as to any of the circumstances of the death.

Evidence.—General objection to admission of is insufficient, p. 37.

Cited to same effect in *People v. Chee Kee*, 61 Cal. 405, as to introduction of almanac to prove time of sunrise.

10 Cal. 38-49. **PEOPLE v. WHITMAN.**

"Offices of Profit" and "Lucrative Offices."—Comptroller is former and surveyor-general, latter, p. 43.

Cited in note to *Shelby v. Alcorn*, 72 Am. Dec. 189, on general subject.

Appointment.—Holding of office may require performance of conditions precedent, such as qualifications, p. 44.

Cited in *Ball v. Kenfield*, 55 Cal. 521, but officer held entitled to salary from appointment, under statute; *People v. Perkins*, 85 Cal. 513, on point that appointment dates from issuance of commission, as to time thereafter for qualification; *State v. Crawford*, 28 Fla. 495, as to duty of secretary of state to countersign and affix seal to commission issued by governor, although deeming such commission illegal.

Vacancy in Office is not created by failure of newly elected officer to qualify; former incumbent holds over, p. 44.

Cited to same effect in *People v. Tilton*, 37 Cal. 619, 620, as to failure to elect officer; *People v. Parker*, 37 Cal. 647, upon same point;

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Treadwell v. Yolo County, 62 Cal. 566, and in dissenting opinion 569, on point that such incumbents were officers de facto and de jure until election and qualification of successors; *People v. Edwards*, 93 Cal. 157, holding no vacancy when appointing power had ceased at adoption of new constitution and no successor to such power was designated therein; *Monash v. Rhodes*, 11 Colo. App. 408, defining "vacancy in office;" *People v. Green*, 1 Idaho, 240, as to failure to qualify—holding further, as to proof necessary for ouster; *State v. Harrison*, 113 Ind. 441, 3 Am. St. Rep. 668, as to failure by legislature to elect successor; *Kimberlin v. State*, 130 Ind. 126, 30 Am. St. Rep. 212, as to death of successful candidate before vote announced, followed by void election; *Borton v. Buck*, 8 Kan. 308, as to failure to qualify—holding further, as to effect on incumbency of justice of division of township; *State v. Boucher*, 3 N. Dak. 399, and *State v. Henderson*, 4 Wyo. 553, as to failure of legislature to confirm appointees. Denied in *State v. Murphy*, 32 Fla. 151, 152, 156, holding vacancy created by adjournment of legislature without confirmation; and *State v. Cooke*, 54 Tex. 485, 486, ruling similarly as to failure to qualify. Cited, also, in *People v. Parker*, 37 Cal. 643, on point whether vacancy can exist for full term; and in *State v. Boyd*, 31 Neb. 731, sustaining right of governor to hold over when successful candidate at succeeding election was ineligible in matter of citizenship. Distinguished, also, and criticised in *People v. Meloney*, 15 Cal. 62, as to time of election of controller.

Statutory Construction.—When statute specifies its own exceptions, no others will be considered intended, p. 45.

Cited to same effect in *Perkins v. Thornburgh*, 10 Cal. 191, on point that effect of verdict stated by statute will be considered exclusive; *People v. Tilton*, 37 Cal. 623, as to power of governor to appoint to office.

Governor's Power of Appointment is restricted by constitution, p. 46.

Cited to same effect in *People v. Tilton*, 37 Cal. 621, 622; *People v. Parker*, 37 Cal. 650, and *State v. Johns*, 3 Oreg. 535; *State v. Compton*, 34 Or. 35, denying governor's right to appoint under local statutes and facts stated; dissenting opinion, *Maddox v. York*, 21 Tex. Civ. App. 627, construing local statutes.

Term of Office.—Judges do not hold till qualification of successors, p. 46.

Cited in *People v. Campbell*, 138 Cal. 15, holding rule not changed by section 879, Political Code.

Elections.—Votes given to ineligible candidate should be counted for him, and not for next highest candidate, p. 47.

Cited to same effect in *Saunders v. Haynes*, 13 Cal. 153—holding further, that incumbent whose right is attacked cannot raise question of ineligibility.

Inconsistent Offices.—Acceptance of one is relinquishment of right to the other, p. 48.

Cited to same effect in *State v. Brinkerhoff*, 66 Tex. 471—holding further, election made upon qualification for second office, and resignation of first is implied therefrom.

10 Cal. 49-50. **NELSON v. LEMMON.**

Instructions.—Refusal to give is not error where record does not show relation to facts proven, p. 50.

Cited to same effect in *Frost v. Grizzly Bluff etc. Co.*, 102 Cal. 527, where no evidence shown by bill of exceptions; and *People v. Gough*, 2 Utah, 72, applying rule to giving of instruction. Cited, also, on point that error must affirmatively appear, in *Federico v. Hancock*, 1 Ariz. Tr. 513, as to sufficiency of evidence to support finding; and *Fulton v. Earhart*, 4 Oreg. 64, on same point, where record did not purport to contain all the evidence.

10 Cal. 50-60. **PEOPLE v. RODRIGUEZ.**

Indictment in statutory form is sufficient, p. 59.

Cited in *Fitzpatrick v. United States*, 178 U. S. 309, sustaining indictment for murder; *People v. Gough*, 2 Utah, 71, as to averment of facts constituting offense.

Grand Jury.—Summoning under special order during term held sufficient, p. 59.

Cited to same effect in *People v. Cuintano*, 15 Cal. 329 (cited in *State v. McNamara*, 3 Nev. 76, distinguishing main case when jury is not selected by proper officers).

Peremptory Challenge after juror sworn will not be allowed except for good cause shown, p. 59.

Distinguished in *State v. Pritchard*, 15 Nev. 81, where defendant withheld his challenge until panel completed and juror not sworn.

Confession is Not Admissible unless voluntary, p. 60.

Cited in *State v. Storms*, 113 Iowa, 391, on point that burden of proof as to voluntary character is on state; note to *Daniels v. State*, 6 Am. St. Rep. 244, 245, upon point that confession cannot be admitted unless shown to have been voluntary.

10 Cal. 60-63. **BULLARD v. KINNEY.**

Action by Partners inter se is not maintainable without accounting, p. 62.

Cited in *Robinson v. Compher*, 13 Colo. App. 344, as to action of debt.

Joint Stock Company is partnership as regards relations of share holders inter se, p. 63.

Cited in *Hornheiger v. Orchard*, 39 Neb. 641, on point that liability of members of unincorporated association to its creditors is governed by law of agency; and note to *Phipps v. Jones*, 59 Am. Dec. 717, upon suits by or against such associations.

10 Cal. 66-67. PEOPLE v. BERNAL.

Children are Competent as Witnesses if of sufficient intelligence, regardless of age, p. 66.

Cited to same effect in *State v. Jackson*, 9 Oreg. 458, holding child of seven years competent; holding further, as to sufficiency of preliminary examination; and *State v. Juneau*, 88 Wis. 182, 43 Am. St. Rep. 878, ruling similarly as to child of four years and nine months; and holding further, that determination of court on preliminary examination is final except for abuse of discretion.

Competency of Witnesses is question of law, p. 67.

Cited in *People v. Swist*, 136 Cal. 522, sustaining admission of child's evidence; *Commonwealth v. Reagan*, 175 Mass. 339, 78 Am. St. Rep. 499, as to competency of children.

10 Cal. 68-70. PEOPLE v. BEARSS.

Principal and Accessary.—Aiders and abettors are considered as principals, p. 69.

Cited to same effect in *People v. Newberry*, 20 Cal. 441, holding such person not discharged by conviction of actual principal, though indicted as accessory; and *State v. Hermann*, 117 Mo. 638, as to indictment for manslaughter. Cited, also, in note to *State v. Hildreth*, 51 Am. Dec. 373, defining "aider and abettor"; and p. 376, among miscellaneous decisions as to their criminal liability.

Principals in First and Second Degree.—Common-law distinction is abolished, p. 69.

Cited to same effect in *Rowland v. State*, 45 Ark. 135; holding further, declarations and conduct of first not admissible as against second.

General citation: *Williams v. United States*, 1 Ind. Ter. 564.

10 Cal. 71-83. ISAAC v. SWIFT. 70 Am. Dec. 698.

Judgment Lien is not extended by levy of execution before its expiration, p. 79.

Cited in *Estate of Wiley*, 138 Cal. 304, construing section 671, Code of Civil Procedure; *Ruth v. Wells*, 13 S. Dak. 487, 79 Am. St. Rep. 905, on point that judgment lien can be extended only as statute provides; *Savings etc. Co. v. Irrigation Co.*, 89 Fed. 37 (also quoting *Bagley v. Ward*, 37 Cal. 133), holding lien not extended by reason of appointment of receiver; *In re Boyd*, 4 Sawy. 264, 3 Fed. Cas. No. 1092, upon point

that judgment lien is creature of statute; *Brier v. Bank*, 24 Wash. 712, and dissenting opinion, *Brown v. Hopkins*, 101 Wis. 505, construing local statutes; *Bagley v. Ward*, 37 Cal. 133, 99 Am. Dec. 262 (and in dissenting opinion, 141)—holding further, as to effect of such levy as lien; *Sanders v. Russell*, 86 Cal. 121, 21 Am. St. Rep. 28—holding further, that levy on homestead does not dispense with necessity of presenting probate claim on judgment; *Wells v. Bower*, 126 Ind. 121, 22 Am. St. Rep. 575, and *Spicer v. Gambill*, 93 N. C. 380—holding further that purchaser at sale under such levy takes subject to all liens existing at time of levy; *Newell v. Dart*, 28 Minn. 250, applying rule to creditor's bill brought to enforce judgment. Cited, also, in *Englund v. Lewis*, 25 Cal. 351, 352, on point that lien is extended by appeal; in dissenting opinion in *Myers v. Mott*, 29 Cal. 372, main opinion holding attachment lien destroyed by defendant's death before judgment; and *In re Boyd*, 4 Sawy. 264, 3 Fed. Cas. 1092 (cited in *Creighton v. Leeds*, 9 Oreg. 220), upon point that judgment lien is creature of statute, holding it to depend on docketing of judgment; *Luco v. Commercial Bank*, 70 Cal. 342; note to *Bank v. Wells*, 31 Am. Dec. 166, upon general subject; *Durham v. Heaton*, 81 Am. Dec. 281, upon extent of judgment lien; *Ray v. Thompson*, 94 Am. Dec. 703, and *McAfee v. Reynolds*, 30 Am. St. Rep. 200, as to its continuance; *Boyle v. Maloney*, 5 Am. St. Rep. 663, as to its revival; and *Ludeman v. Hirth*, 35 Am. St. Rep. 590, as to issuance of execution on judgment barred by limitation.

10 Cal. 83-88. PEOPLE v. HONSHELL.

Bill of Exceptions is necessary to bring up affidavit used on motion for arrest of judgment, p. 86.

Cited to same effect in *People v. Martin*, 32 Cal. 92, as to necessity for bill on motion for new trial, and holding loose and unidentified papers insufficient; and *Everett v. Buchanan*, 2 Dak. Ter. 253, as to record of proceedings on motion for continuance.

Manlaughter Embraces Murder committed in defendant's performance of unlawful act, p. 87.

Cited in *State v. Smith*, 12 Mont. 392, holding as assault to kill, such assault committed upon road supervisor attempting to make road through defendant's field, though under void order.

Instruction.—Error without prejudice to defendant is not ground for new trial, p. 88.

Cited to same effect in *Mackey v. People*, 2 Colo. 19.

10 Cal. 88-90. SANDERS v. WHITESIDES.

Mexican Grant.—Confirmation is proved by judgment of board of land commissioners where not reversed or suspended by appeal, p. 90.

Distinguished in *McGarrahan v. Maxwell*, 28 Cal. 91, holding effect of such judgment as evidence, destroyed by appeal.

10 Cal. 90-92. **TAYLOR v. WOODWARD.**

Trespass.—Possession by plaintiff is sufficient for maintaining action, and title need not be shown, p. 92.

Cited to same effect in *Kellogg v. King*, 114 Cal. 383, 55 Am. St. Rep. 77, applying rule to suit in injunction to restrain trespasses.

10 Cal. 95-109. **BRANNAN v. MESICK.**

Construction of Deed depends upon understanding and intention of parties, p. 105.

Cited in *Walsh v. Abbott*, 145 Cal. 289, construing deed by owner of uncertain third of undivided half of ranch as quit claim deed; *Mulford v. Le Franc*, 26 Cal. 111, considering question whether deed conveyed land or easement; *Sprague v. Edwards*, 48 Cal. 249, defining "appeal" to mean "approval"; *Stockton v. Weber*, 98 Cal. 439, construing effect of proviso; *Bean v. Kenmuir*, 86 Mo. 672, construing habendum clause of deed; *Kanne v. Otty*, 25 Oreg. 536, as to ambiguity in description in deed; and *Smith v. Brown*, 66 Tex. 545, construing provisions of trust deed.

Performance of conditions precedent in deed is necessary before title can pass, p. 107.

Cited to same effect in *Tewksbury v. Provizzo*, 12 Cal. 25 (cited in *Emeric v. Alvarado*, 64 Cal. 574), holding performance shown of such conditions as to release.

Receipt is only Prima Facie Evidence of payment, even when acknowledged before notary, p. 108.

Cited to same effect in *Securities Co. v. Talbert*, 49 La. Ann. (pt. 2) 1402, as to acknowledgment of payment of mortgage.

10 Cal. 110-120. **HAYNES v. MEEKS.** 70 Am. Dec. 703; 20 Cal. 238; *Meeks v. Vassault*, 3 Sawy. 211, 16 Fed. Cas. 316.

Jurisdiction of Probate Court is special and limited, p. 116.

Cited to same effect in *Townsend v. Gordon*, 19 Cal. 205, as to sufficiency of petition for sale. Cited, also, in note to *Beckett v. Selover*, 68 Am. Dec. 257, as to jurisdictional facts necessary to support administration; *Andrews v. Ivory*, 73 Am. Dec. 366; *Kimball v. Fisk*, 75 Am. Dec. 219; *In re Warfield*, 83 Am. Dec. 58; *Buckley v. Superior Court*, 41 Am. St. Rep. 140, as to general nature of jurisdiction of probate court; *Broughton v. Bradley*, 73 Am. Dec. 484, and *Ex parte Maxwell*, 79 Am. Dec. 65, as to validity of grant of administration.

Resignation of Administrator.—Order of court accepting cannot be attacked collaterally, p. 119.

Cited to same effect in *Luco v. Commercial Bank*, 70 Cal. 342, holding judgment against executor after resignation not binding on heirs. Cited, also, in note to *Fisher v. Bassett*, 33 Am. Dec. 242, as to collateral attack on probate orders; *Broughton v. Bradley*, 73 Am. Dec. 484, as to collateral attack on appointment of administrator; and *Evans v. Johnson*, 45 Am. St. Rep. 924, as to resignations of officers.

Notice of Application to sell real estate, in probate proceedings, held sufficient, p. 119.

Cited in *Halleck v. Moss*, 17 Cal. 344, holding sale invalid for want of sufficient notice, where notice published without order of court; note to *Stuart v. Allen*, 76 Am. Dec. 560, as to probate sales in California; *Thornton v. Mulquinne*, 79 Am. Dec. 555, and *Morris v. Hogle*, 87 Am. Dec. 246, as to defects in notice of sale; and *Dorrance v. Raynsford*, 52 Am. St. Rep. 269, as to necessity for order in probate sales.

Purchaser at void probate sale afterwards set aside has lien on estate for price paid, p. 120.

Cited in *Stone v. Crawford's Heirs*, 1 Posey (Tex.), 613, on point that where heirs set aside probate sale because made without authority, they must repay price paid; *Davis v. Gaines*, 104 U. S. 404, to same effect, holding purchaser entitled to possession until repayment; note to *Scott v. Dunn*, 36 Am. Dec. 177, upon rights of such purchasers.

Succession.—Property descends immediately to heirs, p. 120.

Cited in *Murphy v. Crouse*, 135 Cal. 18, noted under *Beckett v. Selover*, 7 Cal. 215.

10 Cal. 120-125. **PERLBERG v. GORHAM.**

Same Case.—23 Cal. 350. Cited in *De Haven v. Berendes*, 135 Cal. 181.

10 Cal. 126-149. **BAGLEY v. EATON.**

Testimony of Parties is admissible on incidental matters—e. g., to show destruction of papers, for introduction of secondary evidence, p. 146.

Cited in *Stuart v. Lord*, 138 Cal. 677, but holding rule inapplicable to admission of testimony of party in action against estate to deny admissions alleged to have been made by him; *Landis v. Turner*, 14 Cal. 575 (cited in *Roche v. Ware*, 71 Cal. 379, 60 Am. Rep. 542), as to preliminary proof of original book of entries; in *Caulfield v. Sanders*, 17 Cal. 573, as to proof of loss of book of original entries, by assignor of demand.

Secondary Evidence of paper may be given where original shown to be lost or destroyed, p. 147.

Cited to same effect in *Fallon v. Dougherty*, 12 Cal. 105, but holding preliminary proof insufficient.

Supreme Court will Direct Entry of judgment below only where judge has found facts, or where there is special verdict, p. 149.

Approved in dissenting opinion in *State v. Thum*, 6 Idaho, 338, majority holding defect in complaint may be cured by allegation in answer.

10 Cal. 150-166. **ARGUELLO v. EDINGER.**

Statute of Frauds.—Part performance will take oral executory contract for sale of land out of statute, p. 157.

Cited to same effect in *Weber v. Marshall*, 19 Cal. 461—holding, however, no part performance shown, and specific performance denied, for delay; *Willis v. Wozencraft*, 22 Cal. 616, on point that vendee under such contract is entitled to possession of land; and on same point in *Blum v. Robertson*, 24 Cal. 141—holding, further, as to sufficiency of equitable defense in ejectment; *Owen v. Frink*, 24 Cal. 176, granting specific performance of such contract, and holding further as to sufficiency of transfer of rights of vendee; *King v. Meyer*, 35 Cal. 649, decreeing specific performance on equitable defense; *Calanchini v. Branstetter*, 84 Cal. 253, holding taking of possession and making of improvements sufficient to sustain specific performance, and further as to mutuality of contract; *Wallace v. Scoggins*, 17 Oreg. 480 (re-reported 18 Oreg. 505, 17 Am. St. Rep. 751), ruling similarly as to specific performance of lease.

Ejectment.—Equitable defense is allowable, but should be tried by court before trial of legal issues, p. 160.

Cited to same effect in *Estrada v. Murphy*, 19 Cal. 273, as to imposing trust on patentee of grant; *Weber v. Marshall*, 19 Cal. 457, holding erroneous the submission of legal and equitable issues to jury together; *Lestrade v. Barth*, 19 Cal. 671, as to defense of mistake, holding further as to sufficiency of equitable defense; *Clarke v. Huber*, 25 Cal. 598, on point that such defense (equitable estoppel) is waived by failure to plead it, and on same point in *Davis v. Davis*, 26 Cal. 39, 85 Am. Dec. 165; *Swasey v. Adair*, 88 Cal. 180, 181—holding, however, rule not to apply to certain defenses in action for replevin; *Suessenbach v. First Nat. Bank*, 5 Dak. Ter. 504, holding discharge of jury proper in ejectment where equitable defense (trust as to patent) found for defendant; concurring opinion in *Rose v. Treadway*, 4 Nev. 460, 97 Am. Dec. 549, holding equitable defense (trust) proper in ejectment, but not sufficiently pleaded here; *Quimby v. Conlan*, 104 U. S. 421, holding further as to nature of equitable defenses, and that verdict of jury thereon is merely advisory; *Bohall v. Dilla*, 114 U. S. 50, holding equitable defense (trust) not proven; *Crillin v. Ely*, 7 Sawy. 535, 13 Fed. Rep. 422, holding equitable defense maintainable in circuit court, and that if independent equitable suit is brought, ejectment suit will be enjoined till its determination. Distinguished, *Houser v. Austin*,

2 Idaho, 193, 194, holding within discretion of court to submit legal and equitable issues to jury together, in suit for injunction and damages.

Parol Evidence to convert deed to mortgage. Dissenting opinion, p. 160, holding evidence inadmissible, denied in *Pierce v. Robinson*, 13 Cal. 132.

10 Cal. 167-172. **DUNN v. TOZER.**

Nonjoinder of Parties is waived by failure to demur therefor when appearing on face of complaint, p. 170.

Cited to same effect in *Williams v. Southern Pac. etc. Co.*, 110 Cal. 461, holding objection improperly raised by motion for nonsuit; and note to *Alvarez v. Brannan*, 68 Am. Dec. 280, on general subject.

Abandonment of Homestead held not shown by facts; and declarations of husband in reference thereto do not bind wife, p. 171.

Cited to same effect in *Cox v. Harvey*, 1 Posey (Tex.) 274, holding no abandonment shown. Cited, also, in note to *Wyman v. Hurlburt*, 40 Am. Dec. 467, upon abandonment generally; *Taylor v. Hargous*, 60 Am. Dec. 608, on point that mere intention to abandon is not per se an abandonment; at p. 610, as to effect of removal from premises; and *Poole v. Gerrard*, 65 Am. Dec. 484, as to necessity of concurrence of spouses in abandonment.

Cloud on Title.—Injunction will lie to prevent execution sale which will create cloud, p. 172.

Cited to same effect in *Culver v. Rogers*, 28 Cal. 527, as to execution against homestead for deficiency judgment on mortgage of other property; *King v. Clay*, 34 Ark. 299, as to suit by minors to enjoin such sale of their lands on execution against their father; and *Tucker v. Kenniston*, 47 N. H. 271, 93 Am. Dec. 431, as to injunction against sale of equity of redemption in homestead.

10 Cal. 172-178. **BLEVEN v. FREER.**

Owner of property levied on as another's may be estopped from claiming the property by failing to assert his claim, p. 175.

Cited to same effect in *Dresbach v. Minnis*, 45 Cal. 224, holding owner estopped under similar facts; *Case v. Steele*, 34 Kan. 94, holding him estopped by giving forthcoming bond in defendant's behalf; *Cooper v. Davis etc. Co.*, 48 Neb. 424, and *Johnston v. Oliver*, 51 Ohio St. 18, under similar facts; *Plunkett v. Hanschka*, 14 S. Dak. 460, where execution levied on mortgaged property in possession of mortgagee with knowledge of mortgage, and no tender made of amount due, mortgagee not estopped to claim property to extent of mortgage lien. Distinguished, *Koeniger v. Creed*, 58 Ind. 558, holding obligors in delivery bond not estopped to show title in another than defendant, where bond

silent as to ownership; and *Perry v. Williams*, 39 Wis. 344, holding no estoppel by mere giving of receipt to sheriff, where claim asserted. Cited also in *Wood v. Blaney*, 107 Cal. 295, discussing elements of estoppel; *First Nat. Bank v. Commercial Assur. Co.*, 33 Or. 51; and note to *Lathrop v. Cook*, 31 Am. Dec. 64, and *Dewey v. Field*, 38 Am. Dec. 379, upon receptor's estoppel as to ownership of attached goods.

Grounds of Decision, if erroneous, constitute no ground for reversal if judgment correct, p. 178.

Cited to same effect in *Spencer v. Duncan*, 107 Cal. 426, as to erroneous conclusions of law.

10 Cal. 178-180. **WALTHAM v. CARSON.**

Jury Trial—Right to is waived by failure of defendant to appear at trial, p. 180.

Cited to same effect in *Doll v. Feller*, 16 Cal. 433.

10 Cal. 181-185. **PARTRIDGE v. MCKINNEY.**

Abandonment of mining property is not presumed from mere lapse of time, p. 183.

Cited to same effect in *Gassert v. Noyes*, 18 Mont. 219, as to nonuser of water—holding further evidence of intention admissible; and dissenting opinion in *Hewitt v. Storey*, 64 Fed. Rep. 533, main opinion holding abandonment shown under facts. Cited, also, in note to *Merced etc. Co. v. Fremont*, 68 Am. Dec. 274, as to right to mine on public lands; and *Bird v. Lisbros*, 70 Am. Dec. 620, as to abandonment.

Settler on Public Lands has good title, except as against government, p. 83.

Cited to same effect in *Gold Hill etc. Co. v. Ish*, 5 Oreg. 106, discussing rights of mineral claimant as against agricultural patentee.

Actual Possession is notice of claim of ownership, to intending purchaser, p. 183.

Cited to same effect in *Edwards v. Thompson*, 71 N. C. 180, where purchaser lived in another state; and holding further tenant's possession to be notice of his landlord's claim of title.

10 Cal. 185-187. **MOKELUMNE HILL ETC. CO. v. WOODBURY. S. C.**

10 Cal. 187, 188; 14 Cal. 265. See, also, *Woodbury v. Bowman*, 13 Cal. 635 (cited in *Sharon v. Hill*, 26 Fed. Rep. 391), action on injunction bond in main suit.

Undertaking on Appeal, though insufficient as stay bond, may be sufficient for perfection of appeal, p. 187.

Cited to same effect in *State v. California etc. Co.*, 13 Nev. 212, where undertaking was not to pay in gold coin, as required in stay bond.

Deterioration of Water.—Instructions held erroneous, p. 187.

Cited in note to *Bear River etc. Co. v. New York etc. Co.*, 68 Am. Dec. 331, on same subject.

10 Cal. 187-188. **MOKELUMNE HILL ETC. CO. v. WOODBURY.** S. C.
10 Cal. 185, 188; 14 Cal. 265; and *Woodbury v. Bowman*, 13 Cal. 635 (cited in *Sharon v. Hill*, 26 Fed. Rep. 391), action on injunction bond in main suit.

Appeal.—Order will be Affirmed where no briefs nor abstracts of facts are filed, p. 188.

Cited to same effect in *Faris v. Lampson*, 73 Cal. 191, where no briefs nor oral argument.

10 Cal. 188-189. **MOKELUMNE HILL ETC. CO. v. WOODBURY.** S. C.
10 Cal. 185, 187; 14 Cal. 265; and *Woodbury v. Bowman*, 13 Cal. 635 (cited in *Sharon v. Hill*, 26 Fed. Rep. 391), action on injunction bond in main suit.

Supersedeas Order is erroneous where clerk has refused to accept undertaking on appeal after exception to sufficiency, p. 188.

Cited in note to *Commonwealth v. Magee*, 49 Am. Dec. 516, on point that statutes as to stay of execution must be strictly followed.

10 Cal. 189-192. **PERKINS v. THORNBURGH.**

Nonsuit.—Error in denying, for want of evidence, is cured by introduction of such evidence by defendant, p. 190.

Cited to same effect in *Schlessinger v. Mallard*, 70 Cal. 334; *Higgins v. Ragdale*, 83 Cal. 221-2, as to use of uncertified copy of field notes; *Vaca Valley etc. R. R. v. Mansfield*, 84 Cal. 565, as to failure to prove defendant's adverse claim, in action to quiet title; *Alderson v. Marshall*, 7 Mont. 296, as to validity of judgment; and *Thompson v. Avery*, 11 Utah, 223, holding error waived by defendant's introduction of testimony.

Statutory Construction.—All effects intended as results of provision are presumed to be stated, p. 191.

Cited to same effect in *Lee etc. Co. v. Cram*, 63 Conn. 437, as to failure to record contracts for conditional sale of personalty; *Middle Creek etc. Co. v. Hendy*, 15 Mont. 575, as to priority under recording acts; and *Capital etc. Co. v. Hall*, 9 Oreg. 101, as to effect of verdict of sheriff's jury, distinguishing main case on that point under local statute.

Verdict of Sheriff's Jury on claim to property is not conclusive as to his liability to owner, p. 191.

Cited to same effect in *Sheldon v. Loomis*, 28 Cal. 123, holding verdict inadmissible in action by owner. Distinguished, *Capital etc. Co. v. Hall*, 9 Oreg. 101, under local statute, holding verdict a bar.

10 Cal. 192-193. KAITH v. ORTH.

Record on Appeal.—Judgment roll will be considered alone where no statement in record, p. 193.

Cited to same effect in *Graham v. Linehan*, 1 Idaho, 781, holding further as to constituents of judgment roll; in *Reinhart v. Company D*, 23 Nev. 372, as to appeal from order refusing to open default; and *Henderson v. Morris*, 5 Oreg. 27, on point that where surprise is claimed, the showing should appear in the record.

10 Cal. 193-195. TUOLUMNE ETC. CO. v. COLUMBIA ETC. CO.

Complaint.—Absence of prayer for relief does not make pleading insufficient, p. 195.

Cited to same effect in *Sannoner v. Jacobson*, 47 Ark. 44, suit on account for money advanced.

10 Cal. 195-196. PEOPLE v. ACOSTA.

Reversal of Verdict in criminal case will be granted where no fair and just trial had, p. 195.

Cited in *State v. Van Winkle*, 6 Nev. 352, as to power of supreme court to review sufficiency of evidence in criminal cases.

10 Cal. 197-211. HICKOX v. LOWE.

Absolute Deed will be construed as mortgage where consideration was pre-existing debt, not extinguished by the conveyance, p. 206.

Cited to same effect in *Montgomery v. Spect*, 55 Cal. 356, construing deed a mortgage, although no express promise to pay debt shown; dissenting opinion, *Garwood v. Wheaton*, 128 Cal. 406, majority holding deed not a mortgage under facts stated; *Townsend v. Peterson*, 12 Colo. 495, ruling similarly under facts, where contemporaneous agreement to recovery was made; *Kelley v. Leachman*, 2 Idaho, 1117, also ruling similarly as to like agreement, and holding, further, grantee's only remedy to be by foreclosure and not by ejectment; and *Lawrence v. Du Bois*, 16 W. Va. 462, holding further as to rights of transferee from such mortgagee. Distinguished, *People v. Irwin*, 14 Cal. 436, holding deed not a mortgage, under facts, although agreement to reconvey given. Cited, also, in *Millard v. Hathaway*, 27 Cal. 142, on point that agreement to repay moneys advanced for purchase of land constituted parties debtor and creditor.

Mortgagor is not liable for deficiency unless he makes personal obligation to pay debt, p. 210.

Cited to same effect in *Union etc. Co. v. Murphy's etc. Co.*, 23 Cal. 626—holding, however, four years' limitation to apply to foreclosure proceedings, where no personal obligation expressed.

10 Cal. 211-215. **FREMONT v. CRIPPEN**. 70 Am. Dec. 711.

Writ of Restitution will be awarded against one holding under defendant, although not party to action, p. 214.

Cited to same effect in *Sampson v. Ohleyer*, 22 Cal. 207, where tenant (defendant) transferred possession to his landlord (who had notice) pending ejectment suit. Distinguished, *Fogarty v. Sparks*, 22 Cal. 150, denying writ in ejectment as against person (and his successors) in possession at commencement of action, and not made a party. Cited, also, in note to *Laird v. Winters*, 86 Am. Dec. 622, as to sheriff's powers under this writ.

Mandamus will lie to compel sheriff to execute writ of restitution, where other remedies insufficient, p. 215.

Cited to same effect in *People v. Loucks*, 28 Cal. 71, as to issuance of writ of execution by clerk, holding remedy on bond inadequate; *Babcock v. Goodrich*, 47 Cal. 508, as to drawing of warrant by auditor, even when no money in fund; *Price v. Riverside etc. Co.*, 56 Cal. 434, as to furnishing of water by water company—holding, further, demand on defendant necessary prerequisite (but see *Bright v. Farmer's etc. Co.*, 3 Colo. App. 175, denying writ); *Raisch v. Board*, 81 Cal. 546, as to drawing of draft by board of education for supplies purchased; dissenting opinion in *Willard v. Superior Court*, 82 Cal. 470, as to order by court for attendance at trial, of confined prisoner; main opinion denying writ because such order discretionary; *Sessions v. Boykin*, 78 Ala. 330, as to payment by county treasurer out of specific fund; *Bassett v. Atwater*, 65 Conn. 363, as to calling of special meeting by corporate officers, where stockholders otherwise powerless; *State v. Kamman*, 151 Ind. 411, holding right to writ not lost because of existence of penalty for official inaction; *Metz v. Schweitzer*, 8 Utah, 188, sustaining issuance of writ to compel restoration of personalty under facts stated; cf. *State v. Cone*, 40 Fla. 412, denying writ to compel execution sale; in *Lake Erie etc. Co. v. State*, 139 Ind. 161, as to removal of obstruction from ditch by railroad company, although right of criminal prosecution existed, and holding, further, as to necessity for demand; *Chumasero v. Potts*, 2 Mont. 282, as to canvass of votes by governor, and holding, further, no right to jury trial; *State v. Wright*, 10 Nev. 175, as to calling meeting of stockholders for annual election, and holding, further, as to necessary status of relator; *Coos Bay etc. Co. v. Wieder*, 26 Oreg. 463, 465, as to return to claimant of goods irregularly seized by sheriff. Cited, also, in *Cal. Pac. etc. Co. v. Central Pac. etc. Co.*, 47 Cal. 530, applying rule of inadequacy to application for certiorari; and *People v. Spiers*, 4 Utah, 397, to application for prohibition. Cited, also, in note to *Flournoy v. Jeffersonville*, 79 Am. Dec. 475, upon acts of quasi-judicial officers; *Louisville etc. Co. v. State*, 87 Am. Dec. 362, as to issuance of mandamus; and *Dane v. Derby*, 89 Am. Dec. 731, discussing adequacy of legal remedy; and 734, as to mandamus against sheriff.

- 10 Cal. 216-217. **CAHOON v. LEVY**. S. C. 4 Cal. 243; 5 Cal. 294; and 6 Cal. 295.

Stipulation submitting appeal on specified points is waiver of all other assignments of error, p. 216.

Cited to same effect in *Hammontree v. Huber*, 39 Mo. App. 328, applying rule to stipulation defining and limiting issues of fact to be tried.

- 10 Cal. 217-224. **MARIUS v. BICKNELL**. S. C. 7 Cal. 261, 68 Am. Dec. 257, sub nom. **MAERIS v. BICKNELL**.

Misjoinder of Actions is waived by failure to demur therefor, p. 224.

Cited to same effect in *Wenner v. Smith*, 4 Utah, 245-6.

Costs may be Awarded in actions for diversion of water, though judgment less than \$200, p. 224.

Cited in note to *Hunt v. Morris*, 22 Am. Dec. 484, as to general subject.

Water is Appropriated for mining purposes when ditch used both as drain and channel to convey water for such purposes, p. 224.

Cited in note on general subject to *Nevada etc. Co. v. Bennett*, 60 Am. St. Rep. 802.

- 10 Cal. 224-226. **ELMORE v. ELMORE**.

Cited in dissenting opinion in *Sharon v. Sharon*, 67 Cal. 213, as instance wherein appeal in divorce suit should be allowable.

- 10 Cal. 227-230. **M'KENTY v. GLADWIN**.

Objection to right to intervene is waived if not made at the time, p. 228.

Cited to same effect in *People v. Reis*, 76 Cal. 273, where point that complaint in intervention was not sufficient, was first raised in supreme court; and *Newman v. Bullock*, 23 Colo. 224, ruling similarly as to change of issues by intervenor in original action, without objection. Cited, also, in note to *Brown v. Saul*, 16 Am. Dec. 181, on waiver of objection to intervention.

Fraud Upon Creditors.—Antedating note so as to increase interest is fraudulent where no consideration for such interest, and payee knowingly intended result, p. 228.

Cited to same effect in *Scales v. Scott*, 13 Cal. 79, under similar facts, holding whole note void, and setting aside judgment by confession thereon; *Swinford v. Rogers*, 23 Cal. 236, upon point that where part of transaction (sale) is void as to creditors, the whole becomes so; *Wilcoxson v. Burton*, 27 Cal. 235, 87 Am. Dec. 71, holding judgment by confession void, when founded on note fraudulently made for sum

greater than real debt. Distinguished in *Gladwin v. Garrison*, 13 Cal. 334, sustaining note by principal to surety to indemnify latter, when given in good faith; *Tully v. Harloe*, 35 Cal. 308, 95 Am. Dec. 105, sustaining chattel mortgage given in good faith for present debt and future advances, although for sum greater than that then due; and *Mendes v. Freiters*, 16 Nev. 397, sustaining, to extent of amount due, attachment for excessive amount, levied in good faith.

10 Cal. 230-233. **M'CORMICK v. BAILEY.**

Denial on information and belief held insufficient, p. 233.

Cited in note to *Humphreys v. McCall*, 70 Am. Dec. 625, 632, on general subject.

10 Cal. 233-238. **WEAVER v. CONGER.** *S. C. Conger v. Weaver*, 6 Cal. 548, 65 Am. Dec. 528.

Demurrer to whole of complaint will be overruled when any count is sufficient, p. 237.

Cited to same effect in *Parrott v. Barney, Deady*, 407, 18 Fed. Cas. 1250; *Jones v. Iverson*, 131 Cal. 104, holding general demurrer to ejectment complaint improperly sustained.

Misjoinder of Causes of Action.—Complaint for damages for diversion of water and for injunction does not show misjoinder, p. 237.

Cited to same effect in *Pfister v. Dascey*, 65 Cal. 405, holding no misjoinder in complaint to set aside fraudulent conveyances of land and for possession; and note to *Merced etc. Co. v. Fremont*, 68 Am. Dec. 274, as to protection of rights by injunction.

Plea in Abatement based on another action pending is bad, where nothing done in that action beyond filing complaint, p. 239.

Cited to same effect in *Primm v. Gray*, 10 Cal. 523, where process not issued; and note to *Smith v. Lathrop*, 84 Am. Dec. 456, on general subject.

Water Rights under prior appropriation will extend to sufficient use for preservation of flume, p. 238.

Cited in note to *Conger v. Weaver*, 65 Am. Dec. 533, 534, as to mining and water rights of settlers on public lands; and *Merced etc. Co. v. Fremont*, 68 Am. Dec. 274, as to protection of water rights by injunction.

10 Cal. 239-246. **FOGARTY v. FINLAY.** 70 Am. Dec. 714.

Notary Public is liable on official bond for defective acknowledgment, invalidating record as notice, p. 244.

Cited in *Bank v. Oberhaus*, 125 Cal. 324, on point that notary is a ministerial and not a judicial officer; *People v. Bartels*, 138 Ill. 330,

336, applying rule to probate clerk who makes false certificate as to mortgagor's identity; *Curtiss v. Colby*, 39 Mich. 458, as to knowingly certifying acknowledgment of grantor who has not appeared, and holding, further, liability not to depend on act which has reduced damages. Disapproved, *Henderson v. Smith*, 26 W. Va. 838, 53 Am. Rep. 147, holding notary not liable for making defective acknowledgment, when not done maliciously or corruptly, the act being considered judicial only. Cited, also, in note to *Livingston v. Kittelle*, 41 Am. Dec. 175, as to identity of party acknowledging.

Certificate of Notary is *prima facie* evidence of its allegations, p. 245.

Cited in note to *Tate v. Sullivan*, 96 Am. Dec. 607, and *Fletcher v. Bank*, 54 Am. St. Rep. 295, as to protests.

Object of Acknowledgment is to entitle deed to record and to admission of evidence without further proof, p. 245.

Cited to same effect in *Gordon v. San Diego*, 108 Cal. 267, holding passing of title not affected by nonacknowledgment except as to deed of married woman. Cited, also, in note to *Dodge v. Hollinshead*, 80 Am. Dec. 441, and *Kern v. Von Phul*, 82 Am. Dec. 108, as to effect of certificate as evidence, and its rebuttal; and *Tully v. Davis*, 83 Am. Dec. 180, discussing defects in acknowledgments.

Damages—Notary.—Where mortgage is lost by his negligence, his liability is for amount of debt secured, p. 246.

Cited in *Patterson v. Plummer*, 10 N. Dak. 101, noted under *Survey v. Wells*, 5 Cal. 124.

10 Cal. 249-258. **CONANT v. CONANT.** 70 Am. Dec. 717.

Appellate Jurisdiction of supreme court considered and held to apply to divorce suits, p. 253.

Cited in *Dumphy v. Guindon*, 13 Cal. 30, denying jurisdiction when demand, exclusive of costs, was less than statutory amount, and defining "matter in dispute"; *Perry v. Ames*, 26 Cal. 386, on point that jurisdiction of district court extended to mandamus proceedings; *People v. Rosborough*, 29 Cal. 418, affirming appellate jurisdiction in insolvency cases; *Knowles v. Yeates*, 31 Cal. 84, 86, 89 (cited in *Houghton's Appeal*, 42 Cal. 64), ruling similarly as to contested election suits; dissenting opinion in *Houghton's Appeal*, 42 Cal. 65, 67, 69, main opinion denying jurisdiction in proceedings to change street grades in San Francisco; *Sharon v. Sharon*, 67 Cal. 187, 188, following main case as to divorce suits, and distinguishing it in dissenting opinion, pp. 213, 214; and dissenting opinion in *Cline v. Harmon*, 2 Wash. 161, main opinion denying appeal from order of arrest in civil actions. Commented on in *Courtwright v. Bear River etc. Co.*, 30 Cal. 579, as to jurisdiction of district court in divorce suits, affirming its jurisdiction to abate or prevent nuisance.

Adultery.—Pleading must be reasonably certain as to time and place, p. 254.

Cited in note to *Christianberry v. Christianberry*, 25 Am. Dec. 99, and to *Marsh v. Marsh*, 84 Am. Dec. 168, 169, on general subject.

Divorce a vinculo will not be granted where plaintiff has been guilty of acts entitling defendant to divorce, p. 254.

Cited to same effect in *Alexander v. Alexander*, 140 Ind. 559, arresting judgment when findings were in favor of each party upon their respective petitions for cruelty; *Wilson v. Wilson*, 40 Ia. 232, on point that desertion for less than statutory period is not good defense to action based on adultery; *Handy v. Handy*, 124 Mass. 395, where wife committed adultery after husband (plaintiff) was sentenced to imprisonment in state prison; *Church v. Church*, 16 R. I. 668, and *Pease v. Pease*, 72 Wis. 139, as to cruelty charged as recrimination to adultery; and *Redington v. Redington*, 2 Colo. App. 13, where adultery alleged by way of cross-complaint to action based on desertion and nonsupport; and *Wass v. Wass*, 41 W. Va. 130, as to cross-charges of desertion, granting alimony to wife, however, in her suit. Cited, also, in note to *Pierce v. Pierce*, 15 Am. Dec. 211, 214, upon plaintiff's misconduct as defense; note to *Ingersoll v. Ingersoll*, 88 Am. Dec. 501, defining "desertion."

Cited in *Sweasey v. Sweasey*, 126 Cal. 128, construing Civil Code, sections 136, 137; *Redington v. Redington*, 2 Colo. App. 13, dismissing cross-actions.

General citation: *McCannon v. McCannon*, 73 Vt. 148.

10 Cal. 258-265. SANDS v. PFEIFFER.

Fixtures, as between parties to mortgage, include articles permanently affixed and not removable without injury to premises, p. 264.

Cited to same effect in *Union etc. Co. v. Murphy's etc. Co.*, 22 Cal. 631, holding mortgage of flume to cover all improvements then or thereafter put on line of work; *Tibbetts v. Moore*, 23 Cal. 217, as to boiler and engine in quartz mill, holding mortgage subordinate, however, to chattel mortgage of the personalty before its annexation; *Fratt v. Whittier*, 58 Cal. 131, 41 Am. Rep. 255, as to gas fixtures, range, etc., applying rule to case of deed; *Dutro v. Kennedy*, 9 Mont. 107, as to machinery affixed after mortgage, holding further, as to mortgagee's remedy for severance; and *Freeman v. Lynch*, 8 Neb. 196, applying rule to removal of house and its sale as personalty for taxes. Distinguished, *Pennybecker v. McDougal*, 48 Cal. 164, holding cabin erected by settler on public lands, not a fixture; *Canning v. Owen*, 22 R. I. 628, 84 Am. St. Rep. 862, holding electric light fixtures in hotel to pass under mortgage. Cited, also, in note to *Winslow v. Merchants' etc. Co.*, 38 Am. Dec. 376, on general subject.

Foreclosure.—Sheriff's deed relates back to date of mortgage, p. 265.
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Cited to same effect in *Horn v. Jones*, 28 Cal. 203, upon question of conflict with mechanic's lien. Distinguished, *Hill v. Gwin*, 51 Cal. 50, upon point that mortgagor may sue for severance of fixtures made before entry of decree of foreclosure. Cited, also, in note to *Jackson v. Ramsay*, 15 Am. Dec. 253, on general subject.

Replevin will lie for fixtures wrongfully severed, p. 265.

Cited to same effect in *Grewell v. Walden*, 23 Cal. 170, applying rule to wood wrongfully cut; in *McNally v. Connolly*, 70 Cal. 6, as to severance and removal of fixtures, holding engine, etc., for flouring mill to be such, as between lessee, who erected them, and his attaching creditors; *Anderson v. Hapler*, 34 Ill. 440, 85 Am. Dec. 321, action by landlord against tenant (not asserting adverse claim) for wood cut from land; *Central etc. Co. v. Fritz*, 20 Kan. 433, 27 Am. Rep. 178, as to dwellinghouse removed by assignee of vendee under executory contract of sale, and holding, further, that when house once became personalty by severance, wrongdoer could not transform it to realty by affixing it to his land; *Whitney v. Huntington*, 34 Minn. 462, 463, 464, 57 Am. Rep. 71, 72, applying the rule to trover by execution purchaser of land, for wood cut therefrom; *Union etc. Co. v. Tillery*, 152 Mo. 425, 75 Am. St. Rep. 482, quoting *Curry v. Schmidt*, 54 Mo. 517, holding, however, that fixtures did not pass to plaintiff under facts stated. Cited, also, in note to *Mooers v. Wait*, 20 Am. Dec. 670, as to landowner's right to timber.

10 Cal. 265-267. LUNING v. BRADY.

Married Woman is not bound by her note and mortgage, executed jointly with husband, p. 267.

Cited to same effect in *Vantilburg v. Black*, 3 Mont. 464—holding, however, judgment against her thereon erroneous but not void when coverture not pleaded as defense.

Discharge in Insolvency of Mortgagor merely protects him from deficiency judgment, p. 267.

Cited in *Prentis v. Estate*, 118 Mich. 263, holding such judgment invalid.

10 Cal. 267-268. KILER v. KIMBAL.

General Objection to testimony is insufficient, and will be disregarded, p. 268.

Cited in *Kyle v. Craig*, 125 Cal. 112, on point that error in admission of evidence is not reversible error, unless material rights of applicant affected; *Snowden v. Coal Co.*, 16 Utah, 372, quoting *Culmer v. Clift*, 14 Utah, 292; *Martin v. Travers*, 12 Cal. 245, where no grounds stated; *Payne v. Treadwell*, 16 Cal. 248, under like facts; *Owen v. Frink*, 24 Cal. 177, holding "irrelevancy" an insufficient objection; *Keeran v. Griffith*, 34 Cal. 585, as to introduction of patent without preliminary

proof; *Fabian v. Callahan*, 56 Cal. 161, as to competency of certificate of acknowledgment; *Yik Hon v. Spring Valley W. W.*, 65 Cal. 620, as to question of variance when no objection made nor motion to strike out; *Rush v. French*, 1 Ariz. Ter. 125, where objection was that testimony "irrelevant, inadmissible, or incompetent"; *Hazard v. Cole*, 1 Idaho, 291, on point that error must affirmatively appear; *Keys v. Grannis*, 3 Nev. 556, as to objection to writ of attachment, that the complaint did not show justice's authority to issue it; *Sharon v. Minnock*, 6 Nev. 383, holding further that only grounds of objection stated at trial will be considered on appeal; *State v. Jones*, 7 Nev. 418, as to objection that deposition was "incompetent evidence"; *Tornderup v. Hauser*, 8 S. Dak. 380, as to evidence introduced without proper foundation; and *Culmer v. Clift*, 14 Utah, 292. Distinguished, where evidence entirely incompetent on any ground, in *Nightingale v. Scannell*, 18 Cal. 324; and in *People v. Gordan*, 99 Cal. 234; and as to objections to weight of evidence, in *Roberts v. Chan Tin Pen*, 23 Cal. 265.

Nonsuit is properly denied where no grounds of motion stated, p. 268.

ground that "plaintiffs had not introduced any testimony tending to

Cited to same effect in *McGarritty v. Byington*, 12 Cal. 429, affirming denial of motion where record did not show grounds; *People v. Banvard*, 27 Cal. 474; *Coffey v. Greenfield*, 62 Cal. 609, as to motion on sustain the action"; *Loring v. Stuart*, 79 Cal. 201, where record did not show grounds; *Quimby v. Boyd*, 8 Colo. 197, as to grounds similar to *Coffey v. Greenfield*, *supra*, holding, further, objections to insufficiency of pleadings waived if not included in grounds of motion; *Mattoon v. Fremont etc. Co.*, 6 S. Dak. 198, applying rule to motion to direct verdict, on ground that "evidence does not preponderate for plaintiff"; *Brown v. Warren*, 16 Nev. 239—holding, further, that no ground will be considered on appeal except those stated at trial; and *State v. Tamler*, 19 Oreg. 533, as to application to direct acquittal in criminal case; *Lewis v. Mining Co.*, 22 Utah, 53, holding motion improperly granted when grounds stated, generally. Distinguished, holding general grounds sufficient when plaintiff's case is incurable, *Daley v. Russ*, 86 Cal. 117. Cited, also, in note to *French v. Smith*, 24 Am. Dec. 624, on general subject.

Mining Rules.—Parol evidence of is admissible, though in writing, where no specific objection made, p. 268.

Cited to same effect in *Colman v. Clements*, 23 Cal. 248, holding no error, however, in submitting both oral and written evidence to jury.

10 Cal. 269-278. **DANA v. STANFORDS.**

Insolvent Debtor may give preference to particular creditor or creditors, either by absolute deed or mortgage, p. 274.

Cited in *Heath v. Wilson*, 139 Cal. 366, sustaining bona fide transfer

to trustees for benefit of creditors; *Randall v. Buffington*, 10 Cal. 494, as to payment of debt secured by mortgage on homestead; *Wellington v. Sedgwick*, 12 Cal. 475, where debtors sold goods to X. who was to pay part of purchase price to their creditors, holding transaction not an assignment of the goods; *Gladwin v. Garrison*, 13 Cal. 332, sustaining note given by insolvents to indemnify their surety; *Wheaton v. Neville*, 19 Cal. 46, as to conveyance after attachment although parties knew its effect as to attaching creditor; *Walden v. Murdock*, 23 Cal. 550, 83 Am. Dec. 137, holding, however, that conveyance must be bona fide; *Lawrence v. Neff*, 41 Cal. 569, 570, as to transfer of property to committee of creditors, reserving right to redeem; *Wood v. Franks*, 67 Cal. 34, as to note and chattel mortgage to one creditor, on their agreement to assume and pay debts to other specified creditors; in *Ross v. Sedgwick*, 69 Cal. 250, as to transfer of furniture made after judgment in unlawful detainer; *Saunderson v. Broadwell*, 82 Cal. 133, as to deed made to cancel pre-existing debt and on grantee's agreement to pay another creditor; in *Dyer v. Bradley*, 89 Cal. 562, where payment of two creditors was not fraudulent in fact, holding, further, preference not attackable as violating Insolvent Act, unless made within period therein specified; *Priest v. Brown*, 100 Cal. 631, where conveyance made to one not a creditor, upon long credit, for notes intended to be transferred to creditors by grantor, which was not done as to some of creditors; dissenting opinion in *Bonns v. Carter*, 22 Neb. 507, main opinion holding mortgage to third person void as an assignment for creditors; *Ellis v. Valentine*, 65 Tex. 549, where sale made at fair price and under purchaser's agreement to apply purchase money to paying other creditors; *Watterman v. Silberberg*, 67 Tex. 104, as to mortgage to secure preferences, and holding, further, as to effect of attachment on property mortgaged; *Lucas v. Clafflin*, 76 Va. 277, as to deed, when not made with fraudulent intent; and *Gage v. Cheesebro*, 49 Wis. 491, as to mortgage of whole of debtor's property. Distinguished, *Sabichi v. Chase*, 108 Cal. 87, holding as assignment and void, a conveyance to trustee for benefit of specified creditors, with provision of repayment of surplus to debtor; and in *Marshall v. Livingston, etc. Bk.*, 11 Mont. 362, holding as an assignment an instrument in form of mortgage of personalty. Cited, also, in note to *Crawford v. Taylor*, 26 Am. Dec. 584, 585; and to *Covachovan v. Hart*, 60 Am. Dec. 62, on general subject.

10 Cal. 273-281. **FOSTER v. COLEMAN.**

Municipal Corporations.—Supervisors cannot create debt or liability for any purpose except as provided by law. Rule applied to warrants issued at a discount, p. 281.

Cited to same effect in *Sutro v. Pettit*, 74 Cal. 337, 5 Am. St. Rep. 445, as to refunding of overissued bonds, even when held by bona fide purchasers; in *Gibson v. Board*, 80 Cal. 366, on point that taxpayer

can enjoin issue of bonds where supervisors had falsely declared bond election carried; *Winn v. Shaw*, 87 Cal. 637, on point that taxpayer may maintain injunction to prevent auditor from drawing illegal warrant; *Modoc County v. Spencer*, 103 Cal. 501, denying right to employ special counsel in criminal cases, and holding further that payment of warrant therefor may be enjoined in suit by county; *Pugh v. Little Rock*, 35 Ark. 83, holding void an ordinance providing for issuance of warrants at discount; *Lebcher v. Commissioners*, 9 Mont. 320, ruling similarly as to contract for care of "poor" under local statute; *Erskine v. Steele Co.*, 4 N. Dak. 346, as to warrant upon contract for transcribing records, and for discount thereof, even when held by bona fide purchasers; *Security Co. v. Baker County*, 33 Or. 352, holding action invalid under local statutes; *State v. Wilson*, 71 Tex. 301, on point that supervisors cannot issue warrants in excess of face value of debt, because value of warrants is depreciated, and, further, that state cannot be held liable for loss from discounting warrants, even on assurance of governor; *Arnott v. Spokane*, 6 Wash. St. 448, denying right of city to discount its warrants, and that no estoppel exists because part of discount is paid; and *Shirk v. Pulaski*, 4 Dill. 213, 21 Fed. Cas. 1324, on point that warrants issued in excess of amount due, by way of discount, are void as to excess. Distinguished, *Lewis v. Colgan*, 115 Cal. 537, affirming implied right of state board of examiners to employ expert.

10 Cal. 282-292. **AUD v. MAGRUDER.**

One Signing Note to Pay Absolutely, though he signs as "surety," is not guarantor, p. 284.

Approved in *Randall v. Simmons*, 40 Or. 558, where complaint in action on note alleged joint and several execution for value by makers, and answer tacitly admitted receipt for value, but alleged affirmatively that plaintiff, knowing they were sureties, relieved them from liability by unauthorized extension of time to principal, court cannot strike out latter defense.

Promissory Note.—Liability of one signing as maker cannot be varied by parol proof that he was surety, p. 289.

Cited to same effect in *Shriver v. Lovejoy*, 32 Cal. 577, as to joint and several note; in *Damon v. Pardow*, 34 Cal. 281, as to joint note, where consideration received by principal; *Southern Cal. etc. Bank v. Wyatt*, 87 Cal. 618, applying rule to one signing joint note as accommodation maker, though appending "surety" thereto; *California etc. Bank v. Ginty*, 108 Cal. 151, although creditor knew of fact of suretyship; and *Chafoin v. Rich*, 77 Cal. 477, on point that such surety is not entitled to notice of demand and nonpayment. Distinguished in *Smith v. Freyler*, 4 Mont. 492, holding fact of suretyship may be shown to prove discharge by payee who had knowledge thereof.

Stare Decisis does not apply when decision is manifest change of existing law, p. 292.

Cited in *Kimball v. City*, 19 Utah, 397, noted under *McFarland v. Pico*, 8 Cal. 626; note to *Truxton v. Fait etc. Co.*, 73 Am. St. Rep. 104, on general subject.

10 Cal. 292-296. **HICKMAN v. O'NEAL.**

Execution Sale will be enjoined where owner's property is to be sold for another's debt, p. 294.

Cited to same effect in *Pixley v. Huggins*, 15 Cal. 133, where sale would cast cloud on title; *Bishop v. Moorman*, 98 Ind. 5, 49 Am. Rep. 735, holding injunction proper where owner not party to action when judgment against others, and that execution plaintiff is proper, if not necessary, party to injunction suit (but see *Archbishop v. Shipman*, 69 Cal. 591, denying injunction against foreclosure suit, by owner in possession who was not party to judgment); and *Linnell v. Battey*, 17 R. I. 243, sustaining bill in equity to remove cloud cast by levy and to enjoin sale.

Superior Court of San Francisco.—Process may be sent outside of county, p. 294.

Cited to same effect in *Chipman v. Bowman*, 14 Cal. 158, as to summons; *McCauley v. Fulton*, 44 Cal. 360, on same point—holding, further, that said court could acquire jurisdiction by publication. Cited also as to jurisdiction of that court generally, in *Courtwright v. Bear River etc. Co.*, 30 Cal. 579; *Vassault v. Austin*, 36 Cal. 696, and *Ex parte Stratman*, 39 Cal. 519. See, also, *Kenyon v. Welty*, 20 Cal. 640, where decision involved a point of mistake of law. Cited, also, in *Grand Rapids etc. Co. v. Gray*, 38 Mich. 467, on point that jurisdictional facts must be pleaded in inferior courts, but objection waived by general appearance and trial; Cited in *Chapman v. Reddick*, 41 Fla. 135, construing local statutes as to summons. *Mellor v. Gilmore*, 33 La. An. 1405, defining "jurisdiction" of district court.

10 Cal. 296-298. **MOSS v. WARNER.**

Mortgage of Homestead—Foreclosure.—Wife is necessary defendant, p. 297.

Cited to same effect in *Mabury v. Ruiz*, 58 Cal. 15, sustaining her right to intervene if omitted, and holding, further, as to abandonment.

Foreclosure Suits.—Omitted parties may intervene or be allowed to file separate answer, p. 297.

Cited to same effect in *Horn v. Volcano etc. Co.*, 13 Cal. 70, 73 Am. Dec. 571 (cited in note to *Brown v. Saul*, 16 Am. Dec. 184), where judgment creditors intervened, holding further amendment to complaint

also allowable. Cited, also, in note to *Brown v. Saul*, 16 Am. Dec. 182, upon subject of intervention.

Homestead.—Residence of claimant with family is sufficient to impress homestead character which is not lost by temporary absence, p. 297.

Cited to same effect in *Brooks v. Hyde*, 37 Cal. 372—holding, further, that homestead may be acquired as to creditors of claimant, though title to land is in another; *Levins v. Rovegno*, 71 Cal. 279—holding, further, as to right of surviving child on wife's death; *Tipton v. Martin*, 71 Cal. 327, holding no abandonment created under act of 1860 except by written declaration; *Euper v. Alkire*, 37 Ark. 285, and *Hixon v. George*, 18 Kan. 261, on point that temporary removal is no abandonment, when done with intent to return; and on same point in *Showers v. Robinson*, 43 Mich. 513—holding, further, that abandonment by widow does not operate as to minor children who afterwards return; *Austin v. Stanley*, 46 N. H. 52, defining "homestead"; and *Locke v. Rowell*, 47 N. H. 51, holding leasing of property for yearly terms, no abandonment. Cited, also, in *Puget Sound etc. Co. v. Jeffs*, 11 Wash. 469, 48 Am. St. Rep. 886, on point that statute as to exemption of personality should be liberally construed. Cited, also, in note to *Rockwell v. Hubbell's Adm.*, 45 Am. Dec. 252, upon liberal construction of homestead laws; and *Taylor v. Hargous*, 60 Am. Dec. 609, 613, as to effect of temporary absence, or removal, as abandonment of homestead.

Mortgage on Homestead, not executed by wife, is void to extent of homestead exemption, p. 298.

Cited to same effect in *Booth v. Hoskins*, 75 Cal. 276—holding, however, that husband cannot quiet his title as against such mortgage when in form of deed absolute, on ground that right to foreclosure is barred, unless on repayment of loan; and in *Bank v. Lyons*, 52 Miss. 184, holding mortgage valid for excess.

10 Cal. 298-299. **SQUIRES v. FOORMAN.**

Appeal.—Assignment of errors held insufficient and judgment affirmed, p. 298.

Cited in *Hutton v. Reed*, 25 Cal. 483, 484, 487, on point that appeal from judgment cannot be dismissed for want of specification, when judgment roll furnished. Distinguished, *Rose v. Richmond etc. Co.*, 17 Nev. 51, holding specification sufficient.

10 Cal. 299-300. **ROLLINS v. FORBES.**

Demurrer will not lie to prayer of complaint, p. 300.

Cited to same effect in *De Leon v. Higuera*, 15 Cal. 494, as to prayer to hold defendant as trustee; *Althof v. Conheim*, 38 Cal. 234, 99 Am. Dec. 364, as to prayer that debt be decreed lien; *Bailey v. Dale*, 71 Cal. 37, as to prayer for exemplary damages for maintenance of nuisance.

Relief under Reformed Procedure may be granted in any form authorized by facts, even if not specifically prayed for, p. 300.

Cited in *Angus v. Craven*, 132 Cal. 698, as to relief and trial by jury in action to quiet title; *Booker v. Aitken*, 140 Cal. 473, noted under *Truebody v. Jackson*, 2 Cal. 269; *Houghtaling v. Ellis*, 1 Ariz. Ter. 387, holding further as to equitable defenses to actions at law.

Foreclosure.—Personal judgment may be rendered for amount due, p. 300.

Cited to same effect in *Rowe v. Table Mtn. etc. Co.*, 10 Cal. 444; in *Rowland v. Leiby*, 14 Cal. 157, holding, also, plaintiff entitled to judgment in old chancery form, if desired; in *Chapin v. Broder*, 16 Cal. 422, and in *Cormerais v. Genella*, 22 Cal. 127—holding, further, as to effect of such judgment as lien; *Hobbs v. Duff*, 23 Cal. 623, holding such judgment available as setoff; *Englund v. Lewis*, 25 Cal. 349, following *Rowland v. Leiby*, supra, as to choice of remedies, and *Chapin v. Broder*, supra, as to lien of judgment; and *Creighton v. Hershfield*, 2 Mont. 389, as to liability on undertaking for deficiency judgment. Cited, also, in *Davis v. Alvord*, 94 U. S. 546, on point that prayer for personal judgment in mechanic's lien case does not convert action into one at law.

10 Cal. 300-301. **SKILLMAN v. RILEY.**

Statement on Appeal.—Draft and amendments should be incorporated into one paper, p. 300.

Cited to same effect in *Baldwin v. Ferre*, 23 Cal. 462, where papers were separate and judge certified allowance of amendments at bottom of statement; *Kimball v. Semple*, 31 Cal. 662, applying rule to transcript on appeal; and *Fritsch v. Stampfli*, 117 Cal. 442, applying rule to bill of exceptions on new trial and affirming therefor judgment attacked for insufficiency of evidence.

10 Cal. 301. **PEOPLE v. AH LOY.**

Verdict in criminal case will not be set aside unless for absence of evidence against prisoner or decided preponderance in his favor, p. 301.

Cited to same effect in *People v. Brown*, 27 Cal. 501, where reversal asked because verdict against evidence; *People v. Durrant*, 116 Cal. 201, as to question of credibility of witnesses; *State v. Van Winkle*, 6 Nev. 351, discussing jurisdiction of supreme court to review evidence in criminal case; *Territory v. Edie*, 2 N. Mex. 565, denying reversal where evidence conflicting; *United States v. Harris*, 5 Utah, 622, holding evidence sufficient to show polygamy; and *Phillips v. Territory*, 1 Wyo. 84, ruling similarly as to trial for murder.

10 Cal. 301-302. WEDDLE v. STARK.

Order Granting New Trial, where evidence conflicting, is not reversible except for abuse of discretion, p. 302.

Cited to same effect in *Hall v. Bark*, 33 Cal. 525, as to granting of motion, holding further that error must affirmatively appear, to warrant reversal; *People v. Lum Yit*, 83 Cal. 132, ruling similarly—holding, further, order will be affirmed if sustainable on any of specified grounds of motion; *Bates v. Howard*, 105 Cal. 178, discussing reasons for rule, and holding rule of affirmance on conflict of testimony, not to apply to trial court; *Reno Mill Co. v. Westerfield*, 26 Nev. 339, where trial court on appeal from order will not pass on matters alleged in trial court considered only one question in ordering new trial, supreme court on appeal from order will not pass on matters alleged in motion but not considered by trial court; *Chavin v. Valiton*, 7 Mont. 585; and *Newton v. Brown*, 2 Utah, 130.

10 Cal. 302-303. TREAT v. LIDDELL.

Lease is determined by failure to pay rent, p. 303.

Cited to same effect in *Ralph v. Lomer*, 3 Wash. 407, discussing effect of notice to quit, and holding subsequent tender ineffectual to restore right of possession, even if notice informal.

10 Cal. 303-304. GLAZER v. CLIFT.

New Matter must be specially pleaded. Applying rule to sheriff's justification of seizure, p. 304.

Cited to same effect in *Coles v. Soulsby*, 21 Cal. 50, as to accord and satisfaction, and as overruling 2 Cal. 494 and 501; *Moss v. Shear*, 20 Cal. 472, on point that transfer of title by plaintiff or title acquired by defendant, pending ejectment suit, must be specially pleaded by supplemental answer; *Michalitske v. Wells, Fargo & Co.*, 118 Cal. 690, as to contract limiting carrier's liability, in action against it; in *Coos Bay etc. Co. v. Siglin*, 26 Oreg. 392, as to plea of fraudulent conveyance, in action for replevin; but see *Bailey v. Swain*, 45 O. St. 663, distinguishing main case under local statute; *Fisher v. Kelly*, 30 Oreg. 8, as to right of sheriff to justify seizure of goods claimed by stranger, and to attack claimant's title; *Bruce v. Foley*, 18 Wash. 99, as to defense of *res judicata*, but holding averments cured by evidence offered; note to *Piercy v. Sabin*, 70 Am. Dec. 698, on general subject.

10 Cal. 305-309. SCARBOROUGH v. DUGAN.

Statute should not be construed to operate retrospectively; applying rule to statute of limitations, p. 308.

Cited to same effect in *Houston v. McKenna*, 22 Cal. 554, as to street improvement statute; *Vrooman v. Li Po Tai*, 113 Cal. 305, as to statute

directing time for service of summons; and *Pitman v. Bump*, 5 Oreg. 20, as to statute of limitations.

Statute Impairing Contract is void, though acting on remedy alone, where effect is to deny means of enforcement, p. 308.

Cited to same effect in *Teralta etc. Co. v. Shaffer*, 116 Cal. 523, 58 Am. St. Rep. 196, as to retroactive statute altering conditions of redemption of land sold for taxes. Distinguished in *Mill etc. Co. v. Olmstead*, 85 Cal. 85, sustaining amendment shortening time for filing mechanic's lien, where adequate and available remedy is provided. Cited, also, in *Lawson v. Jeffries*, 47 Miss. 705, 706, 12 Am. Rep. 354, among collection of cases on vested rights under judgment, and holding void ordinance of constitutional convention granting new trials in certain cases.

Limitations.—Statute relative to foreign judgments construed, p. 308.

Cited in *Higgins v. Graham*, 143 Cal. 133, noted under *Patten v. Ray*, 4 Cal. 287.

10 Cal. 309-310. PEOPLE v. MURRAY.

Indictment in words of statute is sufficient, p. 310.

Cited to same effect in *People v. Garcia*, 25 Cal. 533, embezzlement, where "feloniously" omitted; *People v. Shaber*, 32 Cal. 38, breaking and entering; where no allegation as to ownership of goods intended to be stolen, nor whether any goods were in house; *People v. Ah Choy*, 1 Idaho, 319, murder, when "deliberate and premeditated" omitted, and there is allegation of "malice aforethought"; and *State v. Thompson*, 12 Nev. 148, and *State v. Hing*, 16 Nev. 309, murder, under similar indictment; *State v. Pike*, 49 N. H. 405, 6 Am. Rep. 540, under similar indictment for murder committed during robbery—holding, further, verdict in first degree sustainable thereby; and *Davis v. Utah*, 151 U. S. 269, murder, where indictment omitted "unlawful" and did not allege degree of crime.

Evidence of Reputation of deceased is not admissible except when self-defense is concerned, p. 310.

Cited to same effect in *People v. Edwards*, 41 Cal. 644, sustaining its rejection; *Territory v. Harper*, 1 Ariz. Ter. 400, ruling similarly; *Wise v. State*, 2 Kan. 430, 85 Am. Dec. 598, holding defendant not prejudiced where sufficient evidence as to character already admitted; *State v. Potter*, 13 Kan. 423, applying rule to evidence of good character introduced by state, when no attack on character made by defendant; *Chase v. State*, 46 Miss. 708, sustaining rejection, and discussing rule fully; *State v. Morey*, 25 Oreg. 254, applying rule to instruction to jury as to consideration of reputation of deceased; *Irwin v. State*, 43 Tex. 241, holding rule also applicable to threats, when acts of

deceased at time of murder showed no intention to execute them; and *Harrison v. Commonwealth*, 79 Va. 379, 52 Am. Rep. 635, 636, when evidence of opinion of witness was sought. Distinguished in *Upthegrove v. State*, 37 Ohio St. 664, admitting evidence under plea of self-defense; and *Horbach v. State*, 43 Tex. 253, ruling similarly, and defining restrictions of admission of such evidence.

10 Cal. 312. **DRAKE v. EAKIN.**

Plaintiff Examined by Defendant as witness may thereafter be examined on own behalf generally as to matters in issue, p. 312.

Cited to same effect in *Tuolumne etc. Co. v. Columbia etc. Co.*, 10 Cal. 396; and *Helms v. Green*, 105 N. C. 265, 18 Am. St. Rep. 899, on point that defendant when examined by plaintiff, cannot be impeached as to credibility, but may be contradicted.

10 Cal. 312-313. **PEOPLE v. GOLDBURY.**

Assignment of Errors.—Judgment will be affirmed, if no assignment filed, p. 313.

Cited in *Hutton v. Reed*, 25 Cal. 483, defining expression; stating, however, erroneously that appeal was dismissed.

10 Cal. 313-315. **PEOPLE v. JUDD.**

Indictment for Murder is sufficient, although not stating where wound inflicted nor that wound mortal, p. 314.

Cited to same effect in *People v. King*, 27 Cal. 510, 87 Am. Dec. 96, sustaining indictment, omitting also means of murder and nature and extent of wound; *People v. Cronin*, 34 Cal. 201, ruling similarly where manner and means of murder not stated; *Brown v. State*, 18 Fla. 478, where wounds not alleged to have been mortal; *State v. Millain*, 3 Nev. 465, where degree of crime not charged, nor other of the particulars, also discussing generally requirements of indictment and holding constitutional the legislative prescribing of form; and *Wikerson v. State*, 2 Tex. App. 265, where place of wound omitted.

10 Cal. 315-317. **PIERPONT v. CROUCH.**

Title and Object of Statute.—Provision that act should embrace but one object, to be expressed in title, is merely directory, p. 318.

Cited to same effect in *San Francisco v. S. V. W. W.*, 54 Cal. 574, holding, however, act sufficient in these respects; dissenting opinion, *Ex parte Pollard*, 40 Ala. 101, main opinion holding act unconstitutional as violative of provision; *Bowman v. Cockrill*, 6 Kan. 335, on point that act "to provide for the assessment and collection of taxes," may properly include statute of limitations with reference thereto; *State v. Gut*, 13 Minn. 350, sustaining act when title was "sufficiently

suggestive" of the subject, and no pretense made of fraud in its passage. Denied, holding provision mandatory, in *Tuskaloosa etc. Co. v. Olmstead*, 41 Ala. 20; *Central etc. Co. v. People*, 5 Colo. 41; in *State v. Rogers*, 10 Nev. 252; and in *State v. Patterson*, 98 N. C. 663. Cited, also, in note to *Davis v. State*, 61 Am. Dec. 340, on general subject, holding former California cases changed by constitution of 1879, art. 1, sec. 22.

Statute may be Repealed by implication, where intention manifest, though no repealing clause exists, p. 316.

Cited in *Mack v. Jastro*, 126 Cal. 133, applying rule to successive County Government Acts; *Rogers v. Nashville etc. Co.*, 91 Fed. 323, 62 U. S. App. 701, holding such repeal shown; *State v. Conkling*, 19 Cal. 513, where second act designed complete scheme for subject matter; *People v. Burt*, 43 Cal. 563, where provisions were repugnant and irreconcilable; In re *Yick Wo*, 68 Cal. 304, applying rule to municipal ordinances, but holding no repeal because no repugnance or conflict; *Swinerton v. Monterey County*, 76 Cal. 116, as to successive acts regarding fees of sheriff for collection of taxes, although officer respectively named "sheriff" and "tax collector" in the conflicting acts; *Reynolds v. McAfee*, 44 Ala. 240, as to conflict between act and subsequent constitution, in reference to office and its salary; *Keese v. Denver*, 10 Colo. 122, as to act covering entire subject; *Jernigan v. Holden*, 34 Fla. 538, as to revised statute of limitations; *State v. Studt*, 31 Kan. 246, when later act intended as substitute for former; *People v. Bussell*, 59 Mich. 112, as to conflict between special act as to sale of meats, and subsequent city charter; *Johnson v. Hahn*, 4 Neb. 146, as to amendatory act for collection of taxes; *Ex parte Wolf*, 14 Neb. 31, as to conflict between ordinances, directing hour of closing of saloons; *Broome v. Cuming County*, 31 Neb. 367, as to conflicting acts for appointment of county attorneys; *State v. Chadwick*, 10 Or. 473, as to like acts respecting allowance for clerks; *Little v. Cogswell*, 20 Or. 347, 348, as to act revising whole subject of fees; *State v. Carbon Hill etc. Co.*, 4 Wash. 423, as to successive acts regulating operation of coal mines; *United States v. Tynen*, 11 Wall. 92, as to successive acts fixing penalties for crime, and *United States v. Cheeseman*, 3 Sawy. 429, 25 Fed. Cas. 416, as to acts on internal revenue taxation and stamp duties. Cited also in note to *Rogers v. Watrous*, 58 Am. Dec. 102, upon repeals by implication.

10 Cal. 317-333. **GREEN v. COVILLAUD.** 70 Am. Dec. 725; *Brown v. Covillaud*, 6 Cal. 566; *Sampson v. Ohleyer*, 22 Cal. 204.

Pleading is Construed most strongly against pleader, p. 322.

Cited in *Nason v. Lingle*, 143 Cal. 366, as to complaint in action for specific performance; *Gregory v. Ford*, 14 Cal. 143, 73 Am. Dec. 643, on point that plaintiff's equity depends on allegations of bill even

though no demurrer filed; *De Castro v. Clarke*, 29 Cal. 16, as to allegation of time of conveyance; dissenting opinion in *Clark v. Phoenix etc. Co.*, 36 Cal. 179, upon question of variance as to responsibility under policy, main opinion holding complaint amendable; *Draper v. Cowles*, 27 Kan. 487, as to allegation of payment by note; *Gibson v. Parlin*, 13 Neb. 294, as to plea of judgment in bar. Cited, also, in note on general subject, to *Groff v. Ankenbrandt*, 7 Am. St. Rep. 345.

Contract to make "good and sufficient deed" requires one that will pass good title, p. 322.

Cited in *Thompson v. Hawley*, 14 Oreg. 206, to same effect, construing like agreement; note to *Porter v. Noyes*, 11 Am. Dec. 35, as to sufficiency of conveyance to satisfy contract; *Tinney v. Ashley*, 26 Am. Dec. 625, 626, as to contract to give a "good" deed; and *Winter v. Stock*, 89 Am. Dec. 61, as to contract to give "good and sufficient" deed.

Specific Performance will not be decreed of executory contract for sale of lands, when plaintiff has made great delay in his compliance therewith, p. 324.

Cited to same effect in *Bensley v. Mountain Lake etc. Co.*, 13 Cal. 316, 73 Am. Dec. 580, applying rule to delay of four years in payment under condemnation proceedings; *Weber v. Marshall*, 19 Cal. 458, 459, 460, holding delay of five years fatal to specific performance pleaded in defense to ejectment, and *O'Donnell v. Jackson*, 69 Cal. 624, ruling similarly as to delay of three years; *Grattan v. Wiggins*, 23 Cal. 34, on point that delay short of statute of limitations may bar relief in equity; *Hicks v. Lovell*, 64 Cal. 20, 49 Am. Rep. 682, where defendant praying specific performance in ejectment suit, had repudiated his contract; *Requa v. Snow*, 76 Cal. 593, where plaintiff had delayed three years in payment; dissenting opinion in *Alexander v. Jackson*, 92 Cal. 525, 27 Am. St. Rep. 166, main opinion holding forfeiture waived, under facts; *Giltner v. Rayl*, 93 Iowa, 21, where delay of nearly a year and land had greatly risen in value; *Davis v. Petty*, 147 Mo. 386, denying specific performance for laches; *Chater v. San Francisco Sugar Ref. Co.*, 19 Cal. 237, holding aliter where no injury done vendor by delay; *Wolf v. Great Falls etc. Co.*, 15 Mont. 61, holding delay of three years fatal to plaintiff's suit, notwithstanding statutory limitation. Distinguished in *Farley v. Vaughn*, 11 Cal. 237, decreeing performance despite delay, when no injury done to vendor thereby; and *Lux v. Haggin*, 69 Cal. 271, holding rule not to apply in injunction as to laches not amounting to acquiescence. Cited in note to *Smith v. Thompson*, 54 Am. Dec. 132 and to *Hatch v. Kizer*, 33 Am. St. Rep. 261, as to effect of laches; *Cooper v. Tyler*, 95 Am. Dec. 445, as to causes of denial of specific performance; and *Robinson v. Harbour*, 97 Am. Dec. 509, on same subject.

Time is not of essence of contract generally in equity, p. 325.

Cited to same effect in *Steele v. Branch*, 40 Cal. 11, as to provision for forfeiture under executory land contract; *Settle v. Winters*, 2 Idaho, 209, 210, holding time of essence, however, as to lease of mine with option to purchase, when value fluctuating; and *Waterman v. Banks*, 144 U. S. 403, ruling similarly as to option on mine, and denying specific performance. Cited also, in note on general subject, *Benedict v. Lynch*, 7 Am. Dec. 492; *Rogers v. Saunders*, 33 Am. Dec. 645; *Young's Admr. v. Rathbone*, 84 Am. Dec. 155; *Harding v. Gibbs*, 8 Am. St. Rep. 349; *Cleary v. Folger*, 18 Am. St. Rep. 191; *Cannon River etc. Assn. v. Rodgers*, 18 Am. St. Rep. 502; *Ide v. Leiser*, 24 Am. St. Rep. 24, as to option to purchase.

Variance.—*Allegata* and *probata* must agree, p. 331.

Cited to same effect in *McCord v. Seale*, 56 Cal. 264, as to variance between firm and individual acts; *Murdock v. Clarke*, 59 Cal. 693, as to variance in date of possession, between findings and complaint; *Noonan v. Nunan*, 76 Cal. 49, upon question of partnership accounting; *Lillienthal v. Anderson*, 1 Idaho, 678, on point of necessity of evidence when allegation admitted; and see, also, *Clarke v. Phoenix etc. Co.*, 36 Cal. 179, cited under first headnote. Cited, also, in note on general subject to *Finley v. Quirk*, 86 Am. Dec. 100; and *Mann v. Birchard*, 94 Am. Dec. 403.

10 Cal. 333-334. **GOODWIN v. GLAZIER.** *S. C. Kewen v. Johnson*, 11 Cal. 261.

Mandamus will not lie to Compel Official Act when remedy on bond is adequate, p. 333.

Cited to same effect in *Fulton v. Hanna*, 40 Cal. 281, as to clerk's refusal to issue execution. Distinguished in *Babcock v. Goodrich*, 47 Cal. 508, sustaining issuance of writ upon auditor's refusal to issue warrant, and holding remedy on bond inadequate. See note 74 Am. St. Rep. 153.

10 Cal. 335-336. **FARMER v. ROGERS.**

Restitution on reversal of judgment does not embrace sale of land under unstayed execution on money judgment, p. 335.

Cited to same effect in *Martin v. State Bk.* 7 S. Dak. 271, as to seizure and transfer of bank deposit; *McFadden v. Swinerton*, 36 Or. 356, construing local statutes; *Wall v. Dodge*, 3 Utah, 171, holding order of restitution improper when there had been redemption before reversal and dismissal of appeal. Distinguished, *Hewitt v. Dean*, 91 Cal. 619, 25 Am. St. Rep. 228, holding restitution proper when plaintiff was execution purchaser, but denying relief where no loss caused to appellant by erroneous judgment.

10 Cal. 337-339. **FREEBORN v. GLAZER.**

Common Count in Assumpsit is sufficient, p. 338.

Cited to same effect in *Abadie v. Carrillo*, 32 Cal. 175, as to goods sold and delivered; *Manning v. Dallas*, 73 Cal. 422, on point that under such complaint for services reasonable value recoverable, although specified amount alleged; *Leeke v. Hancock*, 76 Cal. 130, on point that finding on one count is sufficient when cause of action (for moneys paid to plaintiff's use) is alleged in alternative counts; *Pleasant v. Samuels*, 114 Cal. 37, as to like action, holding allegations as to time unnecessary and such as might be included in bill of particulars.

Attachment.—Notice of Motion to dissolve not specifying grounds is insufficient, p. 338.

Cited to same effect in *Loucks v. Edmonson*, 18 Cal. 204, as to motion to strike out statement; *Donnelly v. Strueven*, 63 Cal. 183, motion to dissolve attachment; *De Stafford v. Gartley*, 15 Colo. 36, holding further affidavit on attachment amendable; *Cupit v. Park City Bk.*, 10 Utah, 297 (reaffirmed, 11 Utah, 428-9) and *Omaha etc. Co. v. Chavin etc. Co.*, 18 Mont. 470, on like motion. Cited, also, in note to *Fridenberg v. Pierson*, 79 Am. Dec. 165, as to motion to dissolve attachment.

10 Cal. 339-340. GREGORY v. HIGGINS.

Attachment.—Note is not subject to before maturity, aliter after maturity when in defendant's possession, p. 340.

Cited to effect of first proposition in *Clough v. Buck*, 6 Neb. 348, distinguishing case when note transferred to naked debt from payee's creditors; and upon general subject in *Bills v. National etc. Bk.*, 89 N. Y. 350, as to attachment of certified check. Cited, also, in note to *Hubbard v. Williams*, 55 Am. Dec. 69, upon garnishment of money's due on negotiable instruments.

10 Cal. 341-342. HASTINGS v. STEAMER UNCLE SAM.

Expert Evidence is inadmissible as to value of services, p. 341.

Cited to same effect in dissenting opinion in *Kahn v. Old Telegraph etc. Co.*, 2 Utah, 212, main opinion admitting such evidence, as to continuity of quartz vein; and *Lincoln etc. Bank v. Davis*, 32 Neb. 7, as to value of mare at some prior time, when never seen by witness.

10 Cal. 343-344. O'BRIEN v. SHAW'S FLAT ETC. CO.

Summons.—Service on corporation is insufficient when not made on officer designated by statute, p. 343.

Cited to same effect in *Great West etc. Co. v. Woodmans etc. Co.*, 12 Colo. 51, 13 Am. St. Rep. 209, where service made on foreman; and *Waco v. Wheeler*, 59 Tex. 556, where made on trustee. Cited, also in note to *Hampson v. Weare*, 66 Am. Dec. 121, on general subject.

10 Cal. 344-346. PEOPLE v. SUPERVISORS.

Judicial Acts of Supervisors may be controlled by certiorari, p. 345.

Cited to same effect in *Fall v. Paine*, 23 Cal. 303, as to establishment of ferry, holding injunction improper; *Miller v. Sacramento County*, 25 Cal. 97, 99, as to approval of official bond, and dissenting opinion in *State v. District Court*, 23 Nev. 261, main opinion denying writ in matter of taxation of costs by lower court. Cited, also, holding acts judicial, *Belser v. Hoffschneider*, 104 Cal. 460, on point that action of city council on appeal from assessment is final; and *Salisbury v. County*, 59 N. H. 382, ruling similarly as to adjustment by county commissioners of claims for support of paupers; *State v. Ormsby, County*, 7 Nev. 397, affirming power of county commissioners to discharge assessment after having equalized it, and in note to *Davner v. Lent*, 65 Am. Dec. 490, as to liability of public officers for judicial acts. Distinguished in *S. V. W. W. v. Bryant*, 52 Cal. 137, denying certiorari, as to passage of order fixing water rates.

County Officers.—Removal for failure to file bond is a judicial proceeding, p. 345.

Distinguished in *Re Carter*, 141 Cal. 322, holding removal by mayor for cause under charter, not judicial.

Official Bond.—Supervisors cannot demand new bonds without notice to officer or examination into sufficiency of old bond, p. 345.

Cited in *Miller v. Sacramento County*, 25 Cal. 97, 99, on point that board exercises judicial functions in approval or disapproval of bond; and *People v. Brown*, 23 Colo. 431, following rule stated, office not having been previously declared vacant. Distinguished in *People v. Evans*, 29 Cal. 435, denying power of county judge to discharge sureties on treasurer's bond.

Board of Supervisors.—Order of, is invalid unless grounds are stated, p. 346.

Cited to same effect in *Johnson v. Eureka County*, 12 Nev. 31, on point that records of County Commissioners must affirmatively show jurisdictional facts.

Undertaking is not necessary on appeal by county, p. 346.

Cited to same effect in *Warden v. Mendocino County*, 32 Cal. 656; *Mitchell v. Board*, 137 Cal. 374, but holding aliter as to appeal by board of education of San Francisco; *Lamberson v. Jefferds*, 116 Cal. 494, when appealing defendant was county auditor, the county being real party in interest.

10 Cal. 347-353. **SUMMERS v. FARISH.**

General Demurrer is confined to cases where no cause of action shown, p. 350.

Cited in *Stewart v. Balderstone*, 10 Kan. 149, on point that in absence of motion to make more certain, all allegations should be taken as true on demurrer, whether well pleaded or not.

Parties.—Action on injunction bond may be brought by one of the obligees whose cause of action is several, p. 350.

Cited to same effect in *Prader v. Purkett*, 13 Cal. 591; *Browner v. Davis*, 15 Cal. 11, when property affected belonged to plaintiff alone; *Lally v. Wise*, 28 Cal. 543, where payment of money to plaintiff on execution was enjoined; *Western Development Co. v. Emery*, 61 Cal. 614, applying rule to action on contract for subscriptions to be paid plaintiff; *Ruble v. Coyote etc. Co.*, 10 Or. 41, holding, however, right of action confined to suit on bond. Distinguished, *Montana etc. Co. v. St. Louis etc. Co.*, 19 Mont. 320, 321, holding all obligees necessary parties, either plaintiff or defendant. Cited, also, in *Sloan v. Langert*, 6 Wash. St. 28, on point that in joint suit by obligees on attachment bond, recovery may cover both joint and individual property.

Injunction Bond.—Counsel fees paid in defending suit may be allowed, if reasonable, p. 353.

Cited to same effect in *Heyman v. Landers*, 12 Cal. 111, allowing \$300.

10 Cal. 354-369. DUPONT v. WERTHEMAN.

Power of Attorney to Sell does not authorize gift, and such conveyance is void, p. 367.

Cited in *Alcorn v. Buschke*, 133 Cal. 657, noted under *Billings v. Morrow*, 7 Cal. 171; *Arlington etc. Bank v. Paulsen*, 57 Neb. 731, applying rule to sale by executors under power in will; *Mott v. Smith*, 16 Cal. 557, as to conveyance for love and affection; *Frink v. Roe*, 70 Cal. 313, as to conveyance to trustees for payment of debts of agent and his partners; *Randall v. Duff*, 79 Cal. 125, 126, as to conveyance wrongfully purporting to have been for valuable consideration; *Winter v. McMillan*, 87 Cal. 262, 22 Am. St. Rep. 246, as to conveyance by agent to himself and wife; *Hawxhurst v. Rathgeb*, 119 Cal. 534, as to hypothecation, and holding further that pledgee acquires no interest; *Palmer v. Texas L. Co.*, 3 Tex. Civ. Ap. 474, as to conveyance without sale, holding ratification possible; *Anderson v. Bigelow*, 16 Wash. 200, as to dedication of part of property for street; *Meade v. Brothers*, 28 Wis. 693, as to transfer without consideration, although price left to agent's discretion. Distinguished in *Duff v. Duff*, 71 Cal. 533, on point that equity has jurisdiction when cause of action based on agent's fraud in making such void transfer (but see case criticised in *Randall v. Duff*, 79 Cal. 125, 126). Cited, also, in note to *Putnam v. French*, 38 Am. Rep. 684, on general subject; and in *McDonald v. Bear River etc. Co.*, as to point raised in argument (p. 358), that deed under power must run in name of principal.

Ratification of agent's void transfer cannot take place where principal had no knowledge of circumstances, p. 367.

Cited in *Frink v. Roe*, 70 Cal. 311, on point that such transfer may

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be ratified; Cited in *Moyle v. Society*, 16 Utah, 82, holding ratification not established by facts stated; note to *Billings v. Morrow*, 68 Am. Dec. 237, on general subject.

Purchaser of Equitable Title, takes subject to all prior equities, p. 368.

Cited to same effect in *Clark v. McElvy*, 11 Cal. 160, as to conveyance of right, title and interest in mining claim whereof vendor has merely possession; *Taylor v. Weston*, 77 Cal. 539, as to assignment of certificate of purchase. Distinguished in *Weston v. Dunlap*, 50 Iowa, 184, holding innocent purchaser under bond for deed where notes given for price, not subject to mechanic's lien not filed in proper time.

10 Cal. 369-370. DENNIS v. TABLE MOUNTAIN ETC. CO.

Appeal—"Party Aggrieved."—Corporation, in suit against it, cannot appeal from decree directing sale of property of strangers to suit, p. 370.

Cited in *Estate of Boland*, 55 Cal. 312, affirming right of appeal by original purchaser from order directing resale by administratrix.

10 Cal. 370-371. PAINE v. LINHILL.

Affidavits used on motion must be identified for use on appeal but need not be embraced in statement, p. 370.

Cited to same effect in *Stone v. Stone*, 17 Cal. 514, holding statement necessary, however, on appeal from order, when record does not consist of affidavits alone; and *Bowring v. Bowring*, 4 Utah, 186, discussing record on appeal from order denying motion to dissolve attachment.

10 Cal. 373-374. LEHMAIER v. KING.

Statute of Limitations cannot be construed retrospectively upon pending obligations, p. 374.

Cited to same effect in *Vrooman v. Li Po Tai*, 113 Cal. 305, applying rule to statute directing time for service of summons; and *Gillette v. Hibbard*, 3 Mont. 415.

10 Cal. 374-375. GREEN v. JACKSON WATER CO.

Action is not "commenced" until issue of summons, p. 375.

Cited to same effect in *Van Winkle v. Stow*, 23 Cal. 458, as to mechanic's lien suit; in *Pacific Coast Ry. Co. v. Porter*, 74 Cal. 263, as to condemnation proceedings; and note to *Ross v. Luther*, 15 Am. Dec. 346, on general subject.

10 Cal. 376-377. MAGEE v. SUPERVISORS.

Election.—Mandamus Will Lie to compel action but not to control discretion of supervisors as to issuance of certificate of election, p. 376.

Cited to same effect in *Clune v. Sullivan*, 56 Cal. 250, denying writ to compel court to try cause, where prior order not complied with; and *State v. Elder*, 31 Neb. 186, on point that writ lies to compel canvass of votes, and applying rule to refusal of speaker to open and publish returns. Distinguished and criticised in *State v. Barber*, 4 Wyo. 77, awarding writ to correct erroneous decision of state board of canvassers.

Quo Warranto.—Certificate of election is only prima facie evidence of title to office, and is not necessary for quo warranto proceedings, 10 Cal. 377.

Cited to same effect in *People v. Jones*, 20 Cal. 53, on point that holder of certificate may be sued for usurpation if not in fact elected; *Stone v. Elkins*, 24 Cal. 127, on point that title to office may be tried by quo warranto, notwithstanding determination by supervisors under void statute; and *State v. Owens*, 63 Tex. 270, sustaining jurisdiction of district court to try election contests by quo warranto, and examine ballots therein.

10 Cal. 377-378. **VALLEJO v. FAY.**

Judgment in Ejectment for whole tract need not specify particular portion occupied by defendant, p. 378.

Cited to same effect in *Lick v. Stockdale*, 18 Cal. 224, as to several defendants, who did not appear at trial; and *Camarillo v. Fenlon*, 49 Cal. 207.

10 Cal. 378-380. **WALDMAN v. BRODER.**

Replevin.—General verdict for defendant will authorize judgment for return, p. 379.

Cited to same effect in *Etchepare v. Aguirre*, 91 Cal. 292, 25 Am. St. Rep. 182, as to verdict special as to value and general otherwise; *Johnson v. Fraser*, 2 Idaho, 376, 377, when special verdict and alternative judgment not requested; *Wheeler v. Jones*, 16 Mont. 90, where general judgment for defendants for costs on such verdict was afterwards changed to one for return, without notice. Cited, also, in *Hollenbach v. Schnabel*, 101 Cal. 316, 40 Am. St. Rep. 60, on point that sheriff's return is admissible to prove plaintiff's possession.

Replevin.—Alternative judgment for value is immaterial when not asked by defendant, p. 379.

Cited to same effect in *Whetmore v. Rupe*, 65 Cal. 237, on point that judgment need not find value of each article separately, holding further as to form and effect of replevin judgment; *Kneebone v. Kneebone*, 13 Cal. 648, where goods delivered to plaintiff and action dismissed without trial; *Claudius v. Aguirre*, 89 Cal. 505, where like delivery made and plaintiff has judgment; *Etchepare v. Aguirre*, 91 Cal. 292, 25 Am. St. Rep. 182, on point that verdict special as to value and gen-

eral otherwise for defendant will support judgment for return, and holding form of alternative judgment insufficient; *Byrne v. Lynn*, 18 Tex. Civ. App. 259, quoting *Whetmore v. Rupe*, 65 Cal. 237. Distinguished in *Meeker v. Johnson*, 3 Wash. 252, holding verdict as to value necessary, whether for plaintiff or defendant.

Joint property may be seized on execution against one of the joint owners, p. 380.

Cited to same effect in *Bernal v. Hovious*, 17 Cal. 547, 79 Am. Dec. 151, as to crop owned by tenants in common, holding further that only interest of debtor may be sold and purchaser becomes tenant in common with the other; *Veach v. Adams*, 51 Cal. 611, applying rule to seizure on attachment of such crop, and holding further no partition valid except by consent; *Sharp v. Johnson*, 38 Or. 249, officer levying on an undivided interest in chattels may take entire chattel into his possession; *Branch v. Wiseman*, 51 Ind. 3, as to partnership crop, holding further such justification pleadable in replevin against constable, on general denial.

10 Cal. 380-386. **CARR v. CALDWELL.** 70 Am. Dec. 740.

Subrogation.—Mortgagee of homestead who simultaneously discharges prior mortgage is subrogated thereto on mortgagor's death, p. 385.

Cited to same effect in *Swift v. Kraemer*, 13 Cal. 530, 73 Am. Dec. 604 (cited in *Van Sandt v. Alvis*, 109 Cal. 169, 50 Am. St. Rep. 27), where owner married between mortgages and wife did not join in latter, holding, further, his transferee subject to same subrogation; *Shaffer v. McCloskey*, 101 Cal. 580, applying rule to tenant in common compelled to pay other's share of mortgage, in order to protect his own, even when other liens intervened; *Chaffe v. Oliver*, 39 Ark. 545, where second mortgage (trust deed) was void as to wife through defective acknowledgment; in *Home etc. Bk. v. Bierstadt*, 168 Ill. 626, holding one paying at debtor's request not to be a volunteer; dissenting opinion *Johnson etc. Bank v. Carroll*, 109 Iowa, 578, main opinion denying subrogation where money not advanced for that definite purpose; *Mitchell v. McCormick*, 22 Mont. 254, but denying right to impress money judgment as lien on homestead under facts stated; *Straman v. Rechtime*, 58 Ohio St. 455, holding established; *Pratt v. Topeka Bk.*, 12 Kan. 572, when part of original mortgage (by both spouses) was paid and husband alone executed second note and mortgage; and *Lamb v. Mason*, 50 Vt. 351, where execution creditor discharges prior mortgage, although having no valid execution lien. Cited, also, applying rule to subrogation to vendor's lien by mortgagee who pays purchase money; in *Nichols v. Overacker*, 16 Kan. 59, where wife did not join in note or mortgage; *Roby v. Bank*, 4 N. Dak. 162, 50 Am. St. Rep. 637, where husband did not join, and where mortgage secured other debts; and *Hicks v. Morris*, 57 Tex. 663, where note was renewed

and increased so as to include other debts of parties, and old note and mortgage then canceled. Distinguished in *Guy v. DeUpsey*, 16 Cal. 99, denying subrogation where second mortgagee is mere volunteer, and takes no assignment; *Van Loben Sels v. Bunnell*, 120 Cal. 684, where mortgage not for purchase money; and *Burnap v. Cook*, 16 Iowa, 54, 85 Am. Dec. 509, where payment of first lien and creation of the other were not concurrent. Cited, also, in note to *Christy v. Dyer*, 81 Am. Dec. 497, and *Austin v. Underwood*, 87 Am. Dec. 257, as to validity of mortgage for purchase money of homestead executed by husband alone; *Burnay v. Cook*, 85 Am. Dec. 513, as to subrogation of mortgagee of homestead; *Magee v. Magee*, 99 Am. Dec. 576, as to subrogation to vendor's lien; and *Mertz v. Berry*, 45 Am. St. Rep. 386, on same subject.

"Probate Claims" do not include right to be subrogated to prior mortgagee and to foreclose thereon, p. 385.

Cited to same effect in *Kelsey v. Welch*, 8 S. Dak. 262, but holding administrator necessary defendant in such action; *Lusk v. Paterson*, Colo. Ap. 311, as to debt incurred by administratrix in course of her administration.

Mortgage—Subrogation.—Advance of money to discharge purchase money mortgage is equivalent to purchase money, p. 386.

Cited in *Acruman v. Barnes*, 66 Ark. 444, discussing exemption under local statutes.

10 Cal. 386-387. **DANGLADA v. DE LA GUERRA.**

Estates of Decedent.—Statute of limitations does not begin to run until letters granted, p. 386.

Cited to same effect in *Hall v. Smith*, 19 Cal. 86 (cited in *In re Bulard*, 116 Cal. 357), holding further claim not barred for nonpresentation, when no notice to creditors published; and in note to *Miller v. Surls*, 65 Am. Dec. 601, as to suspension of statute by death.

10 Cal. 390-391. **TARPEY v. SHILLENBERGER.**

Complaint in action on injunction bond conditioned for payment of damages awarded must allege such awarding, p. 390.

Cited to same effect in *Hathaway v. Davis*, 33 Cal. 169, as to action on appeal bond, holding aliter as to costs; *Spencer v. Sherwin*, 86 Iowa, 21, where suit was dismissed and no damages awarded; *Offterdinger v. Ford*, 92 Va. 647, as to action on attachment bond, holding sureties liable, however, for "costs and damages sustained"; and *State v. Hall*, 40 W. Va. 460, holding bond to state available to successive persons entitled to sue thereon, until penalty exhausted.

Liability of Sureties is limited by terms of their contract, p. 391.

Cited to same effect in *Pierce v. Whiting*, 63 Cal. 543, exonerating

sureties on bond for release of attachment where no demand for property or its value was alleged; *Spencer v. Sherwin*, 86 Iowa, 121, ruling similarly as to injunction bond to pay damages awarded, when suit was dismissed; *Pinney v. Hershfield*, 1 Mont. 370, as to attachment bond, conditioned that principal should pay damages and costs, where his nonpayment not alleged. Distinguished in *Miles v. Edwards*, 6 Mont. 183, holding sureties on injunction bond liable for attorney's fees, even if services rendered after return day of order to show cause.

10 Cal. 392-393. **MIDDLESWORTH v. SEDGWICK.**

Bill of Sale with delivery divests title, even where bill of sale was returned, p. 393.

Distinguished in *Miles v. Edsall*, 7 Mont. 196, holding that lease with privilege to purchase did not pass title.

Trover.—Plaintiff must show possession or immediate right of possession, p. 393.

Cited to same effect in *Kennett v. Peters*, 54 Kan. 121, 45 Am. St. Rep. 275, holding complaint insufficient, and in note to *Hostler's Admr. v. Skull*, 1 Am. Dec. 586, and to *Bolling v. Kirby*, 24 Am. St. Rep. 796, on general subject.

10 Cal. 393-394. **CALHOUN v. KNIGHT.**

Exemption From Execution.—Claimant must show that he is within statute, p. 394.

Cited to same effect in *Blythe v. Jett*, 52 Ark. 550, as to burden of proof to show residence within state; and in note to *Van Dresor v. King*, 75 Am. Dec. 648, upon burden of proof as to exemptions.

10 Cal. 396-402. **SHAVER v. BEAR RIVER ETC. CO.**

Corporate contracts are presumed valid in absence of proof to contrary, p. 400.

Cited to same effect in *Brown v. Board*, 103 Cal. 534, as to contract of municipal corporation for architect's plans which were adopted.

Corporate Agents.—Corporation may be bound by their acts, by ratification, p. 401.

Cited in *Carey v. Philadelphia etc. Co.*, 33 Cal. 696, on point that agent need not be appointed or authorized by deed or resolution; *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 312, on point that acts of directors may be ratified by acquiescence, even when in violation of by-laws; *Durham v. Carbon etc. Co.*, 22 Kan. 248, as to ratification by working coal land, of contract for its purchase made by stockholder. Distinguished in *Bank v. Bailhache*, 65 Cal. 331, holding bank not bound by settlement made on its behalf by president, of cashier's defalcation.

Invalidity of Mortgage does not extend to debt secured by it, p. 402.

Cited in note to Colby v. McClintock, 73 Am. St. Rep. 561, on mortgagee's remedies.

10 Cal. 402-404. **HARDENBURGH v. KIDD.**

Court of Sessions can perform only judicial acts, p. 403.

Cited to same effect in Phelan v. San Francisco, 20 Cal. 44, holding void act authorizing court to purchase real estate for use of county; Ex parte Griffiths, 118 Ind. 84, 10 Am. St. Rep. 108, ruling similarly as to act requiring judges to write head notes to opinions; Railway Co. v. Board, 28 W. Va. 270, as to appellate jurisdiction over order of lower court which is merely administrative or purely legislative, as in reassessment of taxes; Mackin v. County Court, 38 W. Va. 340. Cited also in note to Mayor v. State, 74 Am. Dec. 591, as to power of legislature to delegate power of taxation.

Invalidity of Part of Tax invalidates sale made for all, p. 403.

Cited to same effect in Bucknall v. Story, 36 Cal. 73, as to addition of percentage as penalty, holding, further, that sale would not cloud title and denying injunction (see p. 71); Low v. Lewis, 46 Cal. 552, on point that tax deed made on assessment of municipal property, conveyed no title; Graham v. Florida etc. Co., 33 Fla. 381, where reassessment made for taxes already satisfied and discharged; Riverside Co. v. Howell, 113 Ill. 262, (cited in Gage v. Pumpelly, 115 U. S. 462), where no preliminary ordinance was passed, even when owner suffered default in suit for taxes; Gamble v. Witty, 55 Miss. 35, as to levy of special county tax, where state and county taxes were collected together; and People v. Hagadorn, 104 N. Y. 525, where taxes for several years were collected together, one or more being void. Cited also, in Pause v. Atlanta, 98 Ga. 100, defining "damage" in condemnation proceedings.

10 Cal. 404-410. **EMERIC v. GILMAN.** 70 Am. Dec. 742; Sharp v. Contra Costa Co., 34 Cal. 284.

Judgment Against County can be enforced by payment from county funds not otherwise appropriated, by levy if no funds on hand and power exists to make levy, or by mandamus in case of failure to do either, p. 410.

Cited in Hart v. Burnett, 15 Cal. 586, on point that pueblo lands held in trust cannot be sold on execution; in People v. Supervisors, 28 Cal. 431, on point that mandamus will lie to compel supervisors to act on claim, when refusal is based on alleged lack of power to approve; Sharp v. Contra Costa Co., 34 Cal. 291, on point that judgment under act permitting claimants to sue counties, only liquidated claim but conferred no new remedy for its collection; Rose v. Estudillo,

39 Cal. 275, on point that warrants cannot be paid out of revenues raised for other purposes, but issuing mandate for payment pro tanto out of proper fund; Campbellsville etc. Co. v. Hubbert, 112 Fed. 723, sustaining act permitting taxation of property holders to pay judgments on county bonds; Lyon v. Elizabeth, 43 N. J. L. 161, on point that real estate of city cannot be sold under execution against it and in Emery County v. Burresen, 14 Utah, 333, 60 Am. St. Rep. 901, and see note 902 ruling similarly as to personalty (but see contra distinguishing main case, State v. Buckles, 8 Ind. Ap. 284, 52 Am. St. Rep. 477), and commented on Rees v. Watertown, 19 Wall. 123, holding that federal courts sitting in equity cannot appoint marshal to collect tax nor subject taxable property of city to assessment, in order to pay judgment against city whose officers evaded mandates issued to compel such tax levy and collection; Oklahoma Agr. etc. College v. Willis, 6 Okla. 599. Cited, also, in note to Divine v. Harvie, 18 Am. Dec. 204, as to garnishment of counties; Gaskill v. Dudley, 30 Am. Dec. 753, as to levy on individual's property for debts of school district, and Beardsley v. Smith, 41 Am. Dec. 156, as to debts of town; and Gilman v. Contra Costa Co., 68 Am. Dec. 297, as to enforcement of judgment against municipalities.

10 Cal. 410. **GALLAGHER v. DELANEY.**

Final Judgment on demurrer should not be granted unless plaintiff declines to amend, p. 410.

Distinguished in Williamson v. Joyce, 140 Cal. 671, and held inapplicable where plaintiff makes no offer to amend; Thornton v. Borland, 12 Cal. 440, affirming judgment on overruling of demurrer where defendant had no defense on merits; Smith v. Yreka etc. Co., 14 Cal. 202, ruling similarly where plaintiff made no offer to amend; but followed in Lord v. Hopkins, 30 Cal. 78, where plaintiff offered to amend before argument on demurrer.

10 Cal. 411-413. **DAVIS v. ROBINSON.**

Arrest on Execution.—Issue of fraud cannot be tried on affidavits, p. 412.

Cited in Stewart v. Levy, 36 Cal. 166, on point that fraud of one partner will not justify such arrest of his copartner.

Arrest on Execution is authorized when fraud alleged, found by jury and stated in judgment, p. 412.

Cited to same effect in Stewart v. Levy, 36 Cal. 167; and in Payne v. Elliot, 54 Cal. 343, holding complaint insufficient to authorize arrest. Cited, also, in Merritt v. Wilcox, 52 Cal. 243, discussing effect of general verdict.

10 Cal. 413-418. **HOFFMAN v. TUOLUMNE ETC. CO.**

Owner of Dam is not liable for its breaking if it was constructed

after manner of discreet and prudent men under the circumstances, p. 417.

Cited to same effect in *Wolf v. St. Louis etc. Co.*, 10 Cal. 545, applying rule to overflow of flume; in *Todd v. Cochell*, 17 Cal. 98, as to breaking of reservoir; *Everett v. Hydraulic etc. Co.*, 23 Cal. 225, as to breaking of dam; *Campbell v. Bear River etc. Co.*, 35 Cal. 683, as to alleged careless management of water ditch; *Durgin v. Neal*, 82 Cal. 597, holding, however, that permitting rain water to accumulate and flood cellar, during course of excavation, was actionable negligence; *Smith v. Whittier*, 95 Cal. 291, 292, ruling similarly against defendants as to running of their elevator; *Hannaher v. St. Paul etc. Co.*, 5 Dak. Tr. 22, as to railroad ditches and culverts causing overflow by surface water; in dissenting opinion *Emry v. Railroad*, 109 N. C. 607, main opinion holding erroneous the refusal to give instructions as to contributory negligence in overflow case; *The Nitroglycerine case*, 15 Wall. 538 as to explosion, affirming same case, sub nom., *Parrott v. Barney*, 1 Sawy. 442, 2 Abb. U. S. 215, 18 Fed. Cas. 1244; and *Central Trust Co. v. Wabash etc. Co.*, 57 Fed. Rep. 448, as to floods from railroad culverts during unprecedented cyclone weather. Cited, also, in note to *McCoy v. Danley*, 57 Am. Dec. 691, on general subject.

10 Cal. 419-429. **WILLIAMS v. COVILLAUD.**

Surety is Not Discharged by mere extension of time given to principal, p. 425.

Cited in *Mulvane v. Sedgely*, 63 Kan. 126, quoting *Bull v. Coe*, 77 Cal. 60, 11 Am. St. Rep. 239, applying rule to failure of creditor to present claim against principal's estate; *Bunn v. Commercial Bank*, 98 Ga. 651, ruling similarly as to agreement for indefinite extension, though based on valuable consideration; and *Quillen v. Quigley*, 14 Nev. 217, holding further no release effected by notice by sureties to creditor to enforce demand against principal. Cited, also in note to *McGee v. Metcalf*, 51 Am. Dec. 124, on effect of creditor's forbearance; and *Burke v. Cruger*, 58 Am. Dec. 108, as to necessity of binding contract to forbear.

10 Cal. 430-431. **DUPRE v. FALL.**

Assignment by pledgor of note pledged gives assignee right to proceeds on payment of lien, p. 430.

Cited to same effect in *Jordan v. Harrison*, 46 Mo. Ap. 177, discussing, further, evidence as to character of transfer.

10 Cal. 431-435. **RICHARDS v. SCHRODER.**

Fraudulent Conveyance.—Delivery held not shown by evidence, p. 434.

Distinguished in *Chaffin v. Doub*, 14 Cal. 386, as to sufficiency of

delivery under chattel mortgage. Cited in note to *Clafin v. Rosenberg*, 97 Am. Dec. 341, upon sufficiency of change of possession.

10 Cal. 435. **BRENNAN v. MARSH.**

Subcontractor's Lien does not relate back to defeat attachment lien acquired before notice filed, p. 435.

Cited to same effect in dissenting opinion in *Pipe etc. Co. v. Howland*, 111 N. C. 630, main opinion holding lien to relate back in reference to assignment of main contract.

10 Cal. 435-436. **TYLER v. DECKER.**

Fixtures.—Buildings not annexed to soil and erected for temporary trade structures are not fixtures and do not pass with land, p. 436.

Cited to same effect in *Pennybecker v. McDougal*, 48 Cal. 164, as to cabin set on blocks; and *Cooke v. Cooper*, 18 Oreg. 150, 17 Am. St. Rep. 715, as to right of mortgagee in possession to remove such improvements constructed by him.

10 Cal. 436-441. **PEASE v. BARBIERS.**

Homestead.—Conveyance of, is invalid when wife's deed improperly acknowledged, p. 440.

Cited in *McQuade v. Whaley*, 31 Cal. 530, on point that husband's mortgage and deed alone will not pass homestead; *Paine v. Baker*, 15 R. I. 104, on point that wife's acknowledgment is fatally defective if not according to statutory form. Cited, also, in note to *Livingston v. Kettelle*, 41 Am. Dec. 182, as to necessary form of wife's acknowledgment.

10 Cal. 441-445. **ROWE v. TABLE MOUNTAIN ETC. CO.**

Corporation may bind itself by note and mortgage made and signed by president and secretary officially, p. 444.

Cited to same effect in *Verzan v. McGregor*, 23 Cal. 346, as to contract made by trustees.

Default confesses all material facts alleged, p. 444.

Cited to same effect in *Doyle v. Hallam*, 21 Minn. 516, as to allegation of ownership and right to possession in ejectment.

Foreclosure.—Personal judgment may be entered in addition to decree of foreclosure, p. 444.

Cited to same effect in *Cormerais v. Genella*, 22 Cal. 127, holding further that it has no effect as general lien; in *Hobbs v. Duff*, 23 Cal. 623, on point that decree of foreclosure may be pleaded as setoff.

Sheriff's Return of service of summons is prima facie evidence as to status of persons named as served therein, p. 444.

Cited to same effect in *Wilson v. Spring Hill etc. Co.*, 10 Cal. 445, when service recited on A. "one of the partners and associates of the company"; *Golden Gate etc. Co. v. Superior Court*, 65 Cal. 189, as to service of injunction on "superintendent and managing agent"; *Kinner v. Eagle Lake etc. Co.*, 110 Cal. 630, as to service on "managing agent"; *Wall v. Railway Co.*, 95 Fed. 404, as to return of service on alleged officer of corporation; *Sibert v. Thorp*, 77 Ill. 45, holding, however, return merely prima facie as to place of service and truth can be put in issue by plea in abatement; and to same effect in *Bond v. Wilson*, 8 Kan. 231, 12 Am. Rep. 467, as to leaving summons at place of residence, distinguishing case as to final process where return held conclusive; and *Crosby v. Farmer*, 39 Minn. 309, holding return attackable by affidavit on motion or other direct proceeding to set aside judgment. Distinguished in *Michels v. Stork*, 52 Mich. 263, holding return on attachment conclusive upon parties to suit as to proceedings had.

10 Cal. 445. **WILSON v. SPRING HILL ETC. CO.**

Sheriff's Return of service is prima facie evidence of truth of its allegations, p. 445.

Distinguished in *Michels v. Stork*, 52 Mich. 263, holding return on attachment conclusive as to proceedings had.

10 Cal. 445-446. **PRESTON v. KEHOE.**

Forcible Entry and Detainer will only lie against defendant in actual possession, p. 446.

Cited to same effect in same case, 15 Cal. 318.

10 Cal. 449-450. **FORD v. RIGBY.**

Execution sale of chattels may be enjoined by vendee, when seized in judgment against vendor, p. 449.

Approved in *Halley v. Ingersoll*, 14 S. Dak. 14, injunction proper where owner of choses in action had sued on them in federal court and had assigned them to his creditors, and other parties had secured judgments against owner and caused defendant as sheriff to levy on choses in action.

Distinguished in *Tavis v. Ellis*, 25 Cal. 519, denying injunction against writ of restitution where damage not irreparable.

10 Cal. 456-458. **ELLIS v. JANES.** S. C. 7 Cal. 409, and 26 Cal. 272.

Ejectment.—Evidence of private survey is admissible, p. 458.

Cited to same effect in *Doherty v. Thayer*, 31 Cal. 145, action for trespass, where location of dividing lots involved.

Declarations of Tenant are not admissible unless he was then in possession, p. 458.

Cited to same effect in *National Min. Co. v. Powers*, 3 Mont. 350, holding declarations of grantor inadmissible under facts; and in note to *Horton v. Smith*, 42 Am. Dec. 632, on general subject.

10 Cal. 461-464. **McCARTY v. BEACH.**

Consideration of Sealed Instrument is presumed and need not be pleaded, p. 463.

Cited to same effect in *Wills v. Kempt*, 17 Cal. 101, as to contract regarding mortgage foreclosures; in *Henke v. Eureka etc. Assn.*, 100 Cal. 432, extending rule to any written instrument (endowment certificate), since Code, whether set out in full or not; *Northern Kansas etc. Co. v. Oswald*, 18 Kan. 339, as to bond for conveyance of real estate. Cited also in note to *Garden v. Derrickson*, 95 Am. Dec. 288, 289, on general subject.

Action Lies for breach of contract though no actual damage sustained, p. 464.

Cited to same effect in *Jacobs etc. Co. v. Union etc. Co.*, 17 Mont. 65, sustaining complaint in such action on general demurrer, though no special damage averred. Cited, also, in *State v. California etc. Co.*, 13 Nev. 212, as to sufficiency of appeal bond as stay.

10 Cal. 464-465. **ARRINGTON v. TUPPER.**

Abuse of Discretion.—Refusal to allow verification of answer held to be, under facts, p. 464.

Cited to same effect in *Lattimer v. Ryan*, 20 Cal. 633.

Verification of Answer.—Objection for nonverification cannot be first raised at trial, p. 464.

Cited to same effect in *San Francisco v. Itsell*, 80 Cal. 61.

10 Cal. 465-479. **TEVIS v. PITCHER.**

Probate Statute is not retroactive, so as to apply to persons dying before its passage, p. 477.

Cited to same effect in *Downer v. Smith*, 24 Cal. 123, holding such proceedings void; in *Coppinger v. Rice*, 33 Cal. 423, upon question of descent; *McNeil v. Congregational Society*, 66 Cal. 108, 112, as to order for sale of real estate; and *Hardy v. Harbin*, 1 Sawy. 199, 11 Fed. Cas. 506, 4 Sawy. 541, 11 Fed. Cas. 512, and *Seaverns v. Gerke*, 3 Sawy. 362, 21 Fed. Cas. 945, as to probate sales. Distinguished in *People v. Senter*, 28 Cal. 505, as to persons dying between Probate Act and Act adopting common law; and *Ryder v. Cohn*, 37 Cal. 89, 91, which is criticised, however, in *McNeil* and *Seaverns* cases, *supra*. Cited, also, in note to *Grime's Est. v. Norris*, 65 Am. Dec. 547, as to law governing probate of wills, and to *Fisher v. Bassett*, 33 Am. Dec. 239, upon general jurisdiction of probate of wills.

Proof of Custom under Mexican rule, as to execution of wills, is admissible, p. 477.

Cited to same effect in *Donner v. Palmer*, 31 Cal. 522, as to effect of grant; *Emerie v. Alvarado*, 64 Cal. 565, holding will valid as properly executed; and *Adams v. Norris*, 23 How. (U. S.) 365, and *Gildersleeve v. Mining Co.*, 6 N. Mex. 42, on same subject.

10 Cal. 480-481. **LOWER v. KNOX.**

Appeal.—Where one notice embodies two appeals and is too late as regards order on new trial, it will be considered only as to judgment, p. 481.

Cited to same effect in *Weinrich v. Porteus*, 12 Nev. 104, as to appeal from several orders. Cited, also, in *Burdge v. Gold Hill etc. Co.*, 15 Cal. 198, dismissing appeal from judgment because of lack of statement on appeal, although bill of exceptions on new trial filed; and *Sharon v. Sharon*, 68 Cal. 336, on point that two appeals may be included in one notice, and extending this to undertakings also.

10 Cal. 481-482. **BUCKHOLDER v. BYERS.**

Notice on Appeal must be filed before undertaking, or appeal will be dismissed, p. 481.

Cited to same effect in *Dooling v. Moore*, 19 Cal. 81, dismissing appeal without prejudice. Cited, also, dismissing appeal where undertaking filed before notice served, in *Little v. Jacks*, 68 Cal. 345; *Weiss v. Board*, 8 Oreg. 529, refusing dismissal, however, and allowing new undertaking to be filed; and in *Hewes v. Carville etc. Co.*, 62 Cal. 517, ruling similarly where undertaking filed between service and filing of notice, and holding rule in main case changed by Code.

10 Cal. 482-483. **IN RE TAYLOR, DEC'D.** S. C. 16 Cal. 434, where main case affirmed.

10 Cal. 483-485. **SLADE v. HIS CREDITORS.**

Fourth District Court.—Jurisdiction held to extend to whole of City and County of San Francisco. p. 485.

Cited to same effect in *People v. Robinson*, 17 Cal. 371, as to criminal jurisdiction where offense committed therein.

10 Cal. 486-489. **WILSON v. BRODER.** S. C. 24 Cal. 190.

Sheriff's Liability for proceeds of execution does not attach under statute for penalty except for willful or corrupt neglect of duty, p. 487.

Cited to same effect in *Giffin v. Smith*, 2 Nev. 378, where sheriff has parted with moneys through mistake in application; Cited in

Hull v. Chapel, 71 Minn. 413, holding sheriff not liable under facts stated; and note to Johnson v. Gorham, 65 Am. Dec. 503, on general subject. Distinguished in Nash v. Muldoon, 16 Nev. 414, affirming liability on official bond.

10 Cal. 491-495. **RANDALL v. BUFFINGTON.**

Preference by Insolvent Debtor is valid if given in good faith, p. 493.

Cited to same effect in Ross v. Sedgwick, 69 Cal. 251, although creditor knew that other creditors would be thereby hindered and delayed; Dyer v. Bradley, 89 Cal. 562, holding preference not opposed to Insolvent Act unless made within period specified thereby; Cavil v. Walker, 7 Tex. Civ. Ap. 307, as to payment with community funds of note and mortgage on wife's land, as against husband's creditors; Bradley v. Gotzian, 12 Wash. 73, as to payment of mortgage on homestead by chattel mortgage of goods; In re Henkel, 2 Sawy. 308, 11 Fed. Cas. 1125, as to discharge of mortgage on homestead, and holding further homestead creatable at any time before attaching of judgment lien (cited in In re Boothroyd, 14 Bank. Reg. 232, distinguishing Henkel case as to conversion of funds into homestead). Cited, also, in note to Covanhoven v. Hart, 60 Am. Dec. 62, on general subject.

Fraudulent Conveyance—Homestead.—Application of funds by insolvent to discharge mortgage on homestead is valid, p. 494.

Cited in Blair v. Smith, 114 Ind. 126, 5 Am. St. Rep. 603, on point that debtor may lawfully exchange non-exempt for exempt property and hold latter against creditors; and on same point in Comstock v. Bechtel, 63 Wis. 661, and Gondy v. Werbe, 117 Ind. 164, 165, allowing exemption of firm property after its dissolution; Paxton v. Sutton, 53 Neb. 85, 68 Am. St. Rep. 592, sustaining right to exemption of homestead acquired through non-exempt property; Gray v. Brunold, 140 Cal. 621, holding fraudulent conveyance not shown by gift of money to wife, when applied toward payment of mortgage on homestead; In re Wilson, 123 Fed. 22, under California law use of funds by insolvent to discharge lien on homestead is not fraudulent, and does not give bankruptcy trustee right to subject homestead to lien for amount so diverted from creditors; Jacoby v. Parkland etc. Co., 41 Minn. 230 (cited in Kelly v. Sparks, 54 Fed. Rep. 72) sustaining creation of homestead by insolvent debtor; and on same point in First Nat. Bk. v. Glass, 79 Fed. Rep. 708, where homestead taken in wife's name. Distinguished in Bishop v. Hubbard, 23 Cal. 518, 83 Am. Dec. 134, where transactions had with fraudulent intent.

10 Cal. 495-502. **POND v. POND.**

District Court.—Jurisdiction to grant new trial in case certified by probate court discussed, p. 500.

Commented on and overruled in In re Bowen, 34 Cal. 687, holding such jurisdiction to exist.

10 Cal. 502-503. **PEOPLE v. HUNTER.**

Recognizance.—Complaint in action on must allege indictment for same offense mentioned in recognizance, p. 503.

Cited to same effect in *People v. Sloper*, 1 Idaho, 163, where crime in indictment not alleged; and *State v. Brown*, 16 Iowa, 321, as to necessity of such identification of facts where indictment is for different offense. Cited, also, note to *Belding v. State*, 99 Am. Dec. 222, on general subject.

10 Cal. 503-504. **DE BARRY v. LAMBERT.**

Interlocutory Order.—Appeal does not lie therefrom, unless statute so provides, p. 504.

Cited to same effect in *Baker v. Baker*, 10 Cal. 528, as to order setting aside referee's finding in divorce case and remanding matter for further testimony; *Ketchum v. Crippen*, 31 Cal. 367, as to order refusing to strike out statement on motion for new trial, even if after judgment in point of time (and see dissenting opinion in *Quivey v. Gamber*, 32 Cal. 326, as to regularity of such practice). Cited also in note to *Williams v. Field*, 60 Am. Dec. 436, among miscellaneous cases of interlocutory orders; and in *People v. Sexton*, 24 Cal. 84, denying mandamus to compel court to try action for change of venue ordered.

10 Cal. 508. **GILMAN v. CONTRA COSTA COUNTY.** S. C. 5 Cal. 426; 6 Cal. 676.10 Cal. 508-511. **BROWN v. SMITH.**

Water Rights.—Diversion of surplus water in ditch is not actionable, p. 511.

Cited to same effect in *Nevada County etc. Co. v. Kidd*, 37 Cal. 313 (cited in 70 Cal. 290), holding no liability where owner of dam not yet completed was not in condition to use the water; and *Edgar v. Stevenson*, 70 Cal. 290, denying injunction to riparian proprietor against such diversion during extraordinary high water.

10 Cal. 511-512. **TREAT v. McCALL.**

Joint Obligations.—Judgment cannot be rendered against one of several defendants, when not served, p. 512.

Cited to same effect in *Schloss v. White*, 16 Cal. 68, as to surety on bond, reversing default judgment, and in note to *Wodd v. Watkinson*, 44 Am. Dec. 573, on general subject.

10 Cal. 512-517. **FISK v. FOWLER.**

Liquidated Damages.—Sum in bond construed to be, p. 517.

Cited in note to *California etc. Co. v. Wright*, 65 Am. Dec. 515, on general subject.

10 Cal. 517-518. **CHASE v. RIES.**

Undertaking on Appeal.—Sureties are not liable when judgment reversed with direction to enter another, p. 517.

Cited to same effect in *Heinlen v. Beans*, 71 Cal. 299, where judgment for specific performance applied only in part; distinguished in *Orr v. Hopkins*, 3 N. Mex. 144 (Gild's ed. 189) where reversal was ordered unless plaintiff remitted part of judgment and remission was made; and *Bem v. Shoemaker*, 7 S. Dak. 520, ruling similarly where judgment was reversed, being held good as to personal property involved but bad as to real estate. Cited, also, in note to *Howell v. Alma etc. Co.*, 38 Am. St. Rep. 709, on general subject.

10 Cal. 518-519. **HURLBURD v. BOGARDUS.**

Fraudulent Conveyance.—Change of possession held insufficient to satisfy statute, p. 519.

Cited in *Doak v. Brubaker*, 1 Nev. 224, holding change insufficient under chattel mortgage, when property in hands of bailee; *Sharon v. Shaw*, 2 Nev. 293, 90 Am. Dec. 549, ruling similarly as to transfer of goods in servant's possession; dissenting opinion in *Gray v. Sullivan*, 10 Nev. 429, main opinion (distinguishing main case at p. 423), holding delivery, etc., sufficient. Cited, also, in note to *Claffin v. Rosenberg*, 97 Am. Dec. 342, on general subject.

10 Cal. 519-520. **CUMMINGS v. CHEVRIER.** S. C. 10 Cal. 520.10 Cal. 520-522. **NICKERSON v. CAL. STAGE CO.** S. C. Nickerson v. Chatterton, 7 Cal. 568.

Judgment in Ejectment for whole tract need not specify particular satisfied, p. 521.

Cited in *Wells v. Schuster etc. B'k.*, 23 Colo. 539, on point that judgment may be used as foundation of creditor's bill, though sued on and partially satisfied in prior suit in another state.

Cited also in note to *Lea v. Lea*, 96 Am. Dec. 782, as to res judicata.

Alternative Judgment in Replevin is necessary for basis of suit on replevin bond, p. 521.

Cited to same effect in *Clary v. Rolland*, 24 Cal. 151, holding complaint insufficient for want of allegation as to such judgment; in *Claudius v. Aguirre*, 89 Cal. 504, holding such judgment unnecessary, where property delivered to plaintiff who secures judgment; and in *Thomas v. Irwin*, 90 Ind. 561, holding sureties on replevin bond not liable when no judgment for return of property. Commented on in *Meeker v. Johnson*, 3 Wash. 252, holding alternative verdict necessary whether for plaintiff or for defendant.

10 Cal. 522-523. **PRIMM v. GRAY.**

Plea in Abatement for pendency of prior action must show issuance of process therein, p. 522.

Cited in *Whelan v. Railway Co.*, 111 Fed. 328, as to nature of plea under California decisions, construing Montana codes; note to *Smith v. Lathrop*, 84 Am. Dec. 456, as to necessity of identity of parties.

10 Cal. 523-526. **FULLER v. HUTCHINGS.** 70 Am. Dec. 740.

Check Void for Gaming is void as to all except bona fide holder without notice, p. 526.

Cited to same effect in *Bedell v. Herring*, 77 Cal. 574, 11 Am. St. Rep. 309 (and note 309, 323), holding note valid as to such holder, although originally obtained by fraud; *Famous etc. Co. v. Crosswhite*, 124 Mo. 40, 46 Am. St. Rep. 427, 428, as to check obtained by fraud, holding burden of proof cast on holder to show bona fide character, etc., when original fraud is shown; and upon last point in *Graham v. Larimer*, 83 Cal. 178 (cited in *Shain v. Goodwin*, 46 Fed. Rep. 567), as to burden of proof of lack of notice, where note void as stifling criminal prosecution. Distinguished on question of burden of proof in *Pana v. Bowler*, 107 U. S. 542, as to holders of coupons when bond election alleged to be irregular; *Landauer v. Improvement Co.*, 10 S. Dak. 211, holding burden of proof cast on holder where note fraudulently altered before negotiation. Cited, also, note to *Davis v. Bartlett*, 80 Am. Dec. 386, as to such burden of proof; and *Perkins v. Pront*, 93 Am. Dec. 451, on same subject, and note to *Sondheim v. Gilbert*, 10 Am. St. Rep. 34, as to validity of margin contracts.

New Trial for surprise will not be granted when based on attorney's mistake as to admissibility of testimony, p. 526.

Cited to same effect in *Klockenbaum v. Pierson*, 22 Cal. 163, as to advice of attorney upon competency of witness, and latter's misstatement of conversation; *Allen v. Chambers*, 18 Wash. 348, but holding matter involved to be not one of law alone. Cited, also, in note to *Delmas v. Margo*, 78 Am. Dec. 518, on general subject.

General citation: *Campbell's Appeal*, 178 Pa. 30.

10 Cal. 527. **BAKER v. BAKER.**

Whole Issue in Divorce cannot be referred, p. 528.

Distinguished in *Clopton v. Clopton*, 11 N. Dak. 216, upholding reference where court, by stipulation of counsel, referred divorce case with directions to take testimony and report same to court, and referee took testimony and reported same to court, but did not make or report any findings.

General citation: *Crane v. Gunn*, 4 B. Mon. (Ky.) 19.

10 Cal. 529-531. **CUMMINGS v. COE.**

Destroyed Deed.—Equity may decree re-execution when defect in deraignment would otherwise be caused, p. 530.

Cited to same effect in *Conlin v. Ryan*, 47 Cal. 73, applying rule to lost deed; *Torrent etc. Co. v. Mobile*, 101 Ala. 562, as to lost deed, but holding complaint insufficient; *Griffin v. Fries*, 23 Fla. 176, 11 Am. St. Rep. 353, ruling similarly as to cross-bill in ejectment, where re-establishment not prayed; and *Kent v. Church*, 136 N. Y. 17, 32 Am. St. Rep. 697, as to lost deed, sustaining action brought by executors of grantee against heirs and devisees of grantor.

10 Cal. 531-533. **WHITNEY v. ARNOLD.**

Acknowledgment by Subscribing Witness.—Substantial compliance with statute is sufficient, p. 532.

Cited in note to *Livingston v. Kettelle*, 41 Am. Dec. 175, as to identity of party acknowledging.

10 Cal. 533-537. **LETTERS v. CADY.**

Marriage.—Cohabitation under facts stated held not to constitute, p. 537.

Cited in *People v. Anderson*, 26 Cal. 133, holding cohabitation to be proof of marriage, as regards testimony of alleged wife against husband; *Kelly v. Murphy*, 70 Cal. 564, upon point that offer to prove cohabitation was not offer to prove marriage; and *Holmes v. Holmes*, 1 Abb. U. S. 550 (S. C. 1 Sawy. 120), 12 Fed. Cas. 414, holding marriage not shown by cohabitation, under facts proved. Cited, also, *McNabb v. Wixom*, 7 Nev. 172 (apparently erroneously), as to liability of administrator for moneys collected.

10 Cal. 538-541. **BEEH v. McCUSICK.**

Escrow Deed takes effect only on delivery after performance of conditions, p. 540.

Cited to same effect in *Dyson v. Bradshaw*, 23 Cal. 536, as to condition to remove settlers from land; and in *Harkreader v. Clayton*, 56 Miss. 391, 31 Am. Rep. 373, holding no title to vest where grantee obtains possession of deed without such performance, and further that his bona fide grantee after grantor's death has no better title; *Hilgar v. Miller*, 42 Or. 556; holding conditions of escrow to care for grantor during life and provide decent burial for his remains faithfully carried out so far as conduct of grantor permitted.

10 Cal. 541-545. **WOLF v. ST. LOUIS ETC. CO.**

Owner of Flume is not liable for its overflow if constructed after the manner of ordinarily prudent men under the circumstances, p. 544.

Cited to same effect in *Todd v. Cochell*, 17 Cal. 98, as to breaking of reservoir; *Everett v. Hydraulic etc. Co.*, 23 Cal. 225, as to breaking of dam; *Campbell v. Bear River etc. Co.*, 35 Cal. 683, as to alleged careless management of water ditch; *Hannaher v. St. Paul etc. Co.*, 5 Dak. Tr. 22, as to railroad ditches and culverts, which caused overflow by surface water; dissenting opinion in *Emry v. Railroad*, 109 N. C. 607, main opinion holding erroneous the refusal to instruct as to contributory negligence in overflow case; *The Nitro-Glycerine Case*, 15 Wall. 538, as to dynamite explosion; and *Central Trust Co. v. Wabash etc. Co.*, 57 Fed. Rep. 448, as to overflow from railroad culverts during unprecedented cyclone weather.

10 Cal. 545-546. **MARZIOU v. PIOCHE.**

Appeal.—Cause may be Remanded for new trial upon single issue, p. 546.

Cited to same effect in *Argenti v. San Francisco*, 30 Cal. 463, holding however that direction to enter specified judgment does not grant new trial; in *San Diego etc. Co. v. Neale*, 78 Cal. 65, holding that new trial may be asked in lower court as to part of issues; in *Duff v. Duff*, 101 Cal. 4, sustaining granting of such new trial; and in *Lake v. Bender*, 18 Nev. 373, ruling similarly as to property issues in divorce case as to which separate trial was had.

10 Cal. 547-554. **WHITNEY v. HIGGINS.** 70 Am. Dec. 748.

Parties to Judgment and privies alone are bound thereby, p. 551.

Cited in *Wakefield v. Van Dorn*, 53 Neb. 25, holding person not bound by mechanic's lien decree; note to *Warwick v. Underwood*, 75 Am. Dec. 771; *Lipscomb v. Postell*, 77 Am. Dec. 658; *Cecil v. Cecil*, 81 Am. Dec. 632; *Cameron v. Cameron*, 82 Am. Dec. 658; and *Warnock v. Harlow*, 31 Am. St. Rep. 217; *O'Brien v. Moffitt*, 36 Am. St. Rep. 574; and upon subject of *lis pendens*, in note to *Stout v. Phillippi etc. Co.*, 56 Am. St. Rep. 857.

Foreclosure Suits.—Purchasers and encumbrancers prior to suit are necessary parties, but may redeem if omitted, p. 551.

Cited in *American etc. Co. v. Railway Co.*, 99 Fed. 318, sustaining right of junior mortgagee to redeem under local (Georgia) statutes; *Eldridge v. Wright*, 55 Cal. 536, discussing difference between statutory and equitable redemption; *Gaines v. Childers*, 38 Or. 203, mortgagee, whose mortgage so inaccurately drawn as to omit certain tract intended to be included, not party to foreclosure of subsequent lien on omitted tract, may redeem from sale on such lien, but is not prior to it; *Montgomery v. Tutt*, 11 Cal. 314, holding further as to right of redemption when omitted; in *Gamble v. Vall*, 15 Cal. 510, as to redemption rights of omitted subsequent mortgagee; *Tuolumne etc. Co. v. Sedgwick*, 15 Cal. 526, on same point, holding right to redemption by sepa-

rate bill in equity not affected by assertion of statutory right thereto; *Goodenow v. Ewer*, 16 Cal. 468, 76 Am. Dec. 545 (and see note 550), as to necessity of making mortgagor party, even though no personal claim asserted against him; in *Van Winkle v. Stow*, 23 Cal. 459, mechanic's lien foreclosure—holding, however, rule changed by statute as to subsequent mortgagee in such cases; *Carpentier v. Brenham*, 40 Cal. 238, on point that omitted junior mortgagee may redeem from sale under senior mortgage. Distinguished in *Horn v. Jones*, 28 Cal. 204, holding party unnecessary who had parted with interest before suit brought. Cited, also, in *Eldridge v. Wright*, 50 Cal. 536, on point of difference between statutory and equitable redemption; in *Rosina v. Trowbridge*, 20 Nev. 112, on point that same rule as to parties applies in mortgage as in mechanics' lien foreclosures; note to *Childs v. Childs*, 75 Am. Dec. 517, as to right of redemption by omitted grantee or mortgagor; *Boggs v. Fowler*, 76 Am. Dec. 567; to *State v. Eads*, 83 Am. Dec. 401; *Street v. Beal*, 85 Am. Dec. 506; *Raymond v. Holborn*, 99 Am. Dec. 109; and to *O'Brien v. Moffitt*, 36 Am. Rep. 574, as to parties to foreclosure suit; *Raymond v. Holborn*, 99 Am. Dec. 108, as to junior mortgagee's right to redeem; and *Stout v. Phillippi etc. Co.*, 56 Am. St. Rep. 857, as to rule of *lis pendens*.

10 Cal. 555-562. HENTSCH v. PORTER.

Nonpresentation of Probate Claim cannot be raised for first time in appellate court or after trial, p. 557.

Cited in *Wise v. Hogan*, 77 Cal. 188, holding complaint sufficient as against general demurrer; *Bemmerly v. Woodward*, 124 Cal. 574, 575, holding nonpresentation before suit mere matter of abatement; *Guerian v. Joyce*, 133 Cal. 408, holding objection to verification not first presentable at trial when not pleaded; *Coleman v. Woodworth*, 28 Cal. 568, 569, as to absence of proof of presentation; *Bank v. Howland*, 42 Cal. 134, where like objection first raised on motion for new trial; *Chase v. Evoy*, 58 Cal. 353, on point that objection cannot be raised on general demurrer; and *Wise v. Hogan*, 85 Cal. 461, holding allegation sufficient on general demurrer; *Preston v. Knight*, 85 Cal. 561, where presentation was admitted at trial—holding, further, as to reasons for presentation; in *Toulouse v. Burkett*, 2 Idaho, 173, on point that presentation need not be alleged; holding, further, that vendor's lien is not a "claim." Cited, also, in *Dowell v. Cardwell*, 4 Sawy. 231, 7 Fed. Cas. 995, on point that nonpresentation is only matter of abatement, and holding lack of allegation waived.

Grounds of Demurrer are only those specified by code, p. 558.

Cited in *Kyle v. Craig*, 125 Cal. 111, denying right to demurrer for use of two counts for same cause of action; *Carpenter v. Smith*, 20 Colo. 40, as to demurrer on ground that complaint is on information and belief.

Pleading.—Defective allegation is curable by default or verdict; aliter as to lack of allegation, p. 559.

Cited to same effect in *People v. Rains*, 23 Cal. 130, as to uncertainty of description of property in tax suit; *Alexander v. McDow*, 108 Cal. 9, as to allegation of assignment of nonnegotiable note; *GrosLouis v. Northeut*, 3 Or. 405, on point that no intendment in favor of judgment will arise in divorce case when complaint omits allegations as to property.

Foreclosure of decedent's mortgage may be had in equity and not probate court, although claim allowed, p. 559.

Cited to same effect in *Willis v. Farley*, 24 Cal. 499, holding further decree against administrator after discharge no bar to subsequent suit against heirs; and *Verdier v. Bigne*, 16 Or. 210. Cited, also, in note to *Deck v. Gerke*, 73 Am. Dec. 560, upon equity jurisdiction in probate matters.

Objection amounting to general demurrer may be raised at any time, p. 561.

Cited to same effect in *Marriott v. Clise*, 12 Colo. 564, applying rule to such objection to cross-complaint; in *Gorman v. County Commissioners*, 1 Idaho, 662, as to objection to complaint first raised on new trial after reversal.

10 Cal. 563-574. PEOPLE v. BOND.

Impairment of Contracts.—Funding Act is a contract and provisions cannot be changed by legislature to detriment of creditors included hereby, p. 569.

Cited to same effect in *Thornton v. Hooper*, 14 Cal. 12, sustaining amendment to act that did not affect creditors injuriously; also, holding respective acts unconstitutional; *McCauley v. Brooks*, 16 Cal. 34, 35, as to act repealing appropriation when contract made and funds or payment collected; *Board v. Fowler*, 19 Cal. 23, as to legislative withdrawal of property conveyed to Commissioners of Funded Debt to pay creditors thereunder; *Rose v. Estudillo*, 39 Cal. 274, as to act requiring auditing of warrants theretofore issued under Funding Act; *Wates v. Gregory*, 89 Cal. 394, as to act passed after issuance of bonds by city, preventing suit against it thereon; but holding presumption in favor of constitutionality; *Micon v. Tallahassee etc. Co.* 47 Ala. 656, applying rule to act permitting building of toll bridge within distance prohibited by law existing when first was built; *English v. Oliver*, 28 Ark. 334, as to act compelling bondholders under prior act to accept treasurer's certificates in payment; *County Commissioners v. King*, 13 Ala. 476, as to act providing for tax levy which would be insufficient to pay interest on bonds issued under prior act, and payable from taxes; dissenting opinion in *Moore v. New Orleans*, 32 La. Ann. 759 (and see 52, 757), main opinion holding municipal charters not contracts within

constitutional inhibition; (but see *Louisiana v. Pillsbury*, 105 U. S. 278); *Forstall v. Consolidated Assn. etc.*, 34 La. An. 777, as to act requiring investment in state bonds of assets of insolvent corporation in process of liquidation; *Pickton v. City*, 10 N. Dak. 477, but sustaining amendatory act as to street improvements; *State v. Walsh*, 31 Neb. 477, as to effect of constitutional provision regarding application of revenue, on bonds previously issued; *Smith v. Appleton*, 19 Wis. 472 (cited and denied in *Moore v. New Orleans*, 32 La. An. 739, *supra*), as to act authorizing new bonds, when prior bond act contained provision against issuance of others; *United States (Von Hoffman) v. Quincy*, 4 Wall. 550, 555, as to act restricting power of municipal corporation to tax in order to pay its prior bonds; *Louisiana v. Pillsbury*, 105 U. S. 288, as to act repealing prior acts making appropriations through levy for payment of interest on bonds; *U. S. v. Johnson County*, 6 Dill. 215, 26 Fed. Cas. 636, as to act requiring auditing of bonds and other new procedure and adjudication as prerequisite to payment of prior bonds; and *Maenhaut v. New Orleans*, 2 Woods, 112, 16 Fed. Cas. 379, as to ordinance providing for diversion of funds raised to pay interest on bonds, and awarding injunction against such diversion. Cited, also, on point that existing law becomes part of contract; in *Howard v. Jones*, 50 Ala. 69, as to exemption statute; in *Watson v. Roe's Exrs.*, 51 Ala. 300, as to statute of nonclaim in probate matters; and *Smith v. Elliott*, 39 Tex. 211, including construction of statute as well as statute itself. Cited, also, in *English v. Supervisors*, 19 Cal. 184, granting mandamus for creation of Sinking Fund mentioned in act; and note to *Goshen v. Stonington*, 10 Am. Dec. 135, upon vested rights.

Funding Act.—Claims under need not be audited by supervisors as prerequisite to payment by treasurer, p. 573.

Cited to same effect in *People v. Tillinghast*, 10 Cal. 584, awarding mandamus against treasurer; and *People v. Board*, 12 Cal. 300, denying mandamus against supervisors to compel their allowance of payment by treasurer.

10 Cal. 574-578. LEWIS v. TOBIAS.

Equity will not Interpose in case where facts may be alleged as equitable defense to action on the obligation, p. 575.

Cited to same effect in *Smith v. Sparrow*, 13 Cal. 597, denying injunction of suit on note, based on alleged reason of good legal defense; *Shain v. Belvin*, 79 Cal. 263, holding no case for equitable relief shown by averment of legal defense to action on note and asking for its cancellation; *Ada Co. v. Bullen Br. Co.*, 5 Idaho, 96, 97, 196, denying equitable jurisdiction to cancel warrants illegally issued by county commissioners as Revised Statutes, section 4928, county can compel holders to urge claims on warrants sued on.

10 Cal. 579-584. **MYERS v. SOUTH FEATHER ETC. CO. S. C. 14**
Cal. 274.

Assignment.—Contract for future payments for work on installments is assignable, p. 582.

Cited to same effect in *Cutting Pack'g Co. v. Packers' Exch.*, 86 Cal. 577, 21 Am. St. Rep. 65, as to assignment of non-negotiable contract for purchase of fruit crop for several seasons.

10 Cal. 584-585. **PEOPLE v. TILLINGHAST.**

Funding Act of 1851 held constitutional, p. 584.

Cited to same effect in *Thornton v. Hooper*, 14 Cal. 11, 12, holding further as to amendatory act of 1851, and application of surplus moneys; and *English v. Supervisors*, 19 Cal. 184, construing Funding Act of 1854. Cited, also, in *Forstall v. Consolidated Assn. etc.*, 34 La. Ann. 777, holding unconstitutional an Act requiring investment in state bonds of assets of insolvent corporations in process of liquidation.

10 Cal. 589-640. **FERRIS v. COOVER. S. C. 11 Cal. 175.**

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Cited and followed as to construction of this grant; *Manson v. Kopikus*, 11 Cal. 92; *Morton v. Folger*, 15 Cal. 277; *Cornwall v. Culver*, 16 Cal. 425; and *Berreyessa v. Schultz*, 21 Cal. 542, construing like colonization grant to Berreyessa.

Mexican Grant.—Authority to make was vested in governor alone, p. 615.

Cited in *Emeric v. Alvarado*, 64 Cal. 556, discussing power of territorial deputation in that behalf; *Byrne v. Alas*, 74 Cal. 634, as to right of occupancy by Mission or Pueblo Indians.

Mexican Grant carries right to possession until defeated by granting power or other competent authority, p. 620.

Cited in *Soto v. Kroder*, 19 Cal. 96, on point that title and right to possession passes despite want of approval by departmental assembly; *Berreyessa v. Schultz*, 21 Cal. 542, illustrating classes of Mexican grants, and their effect; *Love v. Shartzer*, 31 Cal. 493, on point that such grantee may maintain ejectment if ousted; *Cullen v. Spring*, 83 Cal. 65, on point that breach of conditions subsequent on grant of pueblo lands does not work forfeiture per se. Cited, also, in *Northern Pac. etc. Co. v. Majors*, 5 Mont. 146, applying principle of grant on conditions subsequent, to railroad grant and patent; and *Hanrick v. Dodd*, 62 Tex. 89 (and *Phillips v. Watkins etc. Co.*, 90 Tex. 202.), holding no evidence of loss by abandonment shown.

Mexican Grant of definite quantity within specified boundaries, gives right of possession of all land within those boundaries until segregation made, p. 621.

Cited to same effect in *Waterman v. Smith*, 13 Cal. 410, holding further as to right of survey and segregation by United States as successor of Mexican government; *Mahoney v. Van Winkle*, 21 Cal. 577, discussing requirements of colonization act; *Carpentier v. Webster*, 27 Cal. 564, holding, further, as to rights inter se of tenants in common of such grant before survey; *Love v. Shartzer*, 31 Cal. 493, on point that grantee may maintain ejectment; *Rich v. Maples*, 33 Cal. 108, holding Settler's Act (St. 1858, p. 345), unconstitutional; *Mound City etc. Co. v. Philip*, 64 Cal. 495—holding further, as to effect of decree of partition of court of first instance; and *Shanklin v. McNamara*, 87 Cal. 381, 382, discussing Swamp Land Act of 1850.

Description.—Map referred to in grant becomes part of it for purposes of description, p. 622.

Cited to same effect in *Morton v. Folger*, 15 Cal. 277, and in *Cornwall v. Culver*, 16 Cal. 426, 427, approving admission of map used in another action as to same land, in connection with deposition when witness dead; *Seaward v. Malotte*, 15 Cal. 306, admitting copy where original destroyed.

Descriptions in Deeds.—Intention of parties is to control, when ascertained, p. 628.

Cited in dissenting opinion in *Wells, Fargo, etc. Co. v. Board*, 56 Cal. 203, as to construction of proviso in statutes; and in *Brady v. Bartlett*, 56 Cal. 358, on same subject; and *Gordon v. Booker*, 97 Cal. 588; *Fisher v. Bennehoff*, 121 Ill. 434; *Robinson v. Doss*, 53 Tex. 507, and *Boon v. Hunter*, 62 Tex. 588, discussing general rules as to descriptions in deeds and patent, as shown by intention of parties.

Abandonment cannot be claimed except in case of naked possession without title, p. 631.

Cited in note to *Wyman v. Hurlburt*, 40 Am. Dec. 466, 467, upon general subject of abandonment; and in *Hanrick v. Dodd*, 62 Tex. 89 (cited in *Phillips v. Watkins etc. Co.*, 90 Tex. 202), holding no evidence of loss by abandonment shown.

Equitable Estoppel cannot be predicated on silence of owner of land during trespasser's erection of improvements thereon, p. 631.

Cited to same effect in *Davis v. Davis*, 26 Cal. 42, 85 Am. Dec. 167, discussing elements of such estoppel as to true state of title.

Tax Deed conveys no title unless requirements of law as to taxation are complied with, p. 632.

Cited to same effect in *Kelsey v. Abbott*, 13 Cal. 619, where assessment improperly made; *Lachman v. Clark*, 14 Cal. 133, where description of property insufficient; *People v. Reynolds*, 28 Cal. 112, on point that no intendments are allowable as to regularity of taxation proceedings, and holding reassessment void; *People v. Hastings*, 29 Cal. 452 (cited in *Houghton v. Austin*, 47 Cal. 663), ruling similarly as to

assessment made by wrong assessor; *City v. Kaunitz*, 39 Fla. 698, 63
n. St. Rep. 207, holding assessment void when not made by proper
assessor; *Powder River etc. Co. v. Board*, 45 Fed. Rep. 327, as to listing
property or valuation before action by assessor. Cited, also, to
same effect in *Hayes v. Ducasse*, 119 Cal. 685, but held superseded by
L. Code, sec. 3786.

VOLUME XI.

By WILLIAM FOSTER.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

11 Cal. 12-14. MARTIN v. BROWNER.

Mining.—Owner of town lot of twelve acres in a mining district cannot prevent use of part of it by miners for mining purposes, p. 14.

Cited in note to 63 Am. Dec. 94, 95 (*McClintock v. Bryden*, 5 Cal. 97), and note to 91 Am. Dec. 694, 695 (*Levaroni v. Miller*, 34 Cal. 231), on relative rights of miners and settlers on public lands. Referred to in note to 63 Am. Dec. 110.

11 Cal. 14-20. RAUN v. REYNOLDS. S. C. 15 Cal. 459; 18 Cal. 275; Kirk v. Reynolds, 12 Cal. 99; Reynolds v. Harris, 14 Cal. 676, 679 (76 Am. Dec. 463, 467).

Interest cannot be compounded on a judgment, though stipulated in note sued on, p. 19.

Cited, on the question of interest on judgments, in *Gautier v. English*, 29 Cal. 168, holding that as plaintiff did not pray for interest at the same rate expressed in the note, he is not entitled to it. Doubtless, *Catron v. Lafayette Co.*, 125 Mo. 71, where it is said that in the principal case the court, in construing the statute, "by very ingenious, but, as it seems to us, rather specious reasoning, founded entirely upon the particular wording of that statute, held that interest upon a judgment could not be compounded. The wording of our statute is different, and will not support that reasoning."

Judgment by Default can give no relief beyond that demanded in the complaint, p. 19.

Cited in *Scamman v. Bonslett*, 118 Cal. 98, 62 Am. St. Rep. 230, holding foreclosure decree not justified under pleadings; *Ellis v. Rademacher*, 125 Cal. 557, applying rule when answer admitted allegations of complaint; *Claffin Co. v. Simon*, 18 Utah, 162, denying relief on distinct counts when no judgment demanded in any; *Lamping v. Hyatt*, 27 Cal. 102, holding that relief must be demanded in the complaint and specified in the summons; also *Brooks v. Forington*, 117 Cal. 220, holding that where counsel fees on foreclosure of mortgage are not prayed

for, they cannot be allowed, either under general relief or as costs. Affirmed, *Scamman v. Bonslett*, 118 Cal. 99. Cited, *Burling v. Goodman*, 1 Nev. 317, holding that judgment could not be for gold coin, where it was not prayed for.

Priority of Mortgages.—Property included in the first mortgage should be exhausted before recourse is had to the second, p. 20.

Cited, *Abbott v. Powell*, 6 Sawy. 94, where Hoffman, J., says: "Any other rule would be injurious to the mortgagor himself, for after mortgaging his property for, it might be, an insignificant part of its value, he would be unable to sell or encumber any separate parcel of it, for the purchaser or encumbrancer would have no assurance that his parcel might not be first taken to satisfy the general mortgagee."

Reversal of Judgment as affecting liability for rents and profits, p. 20.

Referred to on this point in *Conro v. Crane*, 110 U. S. 412, but the principal case does not decide the point; see S. C. 18 Cal. 275, and note thereto, post.

11 Cal. 21-22. **TURNER v. MORRISON.**

Surprise at the trial must be alleged there as a ground for continuance, otherwise it is no ground for a new trial, p. 22.

Cited, *Schellhous v. Ball*, 29 Cal. 609, holding that where surprise is claimed at the trial, the court should afford relief at once, if it would be granted on motion after the trial, but not otherwise; also, *Heath v. Scott*, 65 Cal. 552, holding that surprise at failure of the other side to introduce depositions must be alleged at the trial; and in *Black v. Appolonio*, 1 Mont. 345, holding that it is within the discretion of the trial court to allow a continuance for surprise; also, *Gaines v. White*, 1 S. Dak. 446, on the principal point.

11 Cal. 22-27. **PHELPS v. OWENS.**

General Demurrer does not cover matters of form, p. 23.

Approved, *Ward v. Clay*, 82 Cal. 505, holding that a note was sufficiently pleaded.

Punitive Damages cannot be recovered in a suit against a sheriff acting under legal process in seizing property, unless he acts with malice, oppression, or fraud; the measure of damages is the value of the property taken, with interest, pp. 24-25.

Approved, *Dorsey v. Manlove*, 14 Cal. 557, 558, where it was claimed by counsel that a seizure by a tax collector under a void assessment was a case for exemplary damages; but the court said that "the law applies in all cases the same measure of relief. This rule is founded upon a wise and beneficial policy, and it is of the utmost importance that it be strictly and rigidly adhered to by the court." This case and the principal case are approved in *Nightingale v. Scannell*, 18 Cal.

325, where the court says that the rule is based on the absence of malice or oppression: "We think an officer is no less responsible for the consequences of a malicious act than a private person"; but there being no malice shown, the rule of the principal case is enforced. In *Abbott v. 76 Land Co.*, 103 Cal. 611, the principal case is cited, and the court hold that in conversion of wheat under a bona fide claim of title the measure of damages is the actual injury done, and punitive damages cannot be awarded. The rule of the principal case is adopted, in suits against a sheriff for unlawful seizure, in *Alley v. Daniel*, 75 Ala. 409, and *Winstead v. Hulme*, 32 Kan. 574; also, in a suit against a railway for damage to a passenger by delay of train, in *Hansley v. Jamesville R. Co.*, 115 N. C. 611, 44 Am. St. Rep. 481, holding that "smart money is not recoverable in every case where an action ex delicto lies"; and in *Smith v. Holland*, 4 Tex. Ct. App. Civ. Cas. 438, in suit against a justice of the peace for illegal issuance of a writ.

11 Cal. 28-36. **HITCHENS v. NOUGUES.**

Deed purporting to convey a title in fee simple absolute gives the grantee a right to any title subsequently acquired by the grantor, p. 36.

Approved, *Green v. Green*, 103 Cal. 110, where a deed expressly purported to convey after-acquired title.

Mining.—Agreement for sale of a claim held to convey only the seller's interest, not the title to the premises, p. 36.

Cited, *Treat v. Hiles*, 68 Wis. 353, 60 Am. Rep. 863, holding that an agreement to procure the conveyance of land and work a quarry thereon was not within the statute of frauds.

11 Cal. 41-42. **HESTON v. MARTIN.**

Mechanic's Lien.—Where contract is for a gross sum, statement of lien need not give items of labor and material, p. 42.

Cited, *Davis v. Livingston*, 29 Cal. 287, to the point that notice of lien need not specify the particular character of the materials; and in *Hicks v. Murray*, 43 Cal. 522, to the point that the statement need not apportion the amount between labor and materials; also in *Jewell v. McKay*, 82 Cal. 150, holding that the notice need not itemize the materials and labor. Cited also in *Leftwitch Co. v. Florence Assn.*, 104 Ala. 594, holding that statement of total amount of materials is sufficient; and, to the point that it is enough to state amount of balance due, in *Nichols v. Culver*, 51 Conn. 179, and in *Taylor v. Netherwood*, 91 Va. 93.

11 Cal. 42-48. **PEOPLE v. SUPERVISORS.**

Mandamus will not lie to compel mode or manner of action when discretionary, p. 47.

Cited in *Sawyer v. Mayhew*, 10 S. Dak. 23, denying writ to compel audit of claim.

11 Cal. 49-68; 70 Am. Dec. 754. **PEOPLE EX REL. McKUNE v. WELLER.**

See 11 Cal. 77-88. *People ex rel. Brodie v. Weller.*

Elections are valid only by virtue of statute. A person cannot "make title to an office through the popular vote, unless such vote was cast in pursuance of legislative regulation and authority," p. 61.

Cited, *Kenfield v. Irwin*, 52 Cal. 169, holding that "the time of holding an election, whether general or special, must be authoritatively designated in advance, either by law or by some means which the law has prescribed; otherwise the election is held without authority and is ineffectual for any purpose." Also, *People v. Hoge*, 55 Cal. 620, by Thornton, J., in a dissenting opinion, quoting from 52 Cal. 169, as above; the majority of the court holding that an election for a board of freeholders for San Francisco, held under a notice from the board of election commissioners, was valid under the constitution. Also, *People v. Budd*, 114 Cal. 173, holding that as the law makes no provision for an election to fill the vacancy caused by death of a lieutenant-governor, no election can be held. *Sawyer v. Haydon*, 1 Nev. 80, holds that there can be no election unless specific statutory provision is made therefor, and the court say: "For an able and lucid argument on these points we would refer to the opinion of Mr. Justice Baldwin" in the principal case. In *State v. Simon*, 20 Oreg. 372, the principal case is cited to the same point; also, in dissenting opinion to *Robertson v. State*, 109 Ind. 95, where the majority of the court hold that quo warranto cannot be brought by the lieutenant-governor, as the constitution provided that the general assembly alone can try such controversies; and in *State v. Thoman*, 10 Kan. 196, holding that the duration of a judicial term may be fixed by statute if the constitution is silent, but a term prescribed by the constitution cannot be extended by statute; also, *Douglas Co. v. Keller*, 43 Neb. 646, holding that county lands cannot be sold except by virtue of a vote at a duly authorized election.

Statute requiring the governor to issue a proclamation of an election to fill vacancies in certain offices is mandatory, and an election held without such proclamation is invalid, pp. 65, 66.

Cited in *People v. Prewett*, 124 Cal. 10, but holding notice of election for school trustees sufficient; *People v. Wells*, 11 Cal. 339, holding that as there was no vacancy to be filled by election, an election for county treasurer was invalid; also, *People v. Martin*, 12 Cal. 411, holding that a proclamation must be made of an election to fill a vacancy in the office of county judge; and to the same effect in *Westbrook v. Rosborough*, 14 Cal. 187, 188. Distinguished, *State v. Thayer*, 31 Neb. 97, 98, 99, where the court say of the principal case:

"The opinion is lengthy, discursive, and involved in paradox. . . . The principal effort of the writer of the opinion seems to have been to separate it and distinguish it from that of *People v. Cowles*, 13 N. Y. 350. . . . Under the California statute it is shown that there could be no legal notice without the proclamation, . . . while under our statute the notice . . . is independent of any action of the chief executive"; held, the statutory provision requiring thirty days notice of an election is directory only. Distinguished, also, in *State v. Carroll*, 17 R. I. 596, where the election was because of failure to elect at a previous election, and it was held that notwithstanding lack of proper notice, if the election appeared to be a full expression of the popular will, the court would sustain it. Cited, *Voss v. Terrell*, 12 Tex. Civ. App. 446, in dissenting opinion, the majority of the court holding that notice of a special election for local option, given according to the local option law, is valid, though it does not conform to the notice prescribed by the general election law. Cited, to the point that proclamation or notice is necessary in case of a special election to fill a vacancy, in *George v. Oxford*, 16 Kan. 80; *Morgan v. Gloucester*, 44 N. J. L. 143; *Ex parte Kennedy*, 23 Tex. App. 81; and in notes to 81 Am. Dec. 405, 83 Id. 750, 751, 86 Id. 74. Cited, as to mandatory statutes, in *Wendel v. Durbin*, 26 Wis. 392, holding that a statute as to service of summons is mandatory; *State v. Martin*, 83 Mo. App. 58. Note to 27 Am. Dec. 110.

11 Cal. 68-70. **WHITE v. MOSES.**

General Denial does not put in issue plaintiff's capacity to sue, p. 70.

Distinguished in *Brown v. Curtis*, 128 Cal. 195, holding rule inapplicable in case of action by assignee; cited in *Whelan v. Railway Co.*, 111 Fed. 328, noted under *Primm v. Gray*, 10 Cal. 522.

11 Cal. 70. **PEOPLE v. COMEDO.**

Appeal dismissed for failure to file assignment of errors or statement of points and authorities, p. 70.

Cited, *Hutton v. Reed*, 25 Cal. 483, where the "assignment of errors" is defined as "a specification of the points or particular errors relied on." After discussing the statutory requirements as to statements on motion for new trial or appeal, the court rules that statements not conforming to the requirements will be disregarded, and only such errors as are disclosed by the judgment roll will be considered.

11 Cal. 76. **HOCKSTACKER v. LEVY.** See 9 Cal. 607.

Injunction of proceedings of another court of co-ordinate jurisdiction cannot be allowed, p. 76.

Cited, *Crowley v. Davis*, 37 Cal. 269, holding that the rule applies

in spite of the parties being different in the two suits, nor can it be changed by consent of parties; and in *Judson v. Porter*, 51 Cal. 1, holding that one district court cannot enjoin prosecution of a pending action in another district court.

11 Cal. 77-88. **PEOPLE EX REL. BRODIE v. WELLER.**

See 11 Cal. 49-68. *People ex rel. McKune v. Weller*.

District Judges are elected for six years. The constitution does not fix the time for the commencement of the term, pp. 85-88.

Affirmed, *People v. Burbank*, 12 Cal. 391, 394; also, *Pattison v. Sullivan*, 13 Cal. 182, holding that where a law is declared unconstitutional it must be because it is in conflict with the expressed terms of the constitution, not merely with its "spirit and policy"; and to same effect in *Cohen v. Wright*, 22 Cal. 322. Cited, *State v. Johns*, 30 Cal. 538, holding that in the absence of legislation on the matter, a person elected as county judge, to fill a vacancy, holds for the full term of office; also, *State v. Ware*, 13 Oreg. 389, holding that under the statute a person elected as circuit judge, to fill a vacancy, holds only for the unexpired term of his predecessor; and in the dissenting opinion in *Burks v. Hinton*, 77 Va. 45, a majority of the court holding that a judge elected to fill a vacancy holds only for the unexpired term.

11 Cal. 93-103. **RUSSELL v. CONWAY.**

Setoff is allowed by a court of equity, of mutual judgments, where the party claiming setoff cannot collect the judgment in his favor on account of insolvency of the other party, p. 102.

Cited, *Duff v. Hobbs*, 19 Cal. 659, holding that an offset, set up in an answer, is not an equitable defense, but a statutory right, and is governed entirely by the statute; also, *Hobbs v. Duff*, 23 Cal. 627, holding that a court of equity will enforce a setoff between the parties in interest, and where a beneficiary of a trust is insolvent, the court will compel his trustee to set off a judgment in his favor with one against him; and in *Lyon v. Petty*, 65 Cal. 324, holding that a suit by the administrator of a mortgagee to foreclose a mortgage on a note of the mortgagee, in possession of the mortgagor, but not presented as a claim against the estate, could not be set off. Cited, also, in *Hovey v. Morrill*, 61 N. H. 13, 60 Am. Rep. 316, holding that setoff of one judgment against another will be compelled, in spite of fraudulent assignment of one of them to a third person; and in note to 31 Am. Dec. 731, on setoff of judgments.

Attorney has no lien on the judgment for his costs, p. 103.

Approved, *Hogan v. Black*, 66 Cal. 42; *Gage v. Atwater*, 136 Cal. 1, noted under *Ex parte Kyle*, 1 Cal. 332; notes to 31 Am. Dec. 757 and 51 Am. St. Rep. 258, 259.

11 Cal. 104-113. **WEIMER v. LOWERY.**

Mining Ditch cannot be dug through inclosure of another without his consent, p. 112.

Cited, *Rogers v. Soggs*, 22 Cal. 453, holding that miners cannot use the timber on lands of a prior settler; also, *Jennison v. Kirk*, 98 U. S. 462, holding that the owner of a ditch cannot recover damages from owner of a hydraulic mining claim for washing away the ditch; and in notes to 63 Am. Dec. 95, 96, and 91 Am. Dec. 695, on ditches as a nuisance.

Trespass.—Possession of the invaded premises is evidence of title as against a mere trespasser, p. 112.

Cited in *Kellogg v. King*, 114 Cal. 383, 55 Am. St. Rep. 77, holding that injunction lies in favor of lessees of a game preserve to restrain others from hunting therein.

11 Cal. 120-129. **ROGERS v. HOBERLEIN.**

Public Administrator must receive a grant of administration before title to an estate vests in him, p. 127.

Cited, *Los Angeles County v. Kellog*, 146 Cal. 593, 594, where public administrator is salaried officer and required to pay all commissions into county treasury, if he continues to administer estate after expiration of term, he must pay commissions into treasury; *Abel v. Love*, 17 Cal. 238, holding that the grant may be shown by a copy of the order, and issuance of letters is unnecessary; also, *Estate of Hamilton*, 34 Cal. 468, holding that the order does not vest the administrator with the office until he takes the oath and receives letters; and in note to 68 Am. Dec. 25 (*Beckett v. Selover*).

Public Administrator has authority to act in an estate, after expiration of his term of office, until his authority is revoked, p. 129.

Approved, *Estate of Aveline*, 53 Cal. 260; *Estate of Lermond*, 142 Cal. 586, on point that in contest for letters, such administrator acts solely for his own interest; *In re Pingree*, 100 Cal. 80, holding that a public administrator, who filed a petition for administration just before his term expired, was not entitled to the appointment, but his successor was entitled.

11 Cal. 129. **SAYRE v. SMITH.**

Appeal dismissed for want of assignment of errors, p. 129.

Cited, *Hutton v. Reed*, 25 Cal. 483; see note to 11 Cal. 70, ante. Cited also in *Purdy v. Steel*, 1 Idaho, 217, holding that exceptions taken at the trial must be assigned as errors.

11 Cal. 132. **LAFFERTY v. BROWNLEE.**

Appeal.—When statement on motion for new trial is not filed in
Notes Cal. Rep.—35

time, the supreme court will confine its investigations to the judgment roll, p. 132.

Cited, *Walker v. Hamburg Co.*, 2 Utah, 110, holding that where appellant fails to file and serve statement on appeal, the appeal will be heard on the judgment roll.

11 Cal. 133-142. **ROSE v. DAVIS.**

Constructive Possession.—Where grantee under a deed takes possession of part of the land, and no one is holding adversely, such possession extends to the whole tract granted, pp. 134 and 141.

Cited, *Kile v. Tubbs*, 23 Cal. 437, holding that the rule does not apply where occupant of a small tract conveys a large tract when he has no color of title beyond his actual possession; also, *Hicks v. Coleman*, 25 Cal. 138, 85 Am. Dec. 116, holding that the rule is not limited to small tracts used as farms; and in *Walsh v. Hill*, 38 Cal. 487, holding that the rule has been "repeatedly and fully considered, . . . and it must now be considered as no longer open to debate." Cited, also, in *Kendrick v. Latham*, 25 Fla. 837, holding there is nothing in the size of a quarter section of land to avoid the rule.

11 Cal. 143-154; 70 Am. Dec. 769. **BUTTE CANAL CO. v. VAUGHN.**

Water turned into a natural stream from an artificial watercourse is not thereby abandoned, but may be taken out again; provided the rights of others entitled to the natural flow of the stream are not impaired thereby, pp. 150-154.

Cited in *Mayberry v. Alhambra etc. Co.*, 125 Cal. 449, 452, construing contract for use of water; *Dyer v. Cranston etc. Co.*, 22 R. I. 515, on point that owner may withdraw quantity of water equal to that added by him from foreign source; *Herriman Irr. Co. v. Mining Co.*, 19 Utah 463, on point that in case of such mingling, burden of proof as to right rests on person causing it; *McCall v. Porter*, 42 Or. 56, immaterial how water is diverted from proper channel to constitute appropriation; *Herriman Irr. Co. v. Kee*, 25 Utah, 115, where one turns water developed from his land into a natural stream and takes it out lower down, burden is on him to show he does not take out more than he is entitled to after allowance for seepage and evaporation; *Salt Lake City v. Water etc. Co.*, 24 Utah, 266, a prior appropriator of water in a river acquires no right to the corpus of the water until he has conducted it into his canal for use; *Paige v. Rocky Ford Co.*, 83 Cal. 94, holding that one who turns water in a stream can take out no more than he puts in; also, *Kirk v. Bartholomew*, 2 Idaho, 1090, to the point that prior appropriation gives the prior right. Distinguished, *Malad Co. v. Campbell*, 2 Idaho, 381, where defendant, by building dams and cleaning out springs, was held to interfere with plaintiff's prior appropriation; also, *Druley v. Adam*, 102 Ill. 198, 202, where the court say

that it was logical for the principal case to adopt the common-law rule of confusion of goods in a case where there were rights of property in the water, but in the case at bar there was no ownership of the water, only the right to use it in common with other riparian proprietors; and those lower down the stream are entitled to the benefit of additions made by an upper proprietor. Cited, *Lobdell v. Simpson*, 2 Nev. 277, 90 Am. Dec. 539, holding that a prior appropriator has no right to remove a dam, to the injury of a later appropriator; also, *Barnes v. Sabron*, 10 Nev. 233, holding that later appropriators have rights in the order and to the extent of their appropriation. Distinguished, *Schulz v. Sweeny*, 19 Nev. 362, 3 Am. St. Rep. 890, where water was discharged into a stream without any intent to recapture it, and was held to be subject to the same rights as the natural stream. Cited, *Atchison v. Peterson*, 20 Wall. 514, where the court, per Field, J., say that whether a diminution in quantity or deterioration in quality of the water is an invasion of the rights of the first appropriator depends upon the circumstances of each case, and in the case at bar the injury being very slight, the court refuses an injunction, but leaves the parties to their remedy at law. Cited, *Union Mill Co. v. Dangberg*, 81 Fed. Rep. 95, 106, as to relative rights of owner of quartz-mills and farmers as to use of water from a stream in Nevada. Cited, as to appropriation of water, in notes to 43 Am. Dec. 281, 282, 58 Id. 411, 68 Id. 340, 76 Id. 479, 90 Id. 541, 60 Am. St. Rep. 806; and, as to abandonment, in 40 Am. Dec. 468, and 3 Am. St. Rep. 891.

11 Cal. 154-161. **CLARK v. McELVY.**

Mining Claim.—Bill of sale of right, title, and interest of seller passes only an equity. Doctrine of caveat emptor applies, p. 160.

Cited in notes to 25 Am. Dec. 165, as to quitclaim deed; 25 Id. 334, as to unrecorded deed; 63 Id. 107, as to conveyance of mining claim.

Instructions to Jury.—"The parties are entitled to have the law applicable to any supposed hypothesis of fact, of which there is legal evidence, distinctly given to the jury, that they may apply the law to the proofs," p. 161.

Cited, on the point that contradictory instructions are a ground for reversal, in *Brown v. McAllister*, 39 Cal. 577, and *Black v. Sprague*, 54 Cal. 272.

11 Cal. 161-162. **PILOT ROCK CO. v. CHAPMAN.**

Continuance is in the court's discretion and will not be reviewed where the party whose application is denied fails to move for a new trial on this ground, p. 162.

Approved, *Griffin v. Polhemus*, 20 Cal. 181, and *People v. De Lacey*, 28 Cal. 590; also, *Lander v. Miles*, 3 Oreg. 43. Cited in note to 74 Am. Dec. 141.

Water Rights.—Injury to ditch by deposit of mud and sediment from adjacent mining claim is a good cause of action, p. 162.

Cited in note to 68 Am. Dec. 331, on deterioration of water by mining.

11 Cal. 163-169. **DYE v. DYE.**

Pleading.—In suit by wife for division of common property after divorce, the facts on which the statutory right is based must be stated in the complaint, p. 167.

Doubted, *Gimmy v. Doane*, 22 Cal. 637, 638, holding that the statute does not apply to statutes regarding rights of property, but only to those giving a remedy; the statute as to common property is a matter of regulation of the right of property, and the correctness of the decision in the principal case "may well be doubted." Cited, *Howe v. Howe*, 4 Nev. 472, as partly overruled by 22 Cal. 638; held, where pleadings in a divorce suit do not refer to property, a decree regarding the property is reversed, and the case remanded for amendment of the pleadings. Cited, on the point that in action on a contract the performance of conditions prescribed by a statute must be specially alleged, in *Herman v. Danos*, 35 Cal. 448, which was a suit to enforce a lien for street work; also, *Rhoda v. Alameda Co.*, 52 Cal. 352, holding that in a suit for severing a vault from a building, the facts relied on in bringing the case within the statute must be specifically stated; also, to the same effect, in suit against a county to recover amount of license illegally collected, in *San Luis Obispo v. Hendricks*, 71 Cal. 282. Distinguished, *White Pine Co. v. Herrick*, 19 Nev. 37, holding that in suit on contract, not under a statute, to recover amount of a county treasurer's bond, the allegations of the complaint were sufficient.

11 Cal. 170-175. **PEOPLE v. SUPERVISORS OF EL DORADO COUNTY.**
S. C. 8 Cal. 58.

Supervisors can only allow claims against the county that are "legally chargeable," p. 174.

Cited, *Linden v. Case*, 46 Cal. 174, holding that an injunction would not lie to prevent supervisors from illegally contracting for erecting a hall of records; the supervisors will be presumed to do their duty, but if they allow illegal claims, the taxpayers cannot be injured. For the allowance of such claims could not be sustained. Cited, also, in *Grant Co. v. Sels*, 5 Oreg. 249, holding that warrants issued to a county judge for his salary, to which he was not entitled by law, must be recovered by the county; and in note to 55 Am. St. Rep. 209, on allowance of claims against municipal corporations.

County Warrants, in the hands of an innocent purchaser, have greater validity than when held by the original payee. "If illegal when issued, they are illegal for all time," p. 175.

Cited, *Dana v. San Francisco*, 19 Cal. 490, holding that a suit

county warrants, as negotiable instruments, evidencing of themselves an indebtedness of the county, cannot be maintained; and to same effect in *People v. Gray*, 23 Cal. 126; also, with regard to county bonds, in *Sutro v. Pettit*, 74 Cal. 337, 5 Am. St. Rep. 445, where the court say: "It is clear, in this state at least, that the issuance of bonds is not within the scope of the general and ordinary powers of a board of supervisors, and that such bonds can be legally issued only by virtue of express authority of the legislature"; and in *Shakespear v. Smith*, 77 Cal. 640, 641, 11 Am. St. Rep. 329, holding that an order of school trustees, illegally issued, was not negotiable, and gave no rights to an innocent indorsee. Cited, on the point that county warrants are not negotiable, in *People v. Johnson*, 100 Ill. 548, 39 Am. Rep. 68; *Clark v. Polk Co.*, 19 Iowa, 255; and to like effect, as to city or town orders, in *Clark v. Des Moines*, 19 Iowa, 216, 217, 87 Am. Dec. 431; *Commissioners v. Keller*, 6 Kan. 518; *Eaton v. Berlin*, 49 N. H. 224; *Rich v. Errol*, 51 N. H. 359. In *Dorian v. Shreveport*, 28 Fed. Rep. 295, the principal case is cited on the point that the assignee of a bond stands in the shoes of the original payee; and the court holds that bonds issued for city improvements may be collected by an assignee, even though the city has no power to issue negotiable paper.

11 Cal. 175-186. **FERRIS v. COOVER**; S. C. 10 Cal. 589.

United States Supreme Court, under section 25 of the Act of Congress of 1789, has appellate jurisdiction over state courts in the cases named in the section and in no others, pp. 178-181.

Approved, Hart v. Burnett, 20 Cal. 171, where the court, per Field, C. J., said: "It is only final judgments or decrees of the highest court of a state which can be re-examined upon a writ of error by the supreme court of the United States. In this case the decision of the supreme court of the state finally determined certain questions of law which will control any further action of the court below, but it has never rendered any final judgment within the meaning of the twenty-fifth section of the Judiciary Act of 1789. Its judgment was that the judgment of the lower court be reversed and the cause remanded, from which a new trial followed as a matter of course." Cited, also, in *Greeley v. Townsend*, 25 Cal. 610, 612, 614, where Sanderson, C. J., declines to issue citation on a writ of error from the United States supreme court, on the ground that the case does not involve any federal questions within section 25 of the Federal Judiciary Act; and holds that so far as a statute of California attempts to regulate the practice of writs of error from the United States supreme court, it is unconstitutional, and the court will disregard it. Approved in note by Dixon, C. J., to *Ableman v. Booth*, 11 Wis. 525.

11 Cal. 187-190. **McDONALD v. MADDUX**.

Supervisors are subject to the control of the legislature as to disposition of county funds, p. 189.

Approved, *McCauley v. Brooks*, 10 Cal. 34, 35, holding that where the legislature has entire control of state finances, it cannot, by repealing an appropriation, deprive of his rights a party who has entered into a contract the payment of which was to be made from the appropriation; and such payment may be enforced by mandamus against the controller, directing him to issue warrants for that purpose. Cited, *McDonald v. Bird*, 18 Cal. 198, holding that certain warrants against county funds are preferred claims, and that nothing in the principal case affects the question. Distinguished, *English v. Supervisors*, 18 Cal. 184, holding that supervisors must levy a yearly tax for sink fund to redeem certain bonds, and that nothing in the principal case clashes with the doctrine that when bonds are issued, to be redeemed by certain taxation, the taxation must be enforced as part of the contract. "A legislature has no more right to violate a contract than an individual, nor can it authorize any person, natural or artificial, to do so." Cited, *Esser v. Spaulding*, 17 Nev. 303, holding that a statute authorizing transfers from the general fund to the salary fund is unconstitutional; also, *Hockaday Co. v. Commissioners*, 1 Colo. App. 373, holding that the legislature may direct that certain county revenues be used for specific purposes; and in note to 68 Am. Dec. 299, on power of legislature over county funds.

11 Cal. 190-193. **MONTGOMERY v. TUTT.** S. C. 11 Cal. 307.

Writ of Assistance is the appropriate remedy to place the purchaser of mortgaged premises in possession, after foreclosure sale and sheriff's deed; it rests on the "obvious principle that the power of the court to afford a remedy must be coextensive with its jurisdiction over the subject matter, p. 192.

Cited in California etc. *Bank v. Graves*, 129 Cal. 651, sustaining issuance notwithstanding appeal where no stay bond given; *Ballou Ridge etc. Co.*, 118 Mich. 15, applying rule to enforcement of tax sale decree; concurring opinion of Field, J., in *Tuolumne Co. v. Sedgwick*, 15 Cal. 527, where the court hold that where one has both an equitable and a statutory right to redeem property sold under foreclosure, the assertion of the statutory right is no bar to the assertion of the equitable; also, *Goodenow v. Ewer*, 16 Cal. 468, 76 Am. Dec. 545, holding that where there is no power of sale in a mortgage, the owner of the mortgaged premises cannot be deprived of his rights except by a decree pursuant to a decree; and in *Horn v. Volcano Co.*, 18 Cal. 143, holding that a decree gives the summary right to be put in possession. *Montgomery v. Middlemiss*, 21 Cal. 107, 81 Am. Dec. 148, Field, C. refers to the suggestion in the principal case that an order to deliver possession should first be made, unless embodied in the decree, and says: "Upon further consideration of the subject in later cases we have come to the conclusion that the preliminary order may be omitted, even where no direction for the delivery of possession is contained

the decree. . . . All that is requisite to obtain the writ, as against the parties and those claiming with notice under them after the commencement of the action, is to furnish to the court proper evidence of a presentation of the deed to them, and a demand of the possession, and their refusal to surrender it." In *Sichler v. Look*, 93 Cal. 610. the court say it is expedient to include in the judgment of foreclosure a provision that a writ of assistance may issue without further notice. The principal case is quoted in *Kirsch v. Kirsch*, 113 Cal. 64, as to the power to afford a remedy being coextensive with the jurisdiction; and the court holds that where the husband has obtained a decree for the community property, after divorce for the wife's adultery, he is entitled to a writ of assistance. In *Hibernia S. & L. Soc. v. Lewis*, 117 Cal. 580, the court say: "A writ of assistance is the proper remedy to place the mortgagee, who has purchased under a foreclosure sale, in possession under his deed. It runs against the mortgagor and all persons who have purchased the fee under him pendente lite with notice." In *Terrell v. Allison*, 21 Wall. 291, the court, per Field, J., cite the principal case, and hold that the owner of the mortgaged property is an indispensable party to the suit, and refuse a writ of assistance because the decree was made without notice to her. *Root v. Woolworth*, 150 U. S. 412, quotes the principal case as to the power of a court of equity to enforce its judgment; and orders that a writ of possession issue to enforce a decree adjudging the title to real estate. The principal case is also quoted in *Shainwald v. Lewis*, 69 Fed. Rep. 493, as to jurisdiction to enforce a decree, and it is held that a court of equity has jurisdiction of a bill to revive a former decree. Cited, also, in *Rose v. Richmond Co.*, 17 Nev. 73; and notes to 51 Am. Dec. 154, 157, on writs of assistance, and 99 Id. 575, on vendor's lien.

Homestead cannot be carved out of the property so as to impair the rights of a previous mortgagee, p. 193.

Cited, *Skinner v. Beatty*, 16 Cal. 158, holding that a writ of assistance will not be set aside on account of a homestead claim by the mortgagor. Approved, *Van Sandt v. Alvis*, 109 Cal. 168, 50 Am. St. Rep. 27.

11 Cal. 194-199. JENNY LIND CO. v. BOWER.

Parol Evidence is admissible to explain the sense in which a word having two meanings, is used in a written agreement, p. 197.

Cited, *Giant Powder Co. v. California Powder Co.*, 6 Sawy. 525, 4 Fed. Rep. 728, where Field, J., holds that the court is at liberty to inquire into the circumstances under which the term "inexplosive" was used in a patent; also, *Auzerais v. Naglee*, 74 Cal. 67, holding that the word "settle" having a double meaning, the author of a letter in which it is used may explain the sense in which he used it; and in *Gentile v. Crossan*, 7 N. Mex. 597, holding that the meaning of "las lomas" in a deed might be explained.

New Trial.—Motion should be accompanied by affidavit of witness as to what he will testify, when his evidence is alleged as the ground of the motion, p. 199.

Approved, *Arnold v. Skaggs*, 35 Cal. 688; *Case v. Coddling*, 38 Cal. 194; *Lander v. Miles*, 3 Oreg. 43. Cited in notes to 12 Am. Dec. 304 and 54 Id. 304, on this point.

11 Cal. 200-205; 70 Am. Dec. 774. **JOHNSON v. JOHNSON.**

Community Property held to include land purchased with community funds after marriage, though previously in possession of husband and without title, p. 205.

Cited in note to 86 Am. Dec. 637, on community property.

11 Cal. 206-211. **PEOPLE v. SUPERVISORS OF SAN FRANCISCO.**

Supervisors.—A special act of the legislature, requiring supervisors to pay the amount of a judgment, is not unconstitutional, p. 211.

Cited, *San Francisco v. Beideman*, 17 Cal. 461, on the point that the legislature could authorize the city to dispose of land conveyed to her in trust for creditors; also, *Sinton v. Ashbury*, 41 Cal. 530, holding that an act requiring the city to pay commissioners for Montgomery street extension is constitutional; and in *People v. Lynch*, 51 Cal. 21 Am. Rep. 693, holding that the legislature cannot by special act deprive a municipal corporation of discretion in regard to local improvements, or validate a street assessment that is void for inequality. Cited, also, in *Wilcox v. Deer Lodge Co.*, 2 Mont. 579, holding that a statute authorizing a county to pay part of the expense for building a road is constitutional.

11 Cal. 212-214. **WILLIAMS v. PRICE.**

Probate.—Decree of final settlement of accounts cannot be set aside on the mere allegation by a creditor of his ignorance of the facts, p. 213.

Cited in note to 48 Am. Dec. 746, on probate decrees.

11 Cal. 214. **RITTER v. MASON.**

Appeal.—Stipulations, not embodied in statement or bill of exceptions, are no part of the record; nor are affidavits, where there is no certificate of judge or clerk, or admission of counsel, that they were used in the lower court, p. 214.

Cited, *Everett v. Buchanan*, 2 Dak. 253, holding that an affidavit not properly incorporated in a bill of exceptions cannot be considered; also, *Granite M. Co. v. Weinstein*, 7 Mont. 351, holding that a clerk's certificate as to papers on appeal was sufficient, there being no objection to the testimony below.

11 Cal. 215-222. **PEOPLE v. BUSTER.**

Surety "has a right to stand on the precise terms of his contract. He can be held to no other or different contract," p. 220.

Cited, *People v. Breyfogle*, 17 Cal. 508, 509, holding that what is meant is that a rational interpretation must be given to the language of the agreement; and where there are several sureties, each for a different amount, it must be considered that each surety agrees to pay the sum opposite his name, and the principal binds himself to pay the aggregate of these sums. Cited, also, in *Pierce v. Whiting*, 63 Cal. 543, holding that sureties on an undertaking for release of attachment cannot be sued until demand for payment has been made on them and the principal; and a complaint that fails to allege such demand is fatally defective. In *Carter v. Mulrein*, 82 Cal. 169, 16 Am. St. Rep. 100, it is held that where an order provides that injunction may issue on filing a bond, the sureties on the bond are not liable for damage caused by an injunction issued several days before execution of the bond. In *Ogden v. Davis*, 116 Cal. 36, the bond was against waste on certain land; held, the sureties were not liable for waste on other land, and parol evidence was not admissible to show that the latter land was the one intended to be covered by the bond; held, also, that the bond being against waste and also for any deficiency on a judgment of foreclosure, the sureties were liable for such deficiency, even if no legal waste was proven. The principal case is cited in *Davis v. State*, 5 Tex. App. 50, holding that where a bail bond is altered after execution, the sureties are not liable.

Sureties on official bond of a state treasurer held to have "all contracted together and with reference to the common responsibility. . . . The discharge of any one of the obligors affected the contract as to all. It made it, indeed, a different contract from that made by the parties," p. 220.

Distinguished, *People v. Evans*, 29 Cal. 435, where one of several sureties on a county treasurer's bond applied to the county court to be released; the court did not act in the matter, but the treasurer filed a new bond, approved by the county judge; held, the county court had no jurisdiction under the statute, and all the sureties on the first bond were liable. Distinguished, also, in *Sacramento Co. v. Bird*, 31 Cal. 77, holding that insolvency of some sureties, and removal from the state of others, did not release any of the sureties. Affirmed, *Spencer v. Houghton*, 68 Cal. 90, 91, holding that release of one surety on a guardian's bond releases the others; and section 1543 of the Civil Code, as to release of a joint debtor, is inapplicable, because the bond was executed before the code was made. Distinguished, *Wilson v. Tebbetts*, 29 Ark. 583, 21 Am. Rep. 168, saying that the principal case was decided on the ground that the obligation was joint, not joint and several; and holding that discharge of one surety was personal to him and did not affect the liability of other sureties.

New Bond held not to be cumulative, p. 220.

Cited in note to 49 Am. Dec. 412, on cumulative bonds.

11 Cal. 222-227. **EX PARTE ELLIS.**

Habeas Corpus.—Rule of *res adjudicata* is not applicable to, p.

Cited in *Miskimmins v. Shaver*, 8 Wyo. 404; noted under *In re* *kings*, 2 Cal. 424.

Habeas Corpus.—"Writ should not issue to run out of the court unless for good cause shown, as the absence, disability, or refusal of the local judge, or other reason showing that the object of the writ is not to be granted, or that the law requires its issuance," p. 225.

Approved, *Ex parte Deny*, 10 Nev. 214; *Ex parte Lynn*, 19 Tex. 122. Cited, *People v. Fairman*, 59 Mich. 570, holding that a writ of *habeas corpus* does not lie to an order discharging a prisoner on *habeas corpus*, either at common law or by statute; *In re Hammill*, 9 S. D. 391, holding that the writ is of constitutional right, but its privilege is to be exercised in a reasonable manner; also in note to 67 Am. Dec. 398, on refusal of writ of *habeas corpus*.

Statutes must be construed "according to their true intent and meaning; that intent, when collected from the whole and every part of the statute taken together, must prevail even over the literal sense of the terms, and control the strict letter of the law, when the literal would lead to possible injustice, contradiction, and absurdity," p.

Approved, *Chandler v. Lee*, 1 Idaho, 351, as to a "current expense fund"; also, *Dilger v. Palmer*, 60 Iowa, 130, as to a homestead exemption; *St. Louis v. Speck*, 67 Mo. 408, with reference to benefits from street widening; *United States v. Snow*, 4 Utah, 321, regarding polygamy; *Board of Education v. Brown*, 12 Utah, 272, as to school tax; *P. v. Swan*, 16 Utah, 491, construing local statute; *Laidley v. Kline*, 17 W. Va. 577, as to proceedings on *scire facias*; and in *Holy Trinity Church v. United States*, 143 U. S. 461, holding that a statute, forbidding any person or corporation to assist the migration of any foreigner into the United States under contract to perform labor or service, does not cover the employment of a foreign pastor by a church.

11 Cal. 227-238. **FARLEY v. VAUGHN.**

Specific Performance decreed as to vendor of land, the vendee had made improvements and paid part of the purchase price, and his defense in paying the balance being reasonable, pp. 236-238.

Cited, *Grattan v. Wiggins*, 23 Cal. 37, holding that where one, having purchased at sheriff's sale land subject to a mortgage, made large expenditures in perfecting the title, and the mortgagee stood by without giving notice of his claim or offering to share the expenditure, a court of equity will not allow foreclosure and sale of the premises.

than five years later, at least until the mortgagee had indemnified the purchaser for the expenditures. Cited, also, in *Steele v. Branch*, 40 Cal. 13, holding that a vendor must perform his contract, and that any forfeiture claimed by vendor for delay by vendee in fulfilling conditions to be performed by him, was insufficient, or must be deemed waived, time not being of the essence of the contract; and to same effect in *Day v. Cohn*, 65 Cal. 510; also in note to 68 Am. Dec. 87, on forfeiture, and note to 70 Id. 740, on specific performance.

11 Cal. 238-249; 70 Am. Dec. 775. **RITTER v. SCANNELL.**

Attachment.—A return which simply states that the process was executed is sufficient, *prima facie*, to show due and proper execution; all presumptions are in favor of the regularity of acts of the officer, p. 248.

Approved, *Porter v. Pico*, 55 Cal. 172, holding that whether the evidence was sufficient to repel the presumption was a question for the trial court, which would not be reviewed on appeal. Denied, *Brusie v. Gates*, 80 Cal. 467, where the court say: "If this were an open question, we should be inclined to hold that a general return of service was sufficient, and that it must be presumed when the officer returned that he had served the writ by attaching the described property, that he had performed every act necessary to such service" (citing the principal case). "But this court has held to the contrary in the later cases, and we feel that we should adhere to these decisions, *Sharp v. Baird*, 43 Cal. 579; *Watt v. Wright*, 66 Cal. 207; *Gates v. McLean*, 70 Cal. 47." The three cases named do not refer to the principal case, but hold that the return must specify the details of service required by the statute. Cited, *O'Connor v. Blake*, 29 Cal. 315, holding that where the sheriff already has property under attachment, he may levy a second attachment on the same property by making a return to that effect on the back of the attachment. Cited, *Head v. Daniels*, 38 Kan. 10, 13, holding that the sheriff is not required, under the statute, to state what he did not do, or why he did what he stated; also, *Sabin v. Mitchell*, 27 Oreg. 73, holding that the return is sufficient if it can fairly be inferred that the requirements of the law were met; *Stoddard v. McMahon*, 35 Tex. 298, holding that the presumption is in favor of regularity of acts of the officer, and note to 76 Am. Dec. 148, to the same effect; also in note to 20 Am. St. Rep. 808, 809, on sufficiency of return.

Sheriff's Return on process does not affect the title of a purchaser at sheriff's sale, pp. 248, 249.

Approved, *Wilson v. Madison*, 55 Cal. 8; *Hibberd v. Smith*, 67 Cal. 564; *Exchange v. Stamm*, 9 N. Mex. 371, construing local statutes. The note to the principal case in 70 Am. Dec. 779, on this point is cited in notes to 73 Am. Dec. 528, 74 Id. 522, 76 Id. 147, 77 Id. 466.

Lien of attaching creditor takes effect immediately upon levy the attachment and deposit of a copy with the recorder, and can be divested by failure of the sheriff to make a proper return, p. 249.

Cited, *Horton v. Monroe*, 98 Mich. 199, holding that failure of sheriff to return the writ until a day after the return day did not release the lien; and *City Bank v. Cupp*, 59 Tex. 272, holding that failure to file the return for a year did not destroy the lien; also in note to 99 Am. Dec. 270, on this point.

Evidence.—If the return is not *prima facie* evidence of a proper levy, the fact may be proved by other competent evidence, p. 249.

Approved, *Brusie v. Gates*, 80 Cal. 468, where the court say: "The written return of an officer is not the only evidence of the fact that the writ was properly served; therefore, if the return simply omits to state any fact necessary to a valid service, such fact may be supplied by parol evidence, so long as the facts stated in the return are not varied or contradicted in such way as to affect vested rights." Note to the principal case, 70 Am. Dec. 779, is cited on this point; also note to 29 Am. Dec. 121.

Mistake in Date of return may be corrected at any time, p. 249.

Cited in note to 5 Am. St. Rep. 657, on amending return.

11 Cal. 250-259. HUNT v. CITY OF SAN FRANCISCO.

Pleading.—Common counts in *assumpsit*, under the old system of pleading, are good in actions against private persons, and there is no necessity for a different rule in respect to corporations. The rules of pleading "were designed to embrace all persons, natural or artificial, capable of suing or being sued," p. 258.

Approved, *Brown v. Board of Education*, 103 Cal. 535. Cited, *Ciocca v. St. Anne's*, 60 Mich. 557, holding that corporations are on the same footing with natural persons as regards contracts.

Judgment cannot be entered on a verdict upon several counts, when one of the counts is bad, for it is not certain upon which of the counts the jury bases its finding. But the rule does not apply to judgment by default, for the several counts are distinct causes of action, and although one may be bad, this "does not affect the right of plaintiff to take judgment on those which are rightly stated," pp. 258, 259.

Approved, *Barron v. Frink*, 30 Cal. 488, holding that judgment on a general verdict upon several counts must be reversed if one of the counts is bad; and to same effect in *Bernstein v. Downs*, 112 Cal. 204, although the court there say: "This proposition seems to be violative of the principle that an appellant must affirmatively show error, and the intendments are in support of the judgment." Cited, *Territory v. Virginia Co.*, 2 Mont. 101, holding that a bad complaint will not sustain a good judgment; and the question as to whether there is a cause of action can be raised for the first time in the supreme court.

11 Cal. 262-279. **HUNT v. ROBINSON.**

Judgment in Replevin follows the verdict and undertaking, and is in the alternative, for possession of the property, or the value thereof if delivery cannot be had. The recovery of the thing itself, and not damages in lieu thereof, is the primary object of the suit. The value is recovered only as an alternative, when delivery of the specific property cannot be had, p. 277.

Cited, *Etchepare v. Aguirre*, 91 Cal. 292, 25 Am. St. Rep. 182, where the court say: "The verdict for the defendant was special as to the value of the property, as required by the code. As to all other issues it was general. This was sufficient to justify a judgment for the return of the property, or for the value thereof in case a delivery could not be had. . . . The code does not require the verdict to be special except as to the value of the property, and the sole object of this exception is to enable the court to render an alternative judgment as required by section 667 of the Code of Civil Procedure." Cited, also, in *Swantz v. Pillow*, 50 Ark. 305, 7 Am. St. Rep. 100, holding that defendant cannot keep possession of a mule replevied from him by paying its value; also, *Wilson v. Fuller*, 9 Kan. 193, holding that judgment must be in the alternative for the thing or its value.

Replevin.—Possession obtained by the writ is only temporary and does not divest the title or discharge the lien. The party ultimately entitled to the property has a double security, while the party who replevies it does not incur the extraordinary risk of having to pay the judgment and also to lose the property. The lien of the attachment continued, and when the same property came again into the hands of the sheriff, the condition of the replevin bond, to return the property, was fulfilled, p. 279.

Approved, *Caldwell v. Gans*, 1 Mont. 578-580, where the court say: "We adopt this view and say that according to every principle of law and practice, if the sureties in the undertaking in replevin are compelled to pay the value of the property, they are entitled to the property itself"; *Union etc. Bank v. Milburn etc. Co.*, 7 N. Dak. 217, but held inapplicable where replevin plaintiff seeks merely enforcement of lien; *Mohr v. Langan*, 162 Mo. 484, 85 Am. St. Rep. 507, holding replevined property to be in custodia legis pending action; *Coen v. Watkins*, 62 Mo. App. 510, 511, holding that a mule delivered to plaintiff on a bond is not in custodia legis; *Rinker v. Lee*, 29 Neb. 790, holding that where goods were delivered to plaintiff under a replevin bond and later taken from him, he could not bring replevin for them; *Coos Bay Co. v. Wieder*, 26 Oreg. 457, holding that property replevied from an officer holding it under execution is in custodia legis, and the lien of the officer under his writ is not discharged.

General citation: *Coen v. Watkins*, 62 Mo. App. 509.

11 Cal. 281-298; 70 Am. Dec. 779. **BOURS v. ZACHARIAH.**

Notary Public cannot alter or amend defective certificate of acknowledgment of married woman's deed after delivery, p. 292.

Cited in *Bank v. Oberhaus*, 125 Cal. 323, on point that notary act ministerially; *Durham v. Stephenson*, 41 Fla. 120, denying right of absence of reacknowledgment or its equivalent; *Wedel v. Herman*, Cal. 514, holding that under section 1202 of the Civil Code the superior court can correct a defective certificate; also, *Griffith v. Ventress*, Ala. 373, 24 Am. St. Rep. 924, saying that the principal case "is direct in point, and the reasoning of the court appears to us to be conclusive" and holding that a certificate of acknowledgment by a probate judge cannot be amended by him four years later. Cited, *Wambole v. Foot*, 2 Dak. 23, holding that the acknowledgment must conform to the statute; also, *Gilbraith v. Gallivan*, 78 Mo. 458, holding that a probate clerk cannot correct a certificate of acknowledgment after his term of office has expired, although it seems he may do it before; notes to 11 Am. Dec. 521, 523 (*Jordan v. Corey*), on this point; and note to 11 Id. 369, on omission of notarial seal.

11 Cal. 303-306. **SCRIBER v. MASTEN.**

Conversion.—Where one takes goods of another after notice of the ownership sufficient to put him on inquiry, the owner need make no demand before bringing suit, p. 306.

Cited, *Harpending v. Meyer*, 55 Cal. 560, holding that where goods were pledged by one who had no right to them, no demand by the owner was necessary before bringing suit, and the statute of limitations began to run against the claim from the date of receipt of the goods by the pledgee; also, notes to 1 Am. Dec. 587, on right to maintain trover, and 24 Am. St. Rep. 801, on modes of conversion.

11 Cal. 307-327. **MONTGOMERY v. TUTT.** S. C. 11 Cal. 190.

Mortgage.—In suit for foreclosure, "all persons interested in the estate at the time suit is instituted, whether purchasers, heirs, devisees, remaindermen, reversioners, or encumbrancers, should be made parties," p. 314.

Cited, *Horn v. Volcano Co.*, 13 Cal. 70, 73 Am. Dec. 571, holding that judgment creditors, having liens on the premises may be brought in the foreclosure suit on their petition or by amending the complaint; also, *Tuolumne R. Co. v. Sedgwick*, 15 Cal. 527, holding that in a suit to redeem property sold under execution, parties obtaining interest subsequent to plaintiff, before suit brought, may redeem under the statute or file a bill in equity; *Burton v. Lies*, 21 Cal. 91, holding that where the mortgagor has sold his estate in the premises, the widow of the deceased vendee must be made a party to a suit by the mortgagor to foreclose; *Alexander v. Greenwood*, 24 Cal. 512, holding that a judgment creditor, not made a party to the foreclosure suit, is not

bound by the decree; *Horn v. Jones*, 28 Cal. 203, holding that where the vendee at foreclosure sale brought a suit to quiet his title, he could go behind the decree in a mechanic's lien foreclosure and show there was no lien; *Carpentier v. Brenham*, 40 Cal. 238, holding that a junior mortgagee, not made a party to a foreclosure by the first mortgagee, is not bound thereby. Cited, also, in note to 16 Am. Dec. 184, as to who may intervene.

Parties.—Subsequent encumbrancers are not in all cases indispensable parties to a foreclosure. "The property mortgaged may be insufficient to cover the debt secured; the encumbrancers may be so numerous and their claims so large that the parties possessing the latest liens could not possibly receive any portion of the proceeds of the sale. It would be not only a great inconvenience, but a great hardship, to compel the mortgagee in such case to bring in all such persons who have acquired, without any fault of his, liens upon the property," p. 315.

Approved, *Carpentier v. Brenham*, 40 Cal. 235. Cited, note to 70 Am. Dec. 754, on subsequent encumbrancers.

Entry of Default "only cuts off the right to answer, and this is as effectually done by the decree," p. 316.

Approved, *Kittle v. Bellegarde*, 86 Cal. 564, denying a motion to set aside a default twenty months after entry thereof.

Interest upon interest already due cannot be allowed except in pursuance of a written engagement of the parties, p. 316.

Approved, *Doe v. Vallejo*, 29 Cal. 392, and *Yndart v. Den*, 116 Cal. 545, 546, 58 Am. St. Rep. 209.

Redemption.—The clause in the decree, foreclosing the equity of redemption, is a useless formula. The equitable right of subsequent encumbrancers to redeem is merged into the statutory right; "after the decree they stand, as to their right of redemption, in the same position as ordinary judgment debtors," p. 317.

Approved, *Eldridge v. Wright*, 55 Cal. 536, holding that where land of tenants in common, sold under foreclosure, was redeemed by a judgment creditor of one of them, he took the interests of all. Referred to in note to 70 Am. Dec. 676 (*McMillan v. Richards*), on this point.

Negotiable Instrument.—In a suit against the maker of a promissory note or the acceptor of a bill of exchange payable at a particular place, presentation for payment at such place need not be alleged or proved, p. 317.

Approved, *Greeley v. Whitehead*, 35 Fla. 529, 48 Am. St. Rep. 259.

11 Cal. 328. **FUNKENSTEIN v. ELGUTTER.**

Appeal from justice's court to county court on questions of law and fact, dismissed, there being no issues of fact and no statement of grounds of law on which appellant intended to rely, p. 328.

Approved, *Rickey v. Superior Court*, 59 Cal. 662; Cited in *Maxson v. Superior Court*, 124 Cal. 471, discussing power of superior court reversal of judgment entered on order overruling demurrer. Distinguished, *Ketchum v. Superior Court*, 65 Cal. 495, where "there were issues of fact that the court had jurisdiction to retry," and the superior court properly allowed defendant to amend an answer he had filed in the justice's court. Overruled, *Fabretti v. Superior Court*, 77 Cal. 307, the court saying that the principal case was "decided under section 366 of the Practice Act, which was omitted from the code; and it is now settled that if the appeal be taken on questions of law alone, in fact, when there has been no trial of issues of fact in the justice's court, the superior court must entertain and decide the appeal as upon questions of law alone," citing 59 Cal. 471, 63 Cal. 435. Cited, *Gardner v. Maryatt*, 9 Mont. 267, holding that if there is no issue in the justice's court there is nothing to be tried anew; *Paul v. Armstrong*, 1 Nev. 96, holding that the appellate court can try only the issues tried in the court below. *Italian Swiss Agr. Colony v. Bartagnoli*, Wyo. 207.

11 Cal. 329-339. PEOPLE v. WELLS.

Election to fill a vacancy is void if there is no vacancy, p. 338.

Cited in note to 70 Am. Dec. 769, as affirmed on the authority of *People v. Weller*, 11 Cal. 49.

Statute.—A general provision must be controlled by one that is special, p. 339.

Cited on this point, as to a homestead law, in *Smith v. Shrieves*, 1 Nev. 325.

11 Cal. 339-340. AMERICAN R. CO. v. BEAR R. CO.

Appeal is only on the judgment roll, when there is no properly authenticated statement, p. 340.

Cited, *Everett v. Buchanan*, 2 Dak. 254, holding that anything on the judgment roll may be considered; *Henderson v. Morris*, 5 Oreg. 100, holding that anything to be reviewed by the appellate court must appear on the transcript.

11 Cal. 340. HANSON v. BARNHISEL.

New Trial.—Order granting it will not be reversed where no abuse of discretion appears, p. 340.

Approved, *Anthony v. Eddy*, 5 Kan. 133.

11 Cal. 341. GRAY v. GRAY and EATON v. PALMER.

Remittitur.—If a modification of costs is desired, application must be made within the ten days allowed for filing petition for rehearing, p. 341.

Cited, *In re Levinson*, 108 Cal. 459, to the point that if a modification of the judgment of the appellate court is desired, application must be made before the remittitur goes down; after it is issued the supreme court loses jurisdiction of the case "except in a case of mistake, or of fraud or imposition practiced upon the court."

Costs.—Section 510 of the Practice Act (sec. 1033, C. C. P.) does not apply to costs on appeal; these also include costs of making up the appeal in the lower court and the transcript. When the supreme court awards costs, only the costs on appeal are meant; and if the case is remanded for further proceedings, the costs of the former trial are to abide the event, p. 341.

Approved, *Ex parte Burrill*, 24 Cal. 352, 353. Cited, *Stoddard v. Treadwell*, 29 Cal. 282, holding that where a new trial was ordered, and the result of both trials was a judgment for plaintiff, he was entitled to costs of both trials.

General citation: *Gray v. Larrimore*, 4 Sawy. 638, Fed. Cas. No. 5721.

11 Cal. 342. **CHANDLER v. BOOTH.**

Attachment Lies to reach funds placed in hands of third party for benefit of creditors, p. 342.

Cited in *Wilson v. Harris*, 21 Mont. 397, cited under *Roberts v. Lan-
ecker*, 9 Cal. 262.

11 Cal. 343-350; 70 Am. Dec. 787. **HARDY v. HUNT.**

Wager on Election may be retracted by the maker at any time before the stakeholder pays it over to the winner, p. 348.

Cited, *Johnston v. Russell*, 37 Cal. 675, holding that the maker of an election wager may recover his stake from the other party or the stakeholder before the bet has been decided; "but persons who allow their stakes to remain until after the bet has been decided and the result has become generally known, are entitled to no such consideration. Their tears, if any, are not repentant tears, but such as crocodiles shed over the victims they are about to devour." *Wright v. Stewart*, 130 Cal. 919, plaintiff demanding money deposited with stakeholders before running of fake footrace may maintain action for its recovery. *Lewy Crawford*, 5 Tex. Civ. App. 298. Cited in notes to 89 Am. Dec. 603, a recovery of bets from stakeholders, and 1 Am. St. Rep. 302, on loans for gambling purposes.

Estoppel.—The maker of a wager, who instructed another to place the bet in the other's name, is not estopped from asserting his ownership, as against attaching creditors of the one who placed the bet, pp. 348, 349.

Cited in note to 73 Am. Dec. 202, on estoppel.

Garnishee, knowing the facts as to ownership of the property held
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by him, must protect the rights of all parties by appropriate proceedings, p. 350.

Cited, *Walling v. Miller*, 15 Cal. 40, holding that a garnishee delivered up, on an attachment, property held by him as bailee, notice of the real ownership, was liable to the owner; *Bellingham v. Brisbois*, 14 Wash. 179, holding that the debtor must be notified of assignment of a chose in action; also in notes, on garnishee's rights and duties, to 13 Am. Dec. 342, 26 Id. 694, 41 Id. 628, 70 Id. 791.

General citation: *Campbell's Appeal*, 178 Pa. 29.

11 Cal. 360-361. **MOORE v. SEMPLE.**

Appeal.—Agreement, not embodied in any statement or bill of particulars, is no part of the record, p. 361.

Cited, *Everett v. Buchanan*, 2 Dak. 253, holding that clerk's minutes are no part of the record.

Clerical Error, in omitting the words "to be sold" from a decree, does not affect the decree, p. 361.

Cited, *Norton v. Meader*, 4 Sawy. 619, holding that omission of the word "copy" from a certificate of service was immaterial.

11 Cal. 361-362. **FREMONT v. COUNTY OF MARIPOSA.**

Tax.—An injunction will not lie against the collection of a tax, although the prayer of a taxpayer, alleging that taxes for previous years were illegally assessed and collected, p. 362.

Cited, *Delphi v. Bowen*, 61 Ind. 38, holding that in a suit to prevent collection of a tax, the complaint must show that the assessment was illegal and void; *Apperson v. City*, 2 Flipp. 374, 1 Fed. Cas. 1077, discussing right of setoff against demands for taxes; note to 69 Am. Dec. 204, as to an injunction against collection of taxes.

11 Cal. 363-366. **STEPHENS v. MANSFIELD.**

Public Lands.—Abandonment must be made simply because the owner desires no longer to possess the thing; if made with an intention that some other person should become the possessor, it would constitute a gift, p. 365.

Partly overruled in *Richardson v. McNulty*, 24 Cal. 344, holding that what was said regarding a gift was obiter, and not law. Cited, *Leran v. Benton*, 43 Cal. 476, holding that "there is no such thing as abandonment to particular persons or for a consideration"; also, *Little Creek Co. v. Henry*, 15 Mont. 576, 577, where it was held that there was no abandonment.

11 Cal. 366-372. **WARING v. CROW.**

Partners in a mining claim are tenants in common, and possession by one partner or cotenant is the possession of all, p. 371.

Cited, *Lytle Creek Co. v. Perdew*, 65 Cal. 455, holding that any one of several cotenants, entitled to use of water from a creek, may bring suit for a nuisance against a person diverting the water; and in *Tully v. Tully*, 71 Cal. 346, holding that the presumption is that the tenancy in common continues until one tenant ousts another by notice that he claims adversely or by acts equivalent to notice; cited in *City v. Hopper*, 7 Utah, 238, on point that one tenant in common of water may sue alone for its diversion. *Mallet v. Uncle Sam Co.*, 1 Nev. 206, 90 Am. Dec. 496, says of the principal case: "However much its authority may be weakened by the subsequent doubts of the learned judge, who delivered the opinion of the court, as to its accuracy, the decision is certainly based upon reason and the soundest principles of law" (what is meant by the "subsequent doubts," etc., does not appear); held, the possession of one partner or cotenant inures to the benefit of all, until it becomes adverse. Cited, *Terrell v. Martin*, 64 Tex. 128, holding that possession of one cotenant inures to the benefit of another.

The mere fact that one tenant in common or partner goes away and remains absent from the premises of the joint business or property, leaving his associates in possession, creates no presumption of abandonment, p. 371.

In *Moon v. Rollins*, 36 Cal. 338, 95 Am. Dec. 183, the court comments on the principal case, saying of the charge to the jury therein (p. 369) that one leaving with intent to return might do so within five years: "Nothing was said as to a period of time beyond five years. But if a party may return in five years, it is not apparent why he may not return in five years and one month or two months, unless an adverse possession has barred the right of entry. It is a question of intention, and has been so held over and over again, and not a question of time, except so far as the jury are entitled to consider lapse of time . . . for the purpose of ascertaining the intention." *Trevaski v. Peard*, 111 Cal. 605, holding that "abandonment is a matter of intent, which may be shown by the conduct of a party even against his express declarations to the contrary; and if the intent has been formed and once acted upon, the abandonment is as absolute if it exists for a minute or a second as though it continued for years." *Valcalda v. Mines*, 86 Fed. 95, 56 U. S. App. 676, on point that abandonment is question of intent; *Mitchell v. Carder*, 21 W. Va. 285, holding that a party abandons when he leaves land free to the occupancy of the next owner, without any intention to repossess it and regardless as to what may become of it; *Beaver Brook Co. v. St. Vrain Co.*, 6 Colo. App. 136, on the point that a party claiming abandonment has the burden of proof, and must establish it by unequivocal evidence; and note to 40 Am. Dec. 464, 465, on abandonment.

Forfeiture is not created by refusal of one cotenant or partner to pay, or delay in paying, the expenses of the business, or the assessments, p. 372.

Cited, *Coleman v. Clements*, 23 Cal. 218, 249, holding that a rule, under which a forfeiture is claimed, is to be strictly construed against the forfeiture. Construed in *Wiseman v. McNulty*, 25 Cal. where the court say that in the principal case the word "forfeiture" was used in the sense of "abandonment"; and hold that where a forfeiture is claimed for nonpayment of assessments under an agreement the party claiming it must show compliance on his part with the terms of the agreement.

11 Cal. 372-379. **McMILLAN v. REYNOLDS.**

Summons.—Affidavit of service must show affirmatively compliance with the statute, p. 378.

Cited, *Sharp v. Daugney*, 33 Cal. 514, holding that in affidavit of mailing of summons, it need not be stated that affiant is a white citizen, as the rule applies only to service other than by publication. Cited, *Linott v. Rowland*, 119 Cal. 453, holding that an affidavit that did show service upon a defendant was insufficient to sustain a judgment by default; also, *Coffee v. Gates*, 28 Ark. 44, holding that where service may be made by any person authorized by the officer to whom the process is directed, the person serving it must verify his return; *Linott v. Clendenin*, 3 Mont. 47, holding that service by the United States marshal was not good under the statute; *Layton v. Trapp*, 20 Mont. 456, holding that where a justice of the peace appointed a person to serve summons under the statute, the affidavit of service must be verified; *Heatherly v. Hadley*, 4 Oreg. 16, 21, holding that the principal case was not in conflict with *Peck v. Strauss*, 33 Cal. 678, and distinguishing the latter case, on the point that an insufficient return of service cannot be aided by a recital in a decree; *Goodale v. Coffee*, 24 Oreg. holding that an affidavit of publication of summons must aver compliance with the statutory requirements, but these need not be recited in the affidavit of publication, for jurisdiction is based on the affidavit.

Service of certified copy of complaint must be shown by the return on the summons, p. 379.

Approved, *Reynolds v. Page*, 35 Cal. 300, holding that a summons and certified copy of the complaint must be issued within a year after filing of the complaint.

Notice.—The vendee at foreclosure sale having knowledge of defective service of the summons, the sale is set aside, p. 379.

Cited, *Steinbach v. Leese*, 27 Cal. 299, holding that where the mortgagee purchases the premises at foreclosure sale, he is presumed to have bought with notice of all defects in publication of summons.

Equity invalidates a decree of foreclosure, at suit of the mortgagor a married woman (whose rights are favored in the law) and who has a good defense, p. 379.

Cited, *Martin v. Parsons*, 49 Cal. 100, on the point that a court

equity will interfere to prevent the use of a judgment as an instrument of injustice by one who procured the wrongful entry thereof when there had been no service of summons therein.

11 Cal. 380-390. **FREMONT v. BOLING.**

Tax.—Injunction issues against sale of property for taxes, where the sheriff, who was about to make the sale, was no longer in office and had no legal authority, p. 390.

Cited, *Huntington v. C. P. R. R.*, 2 Sawy. 514, holding that where an assessment was void, for failure to assess land and improvements separately, the sale of the property for taxes must be enjoined; also, *Hallenbeck v. Hahn*, 2 Neb. 438, holding that sale of real estate for taxes will not be enjoined merely because the owner has available personal property; and note to 69 Am. Dec. 201, on injunctions to restrain collection of taxes.

11 Cal. 391. **McGILL v. RAINALDI.**

Appeal must be determined on the judgment roll where there is no statement embodied in the record, p. 391.

Cited, *Everett v. Buchanan*, 2 Dak. 254, holding that general and special verdicts are part of the judgment roll, and that a judgment for plaintiff was properly rendered upon them; also, *Graham v. Linehan*, 1 Idaho, 781, holding that in Idaho the bill of exceptions is part of the judgment roll, while in California it is not.

11 Cal. 393-405; 70 Am. Dec. 791. **HORR v. BARKER.** S. C. 6 Cal. 489; 8 Cal. 603, 609.

Pledge by Factor.—The rule that a factor cannot pledge the goods of his principal is limited, in California, to a technical factor, whose only business is to sell consigned goods, affirming *Hutchinson v. Bours*, 6 Cal. 383, p. 402.

Overruled, *Wright v. Solomon*, 19 Cal. 73, 77, 79 Am. Dec. 199, 203, where the court, per Field, C. J., say: "The limitation asserted in *Hutchinson v. Bours* and *Horr v. Barker* cannot be maintained. Those decisions are anomalous in their character and in conflict with the law upon the authority of factors, as it is recognized by the United States courts and the courts of every state of the Union, where the legislature has not interfered to make a change. We do not hesitate to overrule them, for it is of the highest importance to those engaged in commerce in this state that the decisions of this court on commercial questions should be in conformity with the adjudications on like questions of the courts of the principal commercial communities of the world." Cited in note to 95 Am. Dec. 406, on factor's right to pledge; and the note to the principal case, in 70 Am. Dec. 791, on this point, is cited in note to 79 Id. 203.

Delivery of barrels of flour, all of the same kind and stored same warehouse, to several purchasers, held to be complete upon delivery to each purchaser of a warehouse order; the segregation of the different lots is for the separate purchasers to attend to, and the seller has nothing further to do in the matter of delivery; the fact that the flour was of different qualities makes no difference, pp. 402, 403.

Cited, *Kingman v. Holmquist*, 36 Kan. 739, 59 Am. Rep. 606, where it was held that where a seller of plants delivered two lots for two buyers at a railway station, and one of the buyers took away both lots, it was not a sufficient delivery to allow the other buyer to maintain trover for his share; also, as to constructive delivery, in notes to 75 Am. Dec. 77 Id. 311, 82 Id. 667, 48 Am. St. Rep. 351. The note to the present case in 70 Am. Dec. 791, is cited in notes to 83 Id. 142, 90 Id. 142, 88 Id. 281, on segregation and constructive delivery.

11 Cal. 405. **BROTHERTON v. HART.**

Judgments by Consent, and orders made by stipulation, will be reviewed by the supreme court, p. 405.

Approved, *Mecham v. McKay*, 37 Cal. 158; *San Francisco v. City of San Francisco*, 42 Cal. 518; *Erlanger v. S. P. R. R.*, 109 Cal. 395.

VOLUME XII.

By ALBERT RAYMOND.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

12 Cal. 11-20. AMES v. HOY.

Judgment.—Action lies upon, pp. 19, 20.

Cited to same effect in *Steuart v. Lander*, 16 Cal. 375, 76 Am. Dec. 539, judgment of justice's court, when time for execution had expired; *Brewster v. Ludekins*, 19 Cal. 170, action in one district court on judgment of another; *Rowe v. Blake*, 99 Cal. 170, 172, 36 Am. St. Rep. 46, 47, 48, an action to enforce foreclosure decree, although remedy by sale also exists; *Davidson v. Nebaker*, 21 Ind. 335, 83 Am. Dec. 350, a domestic judgment; *Simpson v. Cochran*, 23 Ia. 83, 92 Am. Dec. 412, a domestic judgment, holding execution merely cumulatory; *Burnes v. Simpson*, 9 Kan. 663, saying: "The proceeding seems harassing and vexatious and to serve no purpose that could not be reached by a more simple and less costly method. But these are reasons why the law should be changed and not that it should be disregarded"; *Hammer v. Lamphear*, 32 Kan. 442, 49 Am. Rep. 494, following *Burnes* case on principle of stare decisis; *Eldredge v. Aultman*, 35 Neb. 885, 37 Am. St. Rep. 477: "While there is some conflict in the decisions the proposition stated is sustained by the great weight of authority in this country"; *Mandlebaum v. Gregovich*, 24 Nev. 161, sustaining action by assignee; *Morse v. Pearl*, 67 N. H. 318, 68 Am. St. Rep. 672, holding right of action not lost by issuance of execution on judgment sued on; *McLean v. McLean*, 90 N. C. 532, holding, further, original judgment not merged in judgment upon it so as to prevent issuance of execution upon first. Explained and distinguished in *Pitzer v. Russel*, 4 Or. 127, holding such action not maintainable unless shown to be necessary in order to enable plaintiff to have full benefit of judgment, and this case is approved in *Hammer v. Lamphear*, 32 Kan. 442, 49 Am. Rep. 494, *supra*.

Lost Judgment.—Secondary evidence of destroyed judgment book is admissible, p. 20.

Cited to same effect in *In re Warfield*, 22 Cal. 64, 83 Am. Dec. 52, as to contents of petition for probate.

12 Cal. 20-27. TEWKSBURY v. PROVIZZO.

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Explained and distinguished in *Emeric v. Alvarado*, 64 Cal. 574, 579, construing deed in question. Cited in note to *Tomlin v. Hily*, 92 Am. Dec. 125, as to question of warranty upon voluntary partition.

Complaint—Amendment.—Order permitting amendment is ineffective unless complied with, p. 46.

Cited to same effect in *Briggs v. Bruce*, 9 Colo. 234.

Damages—Joint Owners.—Where one joint owner recovers damages for trespass upon their property he holds them in trust for the other, p. 47.

Cited in *Nightingale v. Scannell*, 18 Cal. 327, where applied to recovery for benefit of plaintiff by his partner.

12 Cal. 27-50. KIMBALL v. GEARHART.

Appeal.—Verdict will not be set aside where evidence conflicts, p. 48.

Distinguished in *Wilson v. Cross*, 33 Cal. 68, holding rule modified where testimony consists entirely of depositions.

Appropriation of Water Rights.—Various instructions as to proper appropriation discussed, p. 48.

Cited in *McGarritty v. Byington*, 12 Cal. 431, holding (as to minority claim) the mere failure of diligence in working does not affect riparian rights once attached; *Nevada County etc. Co. v. Kidd*, 37 Cal. 311, 312, 314, to same effect, holding, however, that when the prior appropriation is not in condition to use water and delays in perfecting right, another may acquire superior rights, and the former cannot enjoin diversions. Cited, also, in *Mitchell v. Canal etc. Co.*, 75 Cal. 482, on point that pecuniary inability to prosecute work within reasonable time is not excuse for delay; and same effect in *Keeney v. Carillo*, 2 N. Mex. 493; *Nevada Ditch Co. v. Nett*, 30 Oreg. 85, 60 Am. St. Rep. 782, and note 810, holding under facts that reasonable diligence in appropriation had been shown; and *Heath v. Story*, 64 Fed. Rep. 515, stating general rules as to appropriation and holding under facts prior rights abandoned by nonuser. Cited, also, in *Keeney v. Carillo*, 2 N. Mex. 493, upon point that where appropriation effected with due diligence title relates back to commencement of work; and to same effect in *Union Mill etc. Co. v. Dangberg*, 81 Fed. Rep. 109. Cited, also, in *Osgood v. El Dorado etc. Co.*, 56 Cal. 580, on point to sufficiency of notice of appropriation. Cited, also, in *Warren v. Westbrook Mfg. Co.*, 86 Me. 38, as to rights of riparian owners on abutment of river island; and *Union Mill etc. Co. v. Dangberg*, 81 Fed. Rep. 109, 95, and note to *Heath v. Williams*, 43 Am. Dec. 280, 281, as to general rules of appropriation of water rights.

General Denial.—Evidence under such denial is admissible of anything that supports or attacks title, p. 50.

Cited in *Sparrow v. Rhoades*, 76 Cal. 210, 9 Am. St. Rep. 198, where applied in ejectment to evidence of illegality of consideration of deed under which plaintiff claims.

12 Cal. 50-56. **PEOPLE v. BIRCHAM.**

Court of Sessions.—Powers of held transferred to supervisors, p. 54.

Cited in *Kimball v. Alameda Co.*, 46 Cal. 24, as to jurisdiction of supervisors and holding it to include opening public highways over public lands. Also commented on in *People v. Provines*, 34 Cal. 528, granting power to police judge to act as police commissioner.

Statutes.—Legislative Intent may be accomplished by reference to unconstitutional act, p. 55.

Cited in *San Francisco v. Broderick*, 125 Cal. 192, construing section 61, County Government Act.

12 Cal. 56-72. **STATE v. MOORE.**

Taxation.—Mining claim is property, and subject to taxation, p. 69.

Cited in *Bakersfield etc. Co. v. Kern Co.*, 144 Cal. 152, noted under *Merced etc. Co. v. Fremont*, 7 Cal. 317; *Gold Hill etc. Co. v. Ish*, 5 Oreg. 106, on point that right of mining is a franchise; and in note to 68 Am. Dec. 274, as to nature of such right. Cited, also, and approved as to liability to taxation, in *People v. Shearer*, 30 Cal. 657, after doubt in *People v. Morrison*, 22 Cal. 80, and *State v. Central Pacific etc. Co.*, 21 Nev. 259—holding, however, possessory claim in public lands not taxable unless in actual possession. Explained and distinguished in *Hart v. Plum*, 14 Cal. 154, holding taxable the flume used for a non-taxable mining claim.

Value.—Standard of is selling price, p. 71.

Cited in *Doud v. Mason etc. Co.*, 76 Iowa, 440, holding evidence admissible in condemnation proceedings that land contained coal; and in like proceedings in *Montana Ry. Co. v. Warren*, 6 Mont. 281, when property was mining prospects.

General citation: *Topeka etc. Security Co. v. McPherson*, 7 Okla. 345.

12 Cal. 73-76. **KELLEY v. SCANNELL.**

Sheriff—Liability for Levy.—Property of stranger in possession of defendant is subject to attachment, p. 75.

Cited to same effect, holding sheriff, if otherwise without knowledge, liable only on notice of owner's claims and refusal to surrender, *Ful-*

ler Desk Co. v. McDade, 113 Cal. 363, and Vose v. Stickney, 8 Minn. 79 (but see dissenting opinion, p. 83). Cited, also, as to necessity of demand and refusal before suit in Perkins v. Barnes, 3 Nev. 563; and see Fuller case, *supra*.

12 Cal. 76-85. **BURNETT v. MAYOR.** S. C. 73 Am. Dec. 518, and note 522.

Eminent Domain.—Right of does not extend to taking of money, p. 83.

Cited to same effect in Cary Library v. Bliss, 151 Mass. 378, denying right to transfer by special act property public library founded by donations, from trustees to a library corporation; and criticised as to this point in Hammett v. Philadelphia, 65 Pa. St. 152, 3 Am. Rep. 618, denying power of municipality to levy local tax for general purposes. Cited, also, in Hagar v. Supervisors, 47 Cal. 234, holding enforcement of valid tax not to be a taking of private property for public use.

Taxation—Local Improvements.—Levy of special assessment for local improvement is not special tax, and such tax may be imposed by general taxation on all inhabitants of town or county, or confined to adjacent property owners, p. 83.

Cited to same effect in Emery v. San Francisco, 28 Cal. 352, 36, confirming assessment by special act for street improvement on adjacent property owners; Chambers v. Satterlee, 40 Cal. 514, a like assessment for street grading; Hagar v. Supervisors, 47 Cal. 234, swamp land reclamation and taxation upon districts, as to which, see also Reclamation District v. Hagar, 6 Sawy. 570, 4 Fed. Rep. 369; Whiting v. Townsend, 57 Cal. 519, confirming like assessment for street work; In re Madera Irrigation District, 92 Cal. 325, 27 Am. St. Rep. 126, as to assessment for irrigation purposes on irrigation districts, irrespective of special local benefit to taxpayer; Pulmer v. Stumph, 29 Ind. 336, as to local assessment for purposes of street improvement; County Judge v. Shelby etc. Co., 5 Bush (Ky.), 228, as to tax for railroad purposes on county through which road ran; Henderson Bridge Co. v. Henderson, 90 Ky. 503, as to taxation to specified district for bridge construction and holding that when legislature has so imposed tax on district, the court will not inquire as to benefit derived from improvement by particular property within the district; Harvard College v. Aldermen, 10 Mass. 482, holding such assessment a tax and plaintiff exempt therefrom by its charter; Dailey v. Swope, 47 Miss. 385, as to assessment for levee purposes; Macon v. Patty, 57 Miss. 385, 34 Am. Rep. 453, and in Hayden v. City, 70 Ga. 823, as to assessment for improvement of streets, and distinguishing between assessments and exercise of police power; State v. Dodge County, 8 Neb. 130, 30 Am. Rep. 823, as to taxation by county under legislative authority for drainage of swamp and marsh lands; Rolph v. Fargo, 7 N. Dak. 664, construing local statutes; Kimball v. City, 19 Utah, 392, discussing powers of legislature as to mode

of taxation; *King v. Portland*, 2 Oreg. 158, as to assessment on adjacent owners for street improvement; *Winona etc. Co. v. Watertown*, 1 S. Dak. 51, 57, as to like assessment, distinguishing (p. 51) between powers of eminent domain and taxation; and note to *People v. Mayor*, 55 Am. Dec. 287, 288, and *Anderson v. Kerns etc. Co.*, 77 Am. Dec. 66, as to taxation for local improvements and its apportionment. Cited, also, on main point and criticised in *City v. Larned*, 34 Ill. 281, holding invalid an assessment made on basis of frontage of adjacent property.

General citation: *Dooley v. Foster*, 5 Kans. 279.

12 Cal. 85-88. **CROSBY v. WATKINS.**

Undisclosed Principal may sue in his own name on agent's contract made for his benefit, p. 88.

Cited to same effect in note to *Ruiz v. Norton*, 60 Am. Dec. 619.

Tender of Price held not necessary where goods deliverable on demand, p. 88.

Cited to same effect in *Dudley v. Thomas*, 23 Cal. 369, and applied to tender of mutual releases in arbitration proceedings.

Nondelivery.—Damages are different between contract price and value, p. 88.

Cited to same effect in *Boyer v. Cox*, 34 Neb. 816—holding, also, that where goods purchasable in open market, measure of damages is market price on day appointed for delivery, less contract price when not paid.

12 Cal. 89-90. **FRATT v. CLARK.**

Assumpsit lies for property tortiously taken, the tort being waived, p. 90.

Cited to same effect, as to conversion of personalty, in *Roberts v. Evans*, 43 Cal. 382; *Lehmann v. Schmidt*, 87 Cal. 20, action against bailee who had waived his lien; *Isaacs v. Hermann*, 49 Miss. 465, where goods tortiously taken are sold; *Braithwaite v. Akin*, 3 N. Dak. 370, where rule extended to any case where benefit received by tortfeasor, whether by sale, or retention, or otherwise; and in note to *Webster v. Drinkwater*, 17 Am. Dec. 242, 244, upon general subject of waiver of tort; *De la Guerra v. Newhall*, 55 Cal. 23, upon point that allegation of express promise to pay for pasturage of cattle need not be proved when facts showed implied promise; *Howell v. Graves*, 27 Ark. 367, on point that where tort waived plaintiff could recover only what defendant received, or actual selling price of converted property; cited in *Monroe v. Cannon*, 24 Mont. 320, sustaining implied contract for pasturage of sheep unlawfully on plaintiff's land.

12 Cal. 91. **MAY v. BOREL.**

Agent.—Notice to is notice to principal, p. 91.

Cited to same effect in *Watson v. Sutro*, 86 Cal. 516, where applied to notice of infirmity of title to attorney pending negotiations for purchase; and holding, further, that such constructive notice is irrebuttable; *Wittenbrock v. Parker*, 102 Cal. 101, 41 Am. St. Rep. 176, following *Watson* case, *supra*, on similar facts, where notice was to one firm of attorneys; *Parker v. Randolph*, 5 S. Dak. 555, as to knowledge by agent of outstanding lien; and *Lakin v. Sierra Buttes etc. Co.*, 1 Sawy. 240, 25 Fed. Rep. 342, where applied to doctrine of bona fide purchase without notice.

12 Cal. 92-99. **WHEATLEY v. STROBE.** 73 Am. Dec. 522.

Equitable Assignment.—Order to pay another full amount of claim operates as, though not accepted, p. 97.

Cited in *Pullen v. Bank*, 138 Cal. 174, but held inapplicable to check given without consideration with direction not to present until drawer's death; *Donohoe etc. Co. v. S. P. Co.*, 138 Cal. 187-189, holding ordinary bank check for part of deposit not so to operate; *Pope v. Huth*, 14 Cal. 408, where applied to part of moneys to come into hands of drawee; *Joyce v. Wing Yet Lung*, 87 Cal. 425, where acceptance was merely verbal; *Lawrence Nat. Bank v. Kowalsky*, 105 Cal. 44—holding, further, that intention to make assignment need not appear on face of order or bill of exchange; *Board v. Jameson*, 86 Ind. 165, on point that order drawn on particular funds operates pro tanto as such an assignment and assignee can sue therefor as real party in interest; *Grammel v. Carmer*, 55 Mich. 213, in dissenting opinion—main opinion holding, however, that unaccepted draft does not so operate; *Nimocks v. Woody*, 9 N. C. 6, 2 Am. St. Rep. 371, an unaccepted draft for entire claim; *Gardner v. Bank*, 39 Ohio St. 605, under like facts, no other claim intervening, and the question being considered as between drawer and payee; *Pease v. Landauer*, 63 Wis. 29, 53 Am. Rep. 250, a bank draft holding such assignment binding upon drawer, and not to be avoided unless for good cause—"we think reason and authority are in favor of the rule above stated." Distinguished in *Bush v. Foote*, 58 Miss. 14, 38 Am. Rep. 312, as to difference in this respect between orders and bills of exchange, and denied as to assignment by unaccepted bill. Cited, also, in note to *Mason v. Donsay*, 85 Am. Dec. 308, and *Baer v. English*, 20 Am. St. Rep. 376, as to validity of parol promise to accept bill; *Ford v. Angelrodt*, 88 Am. Dec. 178; and *Dana v. Third Nat. Bank*, 90 Am. Dec. 219, upon equitable assignment by draft or order.

12 Cal. 100-102. **JORDAN v. GIBLIN.**

Service by Publication is invalid unless statute strictly followed, p. 102.

Cited in *In re Tracey*, 136 Cal. 390, applying rule to proceedings to terminate life estate; *People v. Huber*, 20 Cal. 82, holding void order of publication before issuance of summons; *Brady v. Seaman*, 30 Cal. 617.

where affidavit as to residence was defective; *Alderson v. Marshall*, 7 Mont. 296, holding that allegation of "due diligence" on affidavit was insufficient without stating facts; *Little v. Currie*, 5 Nev. 92, where affidavit held bad because stating only conclusions of law as to existence of cause of action; *Galpin v. Page*, 3 Sawy. 120, 9 Fed. Cas. 1136; and in same case on appeal, 18 Wall. 369, holding judgment by publication invalid because judgment roll did not contain affidavit of publication—and holding, further, that presumptions as to due jurisdiction do not attach where service is by publication; also, in note to *Hahn v. Kelly*, 94 Am. Dec. 968, as cited in *Galpin* case; and *Palmer v. McMaster*, 8 Mont. 192, upon similar facts. Cited, also, to same effect in *Vizzard v. Taylor*, 97 Ind. 94, where rule applied to notice by auditor under drainage act.

12 Cal. 103-104. **HUTCHINSON v. BURR.**

Municipal Bonds.—In action to restrain issuance of, persons to whom issue is to be made are indispensable parties, p. 103.

Cited to same effect in *Patterson v. Board*, 12 Cal. 106.

12 Cal. 107-111. **HEYMAN v. LANDERS.**

Restraining Order may be issued before complaint filed, p. 110.

Cited in *Ex parte Sayre*, 95 Ala. 290, holding such issuance a mere irregularity, which is cured by motion to dissolve after answer.

Damages for detention of money are only legal interest, p. 111.

Cited to same effect in *North Star etc. Co. v. Stebbins*, 3 S. Dak. 544, as to interest on balance of account; and *Godbe v. Young*, 1 Utah, 61 holding that where contract specifies no interest statutory rate is allowed on breach. Approved in *Lally v. Wise*, 28 Cal. 543, holding that in suit on injunction bond for detaining moneys it should carry only legal interest, and not what the money was worth.

12 Cal. 114-125. **ESTATE OF TOMPKINS.**

Community Property is subject to husband's debts upon his death, p. 124.

Cited in *Frankel v. Boyd*, 106 Cal. 613, and applied to creditor's claims after division of common property on divorce.

Homestead not subject to debts of deceased husband, p. 125.

Cited to same effect in *McCloy v. Trotter*, 47 Ark. 454, holding void order of probate court for sale of homestead to pay husband's debts; and in *Smith v. Shrieves*, 13 Nev. 325, distinguishing case, however, where no declaration made during husband's life.

Homestead is Estate in joint tenancy, p. 125.

Cited in *Brennan v. Wallace*, 25 Cal. 114, and note to *Poole v. Girard*, 65 Am. Dec. 483, as overruled by *Gee v. Moore*, 14 Cal. 474, and

later cases—Brennan case holding declarations of husband as to abandonment binding on both spouses. See, also, *Smith v. Shrieves*, Nev. 308, where decisions and statutes on this point are collated. Cited, also, in *Gimmy v. Doane*, 22 Cal. 638, on point that homestead may be divided on divorce; and note to *Taylor v. Hargous*, 60 Am. Dec. 100, as to nature of homestead.

Probate Court.—Jurisdiction does not extend to question of title in homestead, p. 125.

Cited to same effect in *Estate of James*, 23 Cal. 418, denying jurisdiction to partition homestead on husband's death.

12 Cal. 128-134. **CLOUD v. EL DORADO COUNTY.** 73 Am. Dec. 100.

Judgment by Confession is not collaterally impeachable by stranger, p. 133.

Cited to same effect in *Lee v. Figg*, 37 Cal. 336, 99 Am. Dec. 100, holding only attackable, where valid on face, directly by creditors' fraud; and in note to *McIndoe v. Hazelton*, 88 Am. Dec. 704, and *Weigand v. Matson*, 8 Am. St. Rep. 337, on point that statute must be strictly complied with. Cited, also, in *Keybers v. McComber*, 67 Cal. 399, holding that default judgment in justice's court, voidable because of defective summons, is not collaterally impeachable.

Execution Sale.—Title of purchaser not affected by sheriff's return; he need show only judgment, execution, levy, sale and deed, p. 133.

Cited to same effect in *Clark v. Lockwood*, 21 Cal. 224, as to error in return; in *Hihn v. Peck*, 30 Cal. 288, where return did not recite sale but deed did; in *Moore v. Martin*, 38 Cal. 438, where return recited sale to plaintiff's attorney, the deed being to plaintiff, and holding that other parol evidence of sale to plaintiff admissible on loss of deed; *Blood v. Light*, 38 Cal. 654, 99 Am. Dec. 443 (cited in *Hibberd v. Smith*, 67 Cal. 565, and *Frink v. Roe*, 70 Cal. 302), where return did not recite levy; *Kelley v. Desmond*, 63 Cal. 519, holding purchaser's title good although no notice of sale given, and penalty not recoverable from sheriff; *Frink v. Roe*, 70 Cal. 302, where no notice given; and to same effect in note to *Smith v. Randall*, 65 Am. Dec. 480; *Hazzard v. Colburn*, Idaho, 289, where return irregular and two sales made; *Moore v. Frazer*, 15 Oreg. 637, holding title at foreclosure sale shown by deed, order confirming sale, and deed; and in *Real Estate Co. v. Hendrickson*, 28 Oreg. 491, 492, 52 Am. St. Rep. 801, 802, on facts as in *Hihn v. Peck*, supra, but holding title invalid because of void judgment, although sale confirmed. Cited, also, in note to *Hendrickson v. R. Co.*, 84 Am. Dec. 78, as to effect of irregularities in sale; to *Johnson v. Baker*, 87 Am. Dec. 297, as to foundation of purchaser's title; and to *Drake v. Moon*, 76 Am. Dec. 147, on point that facts as to sale, etc., may be shown by evidence outside of the return.

12 Cal. 134-138. **SACRAMENTO v. CALIFORNIA STAGE COMPANY.**

License Tax where business partly outside city is valid, p. 138.

Cited to same effect in *Los Angeles v. S. P. R. R. Co.*, 61 Cal. 64, case of city tax on railroad company; *Dubuque v. Illinois etc. Co.*, 39 Iowa, 85, as to like taxation; *Pacific R. R. Co. v. Cass County*, 53 Mo. 32, and *Orange etc. Co. v. City Council*, 17 Gratt. (Va.) 186, as to taxation upon rolling stock; *Western Union Tel. Co. v. Fremont*, 39 Neb. 700 (criticised in dissenting opinion, p. 709), excepting, however, operations under interstate commerce act. Cited, also, in *San Jose v. San Jose etc. Co.*, 53 Cal. 481, on point that legislature or municipal corporation when authorized can tax occupations; *City of Leavenworth v. Smith*, 5 Kan. App. 171, but held inapplicable under local ordinance; *Newton v. Atchison*, 31 Kan. 156, 47 Am. Rep. 489, upon power of legislature to delegate levy of license taxes. Distinguished in *Santa Cruz v. Santa Cruz etc. Co.*, 56 Cal. 149, holding that city may not sue for license tax where no license taken out, except where charter permits suit (as to which see *Los Angeles v. S. P. R. R. Co.*, 61 Cal. 64, a point said to have been unconsidered in main case).

12 Cal. 139-140. **MUDGETT v. DAY.**

Agent for Collection of note can take money only in payment, p. 140.

Cited in *Stetson v. Briggs*, 114 Cal. 514, where applied to agent to collect rents who accepts credit on his personal account with debtor.

12 Cal. 143-148. **CORDIER v. SCHLOSS.** S. C. 18 Cal. 576, affirming main case on principle of stare decisis, p. 580.

Judgment by Confession is merely prima facie fraudulent when statement defective, p. 146.

Cited in *Wilcoxon v. Burton*, 27 Cal. 235, 237, holding void such a judgment when fraudulently given for more than amount due, and further that defendant cannot disprove facts in statement nor prove additional debts; *Lee v. Figg*, 37 Cal. 336, 99 Am. Dec. 274, holding such judgment valid until overthrown on direct attack by creditors, and not invalidated by insufficient statement of origin of debt; *Pond v. Davenport*, 44 Cal. 487, holding statement substantially defective, but that defects may be supplied by parol evidence consistent with allegations of statement; *Puget Sound etc. Bank v. Levy*, 10 Wash. 505, 45 Am. St. Rep. 808, holding failure to verify confessions fatal, and criticising main case as to effect of insufficient statement; and in note to *Richards v. McMillan*, 65 Am. Dec. 522, upon point that statute must be strictly followed.

Chancery Pleading.—Old rules superseded by Practice Act, p. 147.

Cited to same effect in *Bostic v. Love*, 16 Cal. 73, holding answer not evidence; in *Houghtaling v. Ellis*, 1 Ariz. Ter. 387, and in *Wa Ching v.*

Constantine, 1 Idaho, 267, on point of allowing equitable defenses actions at law; and in *Plaisted v. Nowlan*, 2 Mont. 361, denying appeal from part of judgment.

12 Cal. 148-168. **STANLEY v. GREEN.** S. C. Hayner v. Stanley. Sawy. 218, 13 Fed. Rep. 220.

Deed.—Description held certain in view of parol evidence, p. 160.

Cited in *Estate of Geary*, 146 Cal. 109, where homestead declaration described land by name as lot of 160 acres on which husband had resided with family for three years which was then unsurveyed government land, attempted description by legal subdivisions, which after survey found incorrect, is surplusage; *De Leon v. Higuera*, 15 Cal. 46, holding description in mortgage, good; dissenting opinion in *Aguirre v. Alexander*, 58 Cal. 37, question of interpretation of deed, main opinion holding instructions as to description conflicting; dissenting opinion in *Crosby v. Dowd*, 61 Cal. 605—main opinion holding description by reference in foreclosure decree void for uncertainty, although good for purposes of mortgage and complaint; *Wheeler v. Bolton*, 66 Cal. 8, where parol evidence was held admissible to identify land in deed to same effect in *Blair v. Bruns*, 8 Colo. 399, as to "all lots remaining undivided," etc.; *Kamphouse v. Gaffner*, 73 Ill. 457, as to location of premises in lease, and holding further that construction of lease was question for court; *Chicago etc. Co. v. Powell*, 120 Mich. 57, applying rule to construction of trustee's powers under deed; *Cornell v. Gallagher*, 36 Neb. 762, applying rule to power of attorney to sell land bought at execution sale; *Huberman v. Evans*, 46 Neb. 797, where guardian's petition for sale of real estate referred to all his ward's estate in a certain county or state; *Paroni v. Elleson*, 14 Nev. 63, where the description was the "McLeod woodranch" in a designated locality; *Brown v. Warren*, 16 Nev. 236, where such evidence was for purpose of identification; and *Armijo v. N. M. etc. Co.*, 3 N. Mex. 435 (292), admitting parol evidence for like purpose; *Cox v. McGowan*, 116 N. 133, where by mistake the parties ran by different line than that indicated in deed; and in *Messer v. Oestreich*, 52 Wis. 689, where also the building of fences without opposition was considered in determining the property granted. Cited, also, in *Marriner v. Dennison*, 78 Cal. 207, holding good a description in executory contract which contained no city, county, or state, where effect of parol evidence is not to introduce new description, but to complete that in the contract, and holding further, that in action upon it complaint must contain averments of necessary extrinsic facts; and in *Mettart v. Allen*, 139 Ind. 652, to effect that description of tract by its well known name is effectual. Distinguished in *Clarke v. Huber*, 25 Cal. 597, rejecting parol evidence of error in description when constituting equitable defense not pleaded; *Clarke v. Lancaster*, 36 Md. 205, 11 Am. Rep. 490, where "degrees" was sought to be changed to "perches" and "perches" added to certain figures; and

Shuttleworth v. Shuttleworth, 34 W. Va. 23, where provision for "home" on land was to be enlarged into "support and maintenance."

Declarations of Grantor in possession are admissible against himself and claimants under him, p. 163.

Cited to same effect in *Moore v. Jones*, 63 Cal. 16, as to declarations of husband that property was bought with wife's separate funds; *Sharp v. Blankenship*, 79 Cal. 413, as to location of boundary line; *Rush v. French*, 1 Ariz. Ter. 144, as to grounds on which title based; *Probst v. Trustees*, 3 N. Mex. 381 (270), as to person for whom property was held by agent in possession; and *Sperry v. Wesco*, 26 Oreg. 491, as to existence of townsite and location of blocks therein.

Deed—Description.—Statement of area yields to description by metes and bounds, or designation of number or place, p. 163.

Cited in *De Arguello v. Greer*, 26 Cal. 632, holding that boundaries govern courses, distances, and quantity; *Haley v. Amestoy*, 44 Cal. 138, that name of tract governs particular description; *Williams v. Harter*, 121 Cal. 52, deed to ditch carries appurtenant water rights; *Baldwin v. Temple*, 101 Cal. 402 (tax assessment), that acreage must yield to boundaries in case of conflict; *Ford v. Springer Ld. Assn.*, 8 N. Mex. 40, construing deed; *Cox v. McGowan*, 116 N. C. 133, that courses and distances yield to calls for stable monuments or natural objects, and also that a special description will govern general one in deed, whether preceding it or not.

Deed—Civil Law.—Requisites of stated, p. 166.

Distinguished in *De Merle v. Mathews*, 26 Cal. 469, holding omission of consideration in Mexican deed not fatal and to be supplied by parol. Cited in note to *Harlowe v. Hudgins*, 31 Am. St. Rep. 28, on point that unsealed indorsement on deed will convey title.

Unrecorded Deed.—Exceptions in bind claimants under, with notice, p. 166.

Cited to same effect in note to *Adams v. Cuddy*, 25 Am. Dec. 334.

Agent.—Notice to is notice to principal, p. 167.

Cited to same effect in *Watson v. Sutro*, 86 Cal. 516, and *Wittenbroek v. Parker*, 102 Cal. 101, 41 Am. St. Rep. 176, as to which see also *May v. Borel*, 12 Cal. 91, ante.

12 Cal. 168-171. **CONNER v. CLARK.** 73 Am. Dec. 529.

Promissory Note.—Liability of one signing as "trustee" is personal, p. 170.

Cited in *Melone v. Ruffino*, 129 Cal. 523, 524, 79 Am. St. Rep. 134, 135 (and see note, 137) applying rule to administrator's contract; *Bank v. Looney*, 99 Tenn. 295, 63 Am. St. Rep. 840, as to note of "trustee"; *Warren v. Harrold*, 92 Tex. 420, as to note of "assignee"; *Andrus v.*
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Blizzard, 23 Utah, 255, 257, one signing note as guardian of incompetent is personally liable thereon; *Chamberlain v. Pacific etc. Co.*, Cal. 106, where note signed X., "President," etc., there being no corporate ratification; *Robinson v. Springfield etc. Co.*, 21 Fla. 223, 224, where note, and mortgage signed by X., "Trustees," etc., and decreed in that way, there being no restriction to trust estate; *Rogers v. Williams Bank v. Groton etc. Co.*, 16 R. I. 507, where indorsement by trustee; and in notes to *Olcott v. Tioga etc. Co.*, 84 Am. Dec. 313, *Sharpe v. Bellis*, 100 Am. Dec. 621, and to *Rand v. Hale*, Id. 765, liability under such signatures.

Parol Evidence is inadmissible to contradict writing, pp. 170-1.

Cited to same effect in *Frink v. Roe*, 70 Cal. 316, where sought to show that title was not to pass under absolute deed; *Stein v. Fogarty*, 4 Idaho, 704, in absence of fraud or mistake, parol evidence of contemporaneous oral agreement is inadmissible to show note was by agreement payable in work and labor; notes to *Timms v. Shannon*, 81 Am. Dec. 638, *Griffith v. Furry*, 83 Am. Dec. 188, *Gelpcke v. Blake*, Id. 422, and *Hahn v. Doolittle*, 86 Am. Dec. 760, upon same subject.

12 Cal. 171-181. DABOVICH v. EMERIC. S. C. 7 Cal. 209.

Damages for breach of guaranty—rule of, stated; cannot include particulars not pleaded, p. 179.

Cited in *Maher v. Riley*, 17 Cal. 416, on point that measure of damages for nondelivery of goods sold is purchase price and interest, or highest market value up to trial; *Plunkett v. Minneapolis etc. Co.*, 7 Wis. 227, holding damages for care and cure of injured cattle recoverable under allegations, and further, that uncertainty in allegations should be attacked by motion; and in note to *Hoffman v. Chamberlain*, 53 Am. Rep. 789, as to rule of damages for nondelivery of purchased chattels. Cited, also, in *Parker v. Bond*, 5 Mont. 11, on second proposition, holding special damages recoverable under pleadings in action on injunction bond.

12 Cal. 181-191. LOW v. BURROWS.

Foreign Judgment.—Authentication held sufficient under facts stated in certificate, p. 188.

Cited in *Wickersham v. Johnston*, 104 Cal. 414, 43 Am. St. Rep. 122, holding certificate of foreign probate sufficient; *Case v. Huey*, 26 Kan. 560, where justice of peace certified as judge and as clerk of his own court; and *Keyes v. Mooney*, 13 Oreg. 182, where certificate of judge did not state him to be only or chief judge, but record did not negative this.

Foreign Administrator.—Assignee of foreign judgment recovered by may sue him thereon, p. 188.

Cited on same point in note to *Peterson v. Chemical Bank*, 88 Am.

Dec. 311; and *Lewis v. Adams*, 70 Cal. 410, 59 Am. Rep. 426, and *McCully v. Cooper*, 114 Cal. 261, 55 Am. St. Rep. 69, granting power of foreign executor or administrator to sue him on foreign judgment or for goods unlawfully taken from his possession, not officially, but individually—latter case allowing also recovery by local ancillary administrator against domiciliary administrator for certificate of deposit in local bank. Cited, also, in dissenting opinion in *Humphreys v. Hopkins*, 81 Cal. 559, 15 Am. St. Rep. 79—main opinion holding property in hands of foreign receiver, brought here, subject to attachment by local creditors.

12 Cal. 191-200. **JONES v. THOMPSON.** S. C. More v. Ord, 15 Cal. 205.

Appeal.—Parties sought to be made defendants by respondents and affected by judgment may appeal therefrom, p. 197.

Cited in *Ballard v. Kennedy*, 34 Fla. 492, where heirs at law were made defendants, but complaint afterwards dismissed as to them and decree did not include them.

Execution.—Partnership interest of debtor is subject to, p. 198.

Cited to same effect in note to *Russell v. Cole*, 57 Am. St. Rep. 437; *Robinson v. Tevis*, 38 Cal. 615, and *Branch v. Wiseman*, 51 Ind. 3—holding, further, that all the firm property may be taken, subject to right of firm creditors and to other partners; *Commercial Bank v. Mitchell*, 58 Cal. 49, where firm creditors were given preference irrespective of order of garnishments over creditor holding judgment against partners as individuals on notes signed by them as individuals; and *Wright v. Ward*, 65 Cal. 527, where sale of entire firm property was held good on execution against partner, although in accounting he would have no interest therein—and holding, further, that in latter case execution purchaser would be guilty of conversion for sale of entire property before accounting with other partner.

12 Cal. 200-208. **ESTATE OF KNIGHT.** 73 Am. Dec. 531.

Administrator cannot use estate funds to remove prior encumbrance on its property, when estate not liable therefor, p. 207.

Cited to same effect in *Tompkins v. Weeks*, 26 Cal. 61, 63, 68, where he was charged with resulting loss; *In re Moore*, 72 Cal. 342, where administrator was denied power to rebuild or improve the property, although for heirs' benefit; *In re Rose*, 80 Cal. 173, denying his power to carry on decedent's business; and in note to *Wales v. Walker*, 99 Am. Dec. 296, as to liability for investments. *Brenham v. Story*, 39 Cal. 188, holding unconstitutional a special act allowing him to sell property to promote heirs' interest, debts or expenses or family allowance not requiring such sale.

Distinguished in *Estate of Freud*, 131 Cal. 672, affirming right of

executor to sell for purpose of redemption of property from decedent's mortgage; *Estate of Smith*, 118 Cal. 467, granting power to preserve from destruction vineyard belonging to estate, even if done without order of court.

12 Cal. 208-212. **WAGENBLAST v. WASHBURN.**

Mistake.—Parol evidence is admissible to show, for purposes of correction in equity, p. 212.

Cited to same effect in *Hathaway v. Brady*, 23 Cal. 124, where note of interest was left blank in note, although it was such as under statute should have been written; and note to *Gillespie v. Moon*, 7 Am. 1569, upon same subject.

12 Cal. 212-216. **KNOWLES v. INCHES.** S. C. *Willson v. McEvoy*, Cal. 170, for suit on injunction bond.

Transcript on Appeal.—Incorporation of unnecessary matter corrected, p. 213.

Cited in *Barrett v. Tewksbury*, 15 Cal. 358, to same effect—and holding, further, as to necessity of setting forth grounds of appeal in statement; and *Albion etc. Co. v. Richmond etc. Co.*, 19 Nev. 229, where statement of substance of documents was held sufficient.

Appeal from Judgment suspends its force as evidence of title, p. 214.

Cited to same effect as to decree of divorce in *Sharon v. Hill*, 370, 370, 26 Fed. Rep. 347, 391; and *People v. Treadwell*, 66 Cal. 401, as to conviction of crime when used as basis for disbarment proceedings.

Bill of Peace will not lie until adjudicated by trial at law, p. 216.

Cited to same effect in note to *Woodward v. Seely*, 50 Am. Dec. 453, in dissenting opinion in *Lehman v. Shook*, 69 Ala. 499—main opinion holding that bill will lie to enjoin ejectment and remove cloud on title where defendants claim under unrecorded fraudulent deed prior to mortgage under which plaintiff claims. Cited, also, in *Northern etc. Co. v. Amacker*, 46 Fed. Rep. 236, denying right to sue in equity even to prevent multiplicity of suits, where one action in ejectment would cover all the property and all the parties involved. Distinguished in *Brook v. Calderwood*, 34 Cal. 566, holding that in action to quiet title court may enjoin defendant and all claiming under him from asserting title thenceforth.

12 Cal. 216-226. **SMITH v. SMITH.** 73 Am. Dec. 533, 537. See *Smith v. McDonald*, 42 Cal. 486.

Community Property.—Property acquired during coverture is presumed to be, unless clear proof to contrary, p. 223.

Cited to same effect in *Scott v. Ward*, 13 Cal. 470; *Pixley v. Huggins*, 15 Cal. 131, where deed on purchase was to wife; *McDonald v.*

Badger, 23 Cal. 398, 83 Am. Dec. 126, under same class of deed; Morgan v. Lones, 78 Cal. 62, holding husband not estopped under facts from maintaining property to be community; Tolman v. Smith, 85 Cal. 284—holding, further, that character of property determinable in foreclosure suit; in dissenting opinion in Charanteau v. Woffenden, 1 Ariz. Ter. 273, main opinion holding property separate, under facts; Smith v. Shrieves, 13 Nev. 308; and Yesler v. Hochstettler, 4 Wash. 355. Cited also, as to such presumption in note to Huston v. Curl, 58 Am. Dec. 112; McDonald v. Badger, 83 Am. Dec. 129; Cooke v. Bremond, 86 Am. Dec. 632, 636, 638, 642, collecting cases further as to rebuttal of presumption; Peck v. Brummagin, 89 Am. Dec. 204.

Community Property.—Husband cannot transfer, in fraud of wife's rights, p. 224.

Cited to same effect in Peck v. Brummagin, 31 Cal. 447, 89 Am. Dec. 200, where distinguished (p. 449), upholding deed by husband to wife of community property; Lord v. Hough, 43 Cal. 585, holding such deed not fraudulent under facts, though made pending divorce suit; dissenting opinion in Maskey v. Huntington, 118 Ill. 98, as to wife's right to attack husband's deed testamentary in character; Walker v. Walker, 66 N. H. 392, 49 Am. St. Rep. 617. Distinguished in Greiner v. Greiner, 58 Cal. 120, holding wife cannot sue to set aside such conveyance while marriage exists. Cited, also, upon general subject in notes to Thayer v. Thayer, 39 Am. Dec. 218, 220; to Beard v. Knox, 63 Am. Dec. 128, and to Lines v. Lines, 24 Am. St. Rep. 403; Murray v. Murray, 115 Cal. 272, 56 Am. St. Rep. 150, as to power of deserted wife to attack husband's transfer of his separate property, in action for maintenance; Spreckels v. Spreckels, 116 Cal. 345, 58 Am. St. Rep. 174, as to power of husband as to gifts of community personalty (and see not 179); and upon same power of husband over community property in note to Meyer v. Kinzer, 73 Am. Dec. 543; and as to interest of cotenants in homestead, in Bartholomew v. West, 2 Dill. 293, 8 Bank. Reg. 14, 2 Fed. Cas. 964.

12 Cal. 231-241. **BENSLEY v. ATWILL.**

Delivery of Deed may be presumed from acknowledgment and recording, p. 236.

Cited to same effect in Savery v. Browning, 18 Iowa, 250, holding possession of deed by grantee presumptive though not conclusive evidence of delivery; Wells v. Jackson etc. Co., 48 N. H. 537, holding further as to proof of execution when deed lost; and in note to Hoffman v. Mackall, 64 Am. Dec. 647, as to evidence of delivery from recording.

New Trial.—Where evidence conflicting, order of judge on motion will be affirmed, p. 240.

Cited to same effect in Hall v. Bark, 33 Cal. 525, where motion was granted, holding that appellant must show abuse of discretion in making order.

12 Cal. 241-243. KNEELAND v. WILSON.

Title.—Knowledge of held shown under facts, p. 243.

Cited in note to *Horton v. Smith*, 42 Am. Dec. 632, as to admissibility of declaration of vendor in possession.

12 Cal. 243-245. MARTIN v. TRAVERS.

Evidence.—Objection to introduction of must be specific, p. 245.

Cited to same effect in *Leet v. Wilson*, 24 Cal. 403, where objection was simply "that the evidence is inadmissible"; *Sneed v. Osborn*, Cal. 627, and *Rush v. French*, 1 Ariz. Ter. 123, 125, holding objection improper if evidence admissible for any purpose, or under any possible circumstances; *Cochran v. O'Keefe*, 34 Cal. 558, where objections to deed were held uncertain and vague; *Fabian v. Callahan*, 56 Cal. 100, where general objection of incompetency to certificate of acknowledgment; *Brumley v. Flint*, 87 Cal. 474, as to like objection to competency of witness as expert; dissenting opinion in *Keys v. Grannis*, 3 Nev. 557, as to like objections to transcript of justice's docket; *State v. Jones*, 7 Nev. 415, as to like objection to admission of deposition in criminal case; and *Knapp v. Schneider*, 24 Wis. 72, as to like objection to order of introduction of evidence or impropriety of cross-examination. Distinguished in *Nightingale v. Scannell*, 18 Cal. 324, sustaining general objection of incompetency where the evidence was incompetent for a particular purpose; and *Roberts v. Chan Tin Pen*, 23 Cal. 265, where rule held not to apply to question of weight of evidence.

12 Cal. 245-247. MORGENTHAU v. HARRIS.

Assignment for Creditors held within statute, p. 247.

Cited in *Johnson v. Robinson*, 68 Tex. 402, holding that effect of assignment not within statute to be determined according to common law, and holding valid assignment by partner of part of firm property.

12 Cal. 247-255. MEYER v. KINZER. 73 Am. Dec. 538.

Community Property defined and described, p. 251.

Cited in note to *Cooke v. Bremond*, 86 Am. Dec. 628-9, defining community property, and at p. 635 as to inclusion of wife's earnings therein.

Property acquired after marriage is presumed to be community property, p. 251.

Cited to same effect in *Smith v. Smith*, 12 Cal. 224, 73 Am. Dec. 538, and in note 537, where rule applied to building erected on husband's property; and holding burden to rest on party asserting it separate property; and *Scott v. Ward*, 13 Cal. 470, where property acquired by purchase; *Pixley v. Huggins*, 15 Cal. 131, where deed of purchase taken in wife's name; and *Mott v. Smith*, 16 Cal. 557—deed to wife—where evidence to rebut presumption.

sumption held insufficient; *Kohner v. Ashenauer*, 17 Cal. 581, where husband deeded to wife, conveyance alleged to have been purchase, not gift; *Burton v. Lies*, 21 Cal. 91, where purchase made by husband; *Adams v. Knowlton*, 22 Cal. 288, where evidence held insufficient to show purchase by wife as sole trader; *Tustin v. Faught*, 23 Cal. 241, bargain and sale deed to wife, holding further as to husband's power to convey; *McDonald v. Badger*, 23 Cal. 398, 83 Am. Dec. 126, following principle in *Mott v. Smith*, *supra*; *Landers v. Bolton*, 26 Cal. 420—deed of purchase—holding, also, as to husband's control over; *Ramsdell v. Fuller*, 28 Cal. 42, 87 Am. Dec. 105, and note 107—holding presumption rebutted under facts; *Peck v. Vandenberg*, 30 Cal. 42, 55, 61, holding parol evidence admissible, however, that deed reciting money consideration was one of gift; *Tibbetts v. Fore*, 70 Cal. 245, holding property conveyed to wife her separate property under facts, and granting her injunction to prevent its sale on execution against husband; *Morgan v. Lones*, 78 Cal. 62, holding facts insufficient to overcome presumption; *Estate of Bauer*, 79 Cal. 307, holding presumption disputable, and that separate property could be followed through various changes, although commingled with community property; *People v. Swalm*, 80 Cal. 51, 13 Am. St. Rep. 100 (and see note 100), that fact of possession by wife did not rebut presumption on facts shown; *Tolman v. Smith*, 85 Cal. 283, 284, holding further that recital in mortgage that property is separate property of mortgagor does not bind mortgagee; *In re Boody*, 113 Cal. 686, holding evidence insufficient to overcome presumption; dissenting opinion in *Oharauleau v. Woffenden*, 1 Ariz. Ter. 272, main opinion ruling presumption overcome by evidence offered; and in *Yesler v. Hochstettler*, 4 Wash. St. 334, holding presumption conclusive unless overcome by evidence. Cited, also, in notes to *Huston v. Curl*, 58 Am. Dec. 112, on presumption as to community character; to *Cooke v. Bremond*, 86 Am. Dec. 635, 636, 637, 638, *Ramsdell v. Fuller*, 87 Am. Dec. 107, *Peck v. Brummagim*, 89 Am. Dec. 204, *Shaw v. Hill*, 96 Am. Dec. 423, *Morris v. Hastings*, 8 Am. St. Rep. 574, and to *Spreckels v. Spreckels*, 58 Am. St. Rep. 179; also, in note to *Warren v. Brown*, 57 Am. Dec. 194, as to conveyances to and purchases by married women.

Cited in *Davis v. Green*, 122 Cal. 367, holding property community; *Hamilton v. Hubbard*, 134 Cal. 604, 607, but holding presumption inapplicable in case of gift of husband to wife; *Yesler v. Hochstettler*, 4 Wash. 353, holding presumption conclusive unless rebutted.

12 Cal. 257-264. **WRIGHT v. LEVY.**

Assignee of Judgment acquires assignor's rights and takes subject to all defenses as between parties to judgment, pp. 262-3.

Cited in *Curtin v. Kowalsky*, 145 Cal. 434, assignment of judgment though without consideration is valid; *Mohr v. Byrne*, 135 Cal. 90, quoting *Duke v. Clark*, 58 Cal. 465; note to *Chilstrom v. Eppinger*,

78 Am. St. Rep. 47, 52, on general subject; *Northam v. Gordon*, 23 Cal. 255, where default judgment was set aside after assignment; *Horton v. Duff*, 23 Cal. 626, where right of setoff was asserted against assignee; *Duke v. Clark*, 58 Miss. 474, where such defenses were restricted to those in debtor's favor; *Winz v. Goudon*, 2 Posey (Tex.), 214, holding that right to execution follows assignment; and in note to *Dugas Mathews*, 54 Am. Dec. 368, upon rights of assignee of judgment; same effect in *First Nat. Bank v. Perris etc. Dist.*, 107 Cal. 62, where assignee for value and without notice of moneys due under contract, was held to take free of latent equities of third persons; *Moresi v. Swift*, 15 Nev. 224, holding assignee of bill of sale to be subject to existing attachment.

12 Cal. 265-273. **MOORE v. PATCH.**

Tax is Debt due from property owner to state, p. 270.

Cited to same effect in *People v. Seymour*, 16 Cal. 344, 76 Am. Rep. 526—holding, further, that legislature may declare assessment prima facie evidence of regularity; and *S. F. Gas Co. v. Brickwedel*, 62 Cal. 646, on point that tax has effect of judgment and could be used in offset in claim against city. Distinguished with *Seymour case*, supra, in *Perry v. Washburn*, 20 Cal. 351, holding United States notes receivable in payment of taxes.

Tax Collections.—Legislature may by act remedy defects in proceedings, p. 270.

Cited to same effect in *Cowell v. Doub*, 12 Cal. 274; and in *People v. Judge*, 17 Cal. 553, approving special act for change of venue in murder trial.

12 Cal. 273-275. **COWELL v. DOUB.**

Taxation.—Irregularities in assessment will not invalidate it where no error results, p. 274.

Cited to same effect in *Kelsey v. Trustees*, 18 Cal. 632, as to non-compliance with meeting of board of equalization; *Guy v. Washburn*, 23 Cal. 626, as to valuation of property, and same case (p. 117) as to failure to make complete "alphabetical index" within statutory time; *Rivers v. Thomson*, 43 Ala. 639, holding provisions as to assessor's attendance mandatory, and that failure to observe directory provisions will not invalidate tax. Criticised in *Power v. Larabee*, 2 N. Dak. 164, holding tax invalid for failure of officials to conform to certain statutory requirements. Cited, also, in *People v. Seymour*, 16 Cal. 344, 76 Am. Dec. 526, on point of obligation to pay taxes levied.

12 Cal. 275-277. **MARKLEY v. RAND.**

Judgment cannot be collaterally attacked in equity by stranger who did not bring it, p. 276.

Cited to same effect in note to Little Rock etc. Co. v. Wells, 54 Am. St. Rep. 251, as to parties to suit in equity to set aside judgment at law.

12 Cal. 277-279. **SEARS v. HATHAWAY.**

Malicious Prosecution.—Punitive damages held improper under facts, p. 278.

Cited to same effect in Vinal v. Core, 18 W. Va. 57, under similar facts, and holding further as to evidence admissible in mitigation; and note to Winkler v. Roeder, 8 Am. St. Rep. 161, as to allowance of attorney's fees as part of damages in such actions; Shaul v. Brown, 28 Iowa, 42, 4 Am. Rep. 153, on point that acquittal under facts similar to those of main case is to be considered on question of probable cause, but does not affect defendant's liability. Distinguished, Stansbury v. Fogle, 37 Md. 38, allowing punitive damages in such action under facts; and dissenting opinion in Kinsey v. Wallace, 36 Cal. 485, main opinion holding damages in such action excessive and remitting part thereof.

12 Cal. 280. **DOYLE v. SEAWALL.**

Appeal.—Supreme court has no jurisdiction when judgment less than \$200, p. 280.

Distinguished under new constitution, Dashiell v. Slingerland, 60 Cal. 656, holding "matter in dispute" to include amount of actual judgment appealed from, and to differ from "demand."

12 Cal. 280. **NEWBERG v. HENSON.**

Special Verdict is conclusive where no proper statement on appeal, p. 280.

Cited, Everett v. Buchanan, 2 Dak. Ter. 254, as to conflict between general and special verdict; and In re Weber Furn. Co., 13 Bank. Reg. 563, 29 Fed. Cas. 538, holding that court will presume evidence to have justified decision, in absence of proof to contrary.

12 Cal. 281-282. **FISK v. CREDITORS.**

Appeal Lies in Insolvency Cases from order made on opposition to discharge, p. 281.

Cited to same effect, People v. Shepard, 28 Cal. 117, denying certiorari from decree of discharge; and People v. Rosborough, 29 Cal. 418, allowing new trial of opposition.

12 Cal. 283-286. **SWAIN v. CHASE.**

Justice's Courts.—Jurisdiction must be affirmatively shown and is not presumed, p. 285.

Cited to same effect, Rowley v. Howard, 23 Cal. 403, where return of service of summons was defective; Paul v. Armstrong, 1 Nev. 98 deny-

ing right of such court to enter judgment in forcible entry action no demand shown; and *Mallett v. Uncle Sam, etc. Co.*, 1 Nev. 1. Am. Dec. 489, holding necessary affirmative proof of service of summons within territorial jurisdiction of justice on default judgment. Cited, also, in *McDonald v. Katz*, 31 Cal. 169, where rule applied in publication of order to show cause in insolvency proceedings; and *parte Kearny*, 55 Cal. 216, where applied to judgment of police court.

12 Cal. 286. COMSTOCK v. BREED.

Consideration for Bond must be an advantage to promisor or to promisee, p. 288.

Cited in *Wright v. Byrne*, 129 Cal. 617, holding note to have been given without consideration; concurring opinion, *McDonald v. Randall*, 31 Cal. 252, holding wife's mortgage based on sufficient consideration.

12 Cal. 291-295. PEOPLE v. MILLER.

Indictment.—Time of act must appear when offense subject to statute of limitations, p. 294.

Cited to same effect, *Vaughn v. Congdon*, 56 Vt. 115, 48 Am. Dec. 759, holding further committing magistrate liable where bar appeared in complaint; *Sledd v. Commonwealth*, 19 Gratt. 818, holding that expiration of commission "within two years" bad at common law, but not under local act when statute as to offense enacted within that time; *State v. Ball*, 30 W. Va. 386, holding, however, allegation of commission within statutory period unnecessary, and further remedies when bar appears from indictment. Approved in *United States v. Owen*, 13 Sawy. 57, 32 Fed. Rep. 537, on point that indictment should negative exception to statute. Denied, *United States v. Cook*, 17 Wall. 179, as to last point, holding that plea of statute of limitations not be raised on demurrer where act defining offense has no exception nor proviso (see *Owen case*, supra); and *State v. Sammons*, 99 Cal. 28, holding that time of act need not be pleaded, though practice is required, and that "188—" as date was mere imperfect statement of time, invalidating indictment; *Packer v. People*, 26 Colo. 316, holding that bar of statute need not be negated in indictment.

12 Cal. 298-299. RITTER v. PATCH. *S. C. Berri v. Patch*, 15 Cal. 299-300.

Taxes.—Injunction will not lie to restrain collection unless irreparable injury shown, although tax void, p. 299.

Cited to same effect, *Insurance Co. v. Bonner*, 7 Colo. App. 101, holding further that complaint must allege issuable facts showing irreparable injury; *Frost v. Flick*, 1 Dak. Ter. 132, where technical irregularities and errors were asserted; *Youngblood v. Sexton*, 32 Mich. 408, 20 Rep. 654 (cited, *Williams v. County Court*, 26 W. Va. 498), where

applied to tax on business, even where prevention of multiplicity of suits was alleged; *Coulson v. Harris*, 43 Miss. 759, where tax collector was alleged to be collecting more than assessed tax; dissenting opinion in *Hallenbeck v. Hahn*, 2 Neb. 438, main opinion excepting taxes void or on exempt property; and holding further that if tax is partly good, that portion must be tendered before rest enjoined; *Wells v. Dayton*, 11 Nev. 169, where insolvency of assessor held not to show irreparable injury; and note to *Holland v. Mayor*, 69 Am. Dec. 203, on injunction against tax collections. Cited, also, in *Delphi v. Brown*, 61 Ind. 37, holding that where same courts administer law and equity injunction will issue at once when tax is illegal and void, though not when merely irregular.

12 Cal. 299-300. **BERRI v. PATCH.**

Taxes.—Injunction will not lie to restrain collection unless injury irreparable, p. 300.

Cited to same effect, *Bucknall v. Storey*, 36 Cal. 71, where tax claimed to be void; *Tallassee etc. Co. v. Spigener*, 49 Ala. 264, holding, however, that injunction will lie when tax illegal, but not when partly legal unless payment as to this is made before suit; and *Youngblood v. Sexton*, 32 Mich. 408, 20 Am. Rep. 654, *Williams v. County Court*, 26 W. Va. 498, and note to *Holland v. Mayor*, 69 Am. Dec. 203, on same points as in *Ritter v. Patch*, 12 Cal. 298, 299.

12 Cal. 300-301. **PEOPLE v. SUPERVISORS.**

Supervisors cannot control treasurer as to payment of sinking fund, p. 300.

Cited, *Forstall v. Consolidated Assn., etc.*, 34 La. Ann. 777, holding unconstitutional an act directing investment in state bonds of funds of insolvent corporation properly applicable to its debts.

12 Cal. 301-305. **HUNT v. WATERMAN.**

Vendor's Lien waived by taking mortgage, though latter defective, p. 304.

Cited to same effect, *Tripp v. Duane*, 74 Cal. 92, where rule applied to resulting trust from deed taken in name of A where price paid by B; *Avery v. Clark*, 87 Cal. 624, 22 Am. St. Rep. 274, holding, further, generally as to nature of lien; *McKeown v. Collins*, 38 Fla. 290, where vendor took vendee's worthless note; *Partridge v. Logan*, 3 Mo. App. 520, where mortgage taken was valueless on foreclosure and there was great delay in asserting lien; and *Pease v. Kearny*, 3 Oreg. 419, where note and mortgage were taken.

12 Cal. 306-308. **STEVENS v. IRWIN.**

Impeaching Witness may testify he would not believe other under oath, p. 308.

Cited to same effect, *Wise v. Wakefield*, 118 Cal. 111; *State v. son*, 40 Kan. 270; and note to *Allen v. State*, 73 Am. Dec. 772, on same subject. Cited, also, in *Hamilton v. People*, 29 Mich. 187, where, on cross-examination, witness who had testified to good reputation was asked if he had not said he would not believe other under oath.

12 Cal. 308-311. **BEEBE v. BROOKS.**

Indorser after Maturity is entitled to demand on maker and note, p. 310.

Cited to same effect, *Beer v. Clifton*, 98 Cal. 326, 35 Am. St. 174, holding further as to time of such demand and notice; *McMurry v. Brown*, 45 Ohio St. 503, holding, however, agreement between indorser, and maker extending time of payment was waiver; *State v. Caro*, 9 Oreg. 281, holding further parol evidence inadmissible to vary indorser's liability on blank indorsement; and note to *Eckert v. Des Coudres*, 12 Am. Dec. 611, upon indorsement after maturity.

12 Cal. 311-315. **BARRINGER v. WARDEN.**

Statute of Limitations may be raised by general demurrer, but not when bar appears on face of complaint, p. 314.

Cited to same effect, *Mason v. Cronise*, 20 Cal. 217, holding further that exception to statute must be pleaded where bar otherwise appears from complaint; *Kelley v. Kries*, 68 Cal. 213, holding plea waived if not taken by demurrer or answer; *Cameron v. San Francisco*, 68 Cal. 391, holding demurrer proper when bar appears on complaint; and *versely*, *McGehee v. Blackwell*, 28 Ark. 30; and note to *Sleeper v. Murphy*, 41 Am. Dec. 234, as to propriety of demurrer. Distinguished in *De Uprey v. De Uprey*, 23 Cal. 353, holding form of demurrer improper.

Promise to Pay Money owed by one party to another need not be in writing, p. 315.

Approved in *Casey v. Miller*, 3 Idaho, 571, where G. owes C. and C. owes G., and G. gives C. order on M., which is accepted, and M. gives C. part on account, M. accepts C. as his creditor and is released as debtor.

12 Cal. 315-316. **STOCKTON v. GARFRIAS.**

Boundary Agreement made after trespass does not estop party from showing title prior to agreement, p. 315.

Cited to same effect, *Stinchfield v. Gillis*, 96 Cal. 38, applying to bulkhead erected by consent between mines upon question of priority of title to minerals.

12 Cal. 317-325. **GRIFFITH v. GROGAN.**

Payment of Note does not extinguish debt unless specially so agreed, p. 321.

Cited in *Bank v. Central Market Co.*, 122 Cal. 33, holding no agreement to extinguish shown. *Higgins v. Wortell*, 18 Cal. 333, holding further right to sue on original debt when note not paid; *Welch v. Arlington*, 23 Cal. 322, holding surrender of old note when new one given not sufficient as agreement for payment; *Mitchell v. Hockett*, 25 Cal. 542, 85 Am. Dec. 154, holding judgment not satisfied by such payment; *Brown v. Olmstead*, 50 Cal. 166, where draft was taken for note; *Comptoir d'Escompte v. Dresbach*, 78 Cal. 20, holding facts to show acceptance of check as payment, and that thereon creditor takes all risks as to payment; *Tolman v. Smith*, 85 Cal. 287, holding foreclosure on original mortgage suspended but not extinguished where second mortgage taken in conditional payment; *Steinhart v. National Bank*, 94 Cal. 366, 28 Am. St. Rep. 135, even where original note was mutilated and marked canceled; *Knox v. Gerhauser*, 3 Mont. 275, where applied to acceptance of order; dissenting opinion in *Bautz v. Bosnett*, 12 W. Va. 801, main opinion holding express agreement as to payment shown by facts; and see *Jenne v. Burger*, 120 Cal. 447; In re *Hurst*, 13 Bank. Reg. 462, where note of third persons taken, applying rule to composition proceedings; and *Alferitz v. Ingalls*, 83 Fed. Rep. 970, holding first note and mortgage not merged in second unless so agreed.

12 Cal. 325-327. **PEOPLE v. URIAS.**

Indictment.—Malice aforethought must be alleged for assault with deadly weapon, p. 326.

Cited in *People v. Mendenhall*, 135 Cal. 348, but holding such malice not synonymous with "express malice"; *People v. Schmidt*, 63 Cal. 28, in indictment for murder; and *People v. Arnold*, 116 Cal. 686, on point of admissibility of evidence where charge was intent to kill and verdict assault with deadly weapon. Cited, also, in *Territory v. Layne*, 7 Mont. 230, as overruled by *People v. Villarino*, 66 Cal. 229, and holding the words unnecessary in indictment for assault with intent to murder.

12 Cal. 327-330. **LIES v. DeDIABLAR.**

Homestead.—Conveyance of by husband alone is ineffectual, not being in statutory mode, p. 329.

Cited to same effect, *Galiardo v. Dumont*, 54 Cal. 499, holding homestead not alienable under power of attorney from husband; *Merced Bank v. Rosenthal*, 99 Cal. 49, where acknowledgment of mortgage was defective; *Larson v. Reynolds*, 16 Iowa, 583, 81 Am. Dec. 447, holding husband's mortgage alone defective and right of second wife to homestead not barred by foreclosure when not made a party; *Thompson v. New England etc. Co.*, 110 Ala. 406, 55 Am. St. Rep. 31, where insanity of wife held not to dispense with her joinder in deed; and note on same point to *Poole v. Gerrard*, 65 Am. Dec. 488; *California etc.*

Co. v. Anderson, 79 Fed. Rep. 406, where applied to mortgage by wife for husband's antecedent debt, cited, also, in Roode v. State, 5 N. 176, 25 Am. Rep. 476, where applied to deed (not of homestead) defective in wife's acknowledgment. Cited, also, in Gimmy v. Doane, Cal. 638, holding that homestead on common property may be partitioned or set apart on divorce; and Johnston v. Turner, 29 Ark. 2, holding actual residence of wife on property not necessary to create of homestead by husband, where she has not abandoned him.

12 Cal. 345-348. PEOPLE v. AH FONG.

Oral Charge in criminal trial is error, p. 347.

Cited to same effect, People v. Woppner, 14 Cal. 438, where applied to oral further instructions to jury after retirement; People v. Char, 26 Cal. 79, also, as to further instructions holding further defendant's consent not presumable, from presence and failure to object; People v. Trim, 37 Cal. 276, where further instructions were given in absence of and without notice to defendant's attorney; People v. Sanford, Cal. 35, where defendant did not consent; People v. Hersey, 53 Cal. 575, under section 1093 of the Penal Code, where oral further instructions were given in absence of reporter; Territory v. Duffield, 1 Ariz. Ter. 63, where written charge filed after verdict; State v. Porter, 35 Mo. Ann. 536, holding court cannot refuse request for written charge because made at unreasonable time, where time not fixed by statute or rule; and State v. Harkin, 7 Nev. 384, where applied to remarks as to weight of testimony. Cited, also, in Bradway v. Waddell, 95 Ind. 175, where applied to civil cases, and distinguishing directions to reject evidence or as to form of verdict or the like; Swaggart v. Territory, 6 Okla. 347; Boggs v. United States, 10 Okla. 447. Distinguished, State v. Potter, 15 Kan. 316, as to answer to question of juror upon return of jury; and State v. Bennington, 44 Kan. 585, where oral instructions were taken down by reporter and copied and delivered to jury with others upon return.

Motion for New Trial in criminal cases may bring up any ruling denying defendant statutory privilege, p. 348.

Cited to same effect, Rakes v. People, 2 Neb. 164, where applied where objection not made in time at trial.

12 Cal. 348-351. BOWEN v. MAY.

Foreclosure cannot be had of joint property where only one defendant served, p. 351.

Cited, note to Wood v. Watkinson, 44 Am. Dec. 573, on validity of joint judgments where all defendants not served. Distinguished, Goodlet v. St. Elmo etc. Co., 94 Cal. 299, as to suit against association by common name and deficiency judgment therein.

12 Cal. 352-362. **WHIPLEY v. McKUNE.**

Elections.—Irregularities of officers at, will not invalidate when result not charged thereby, p. 357.

Cited in *McCarthy v. Wilson*, 146 Cal. 328, ineligibility of election officers who were in fact appointed and served cannot, in absence of fraud, disfranchise voters of precinct; *Packwood v. Brownell*, 121 Cal. 480, *People v. Prewitt*, 124 Cal. 12, and *Abbott v. Hartley*, 143 Cal. 486, holding election not nullified by malconduct of board; *Kenworthy v. Mast*, 141 Cal. 271, quoting *Atkinson v. Lorbeer*, 111 Cal. 419; *Ferguson v. Allen*, 7 Utah, 269, holding rejection of entire poll allowable only where actual legal vote not ascertainable; *Atkinson v. Lorbeer*, 111 Cal. 421, 422, where held malconduct of election board not shown; dissenting opinion in *People v. Cicott*, 16 Mich. 324, holding statutory requirements directory; *Farrington v. Turner*, 53 Mich. 29, 51 Am. Rep. 90, where polling places was changed for convenience of voters; *Taylor v. Taylor*, 10 Minn. 112, 113 where oath not taken by election officers, not list of electors kept, and an election judge was candidate, holding, further, burden of proof to show result affected, on contestant, and certificate of canvassing board prima facie evidence of result; *Wells v. Taylor*, 5 Mont. 208, as to irregularities in appointment and qualification of officers and in returns; and note to *People v. Bates*, 83 Am. Dec. 750, upon conduct of elections. Distinguished, *Schneider v. Bray*, 22 Nev. 279, holding ballots primary and controlling evidence as to result of election. Commented on, also, in *Saunders v. Haynes*, 13 Cal. 150, as to jurisdiction of district court in election contests.

12 Cal. 363-377. **HUNTER v. WATSON.** S. C. 73 Am. Dec. 543, and note 549.

Unrecorded Deed is good as to subsequent purchasers not bona fide or without notice, p. 373.

Cited, note to *Voorhis v. Westerfelt*, 3 Am. St. Rep. 319, as to effect of failure to record; *Middle Creek etc. Co. v. Henry*, 15 Mont. 575, holding subsequent appropriator of water not a "purchaser" under recording act; *Vaughn v. Schmalsle*, 10 Mont. 197, ruling similarly as to judgment creditor; *Murray v. Beal*, 23 Utah, 554, where corporate officers executed deed to secure loan, but did not make oath that they were corporation's officers as required by statute, deed was good as against bankruptcy trustee of corporate estate.

Notice.—Possession under unrecorded deed is, as to subsequent purchaser from same vendor, p. 374.

Cited to same effect, *Woodson v. McCune*, 17 Cal. 304, where extended to any other title consistent with possession; *Havens v. Dale*, 18 Cal. 367, 368, holding necessary, however, actual bona fide possession evidenced by actual inclosure or its equivalent; *Lestrade v. Barth*, 19 Cal. 676, holding such possession sufficient to put second vendee (from original owner's heirs) on inquiry as to occupant's interest; *Dutton*

v. Warschauer, 21 Cal. 628, 82 Am. Dec. 773, holding tenant's possession sufficient for purpose as to landlord's title and overruling as to this Smith v. Dall, where main case was distinguished (13 Cal. 512); Daubenspeck v. Platt, 22 Cal. 335, where possession by mortgagor where mortgage was deed absolute in form with defeasance, was held notice of his title to purchaser from mortgagee; Landers v. Bolton, 26 Cal. 419, following also Dutton case, supra; Fair v. Stevenot, 28 Cal. 490, where applied to interest in mining claim and holding further as to character and rebuttal of such notice and that possession was merely evidence of such notice; Pell v. McElroy, 36 Cal. 271, where vendor remained in possession after formal conveyance, and holding also as to rebuttal of presumption of such notice; Scheerer v. Cudd, 85 Cal. 272, case of unrecorded lease, holding, further, lack of purchaser's knowledge of lessee's possession immaterial as to his rights; Emerson v. Alvarado, 80 Cal. 472, explaining main case as modified by Fair v. Stevenot, supra, and holding possession by tenant merely evidence of his landlord's title as against subsequent purchaser; and notes Blankenship v. Douglas, 82 Am. Dec. 613; to Barney v. McCarty, 82 Am. Dec. 435; to Smith v. Yule, 89 Am. Dec. 171, and to Riley v. Quigley, 99 Am. Dec. 519, as to effect of possession as notice of title.

Deed to Dead Man and heirs is void, p. 376.

Cited to same effect, Morgan v. Hazelhurst Lodge, 53 Miss. 67, where deceased alone was grantee in parties to deed; Wehl v. Robinson, 97 Tenn. 464, applying rule to fictitious grantee, but holding that deed by latter in same name conveys title as against him; United States v. Southern Colo. etc. Co., 5 McCrary, 569, where patent to fictitious person and holding doctrine of bona fide purchasers not to apply; Neal v. Nelson, 117 N. C. 406, 53 Am. St. Rep. 595, holding deed void if to X and heirs, aliter if to X or heirs, when latter can be identified; and distinguished as to this exception in Ready v. Kearsley, 1 Mich. 225. Distinguished, also, in Lyles v. Lascher, 108 Ind. 384, holding deed to heirs of living person good when property conveyed to bona fide purchasers, and, further, as to construction of such deed by contemporaneous acts; and see Oliver v. Forbes, 17 Kan. 129, holding warranty of deed of heirs of deceased allottee before patent to convey title as against their grantee after patent issued.

Power of Attorney held sufficient to include execution of deed, p. 376.

Cited to same effect, as to power to insert conditions in lease, D. Rutte v. Muldrow, 16 Cal. 512.

Bona Fide Purchaser.—Judgment creditor purchasing at own sale without notice, is, p. 377.

Cited to same effect, Foorman v. Wallace, 75 Cal. 554; Riley v. Martinelli, 97 Cal. 583, 33 Am. St. Rep. 213; and note to Boos v. Morgan, 30 Am. St. Rep. 246, on same subject. See, also, as to vendee of purchaser at execution sale, Eldridge v. See Yup Co., 17 Cal. 56.

Knowledge of Agent in course of agency is knowledge of principal, p. 377.

Cited to same effect, *Watson v. Sutro*, 86 Cal. 516, where applied to notice to attorney of defects in title; *Wittenbrock v. Parker*, 102 Cal. 101, 41 Am. St. Rep. 176, where notice was to one of firm of attorneys; and notes to *Little Pittsburg etc. Co. v. Little Chief etc. Co.*, 7 Am. St. Rep. 246. *Atlantic Mills v. Indian etc. Mills*, 9 Am. St. Rep. 708, *Trentor v. Pothén*, 24 Am. St. Rep. 228, 232; *Singly v. Warren*, 63 Am. St. Rep. 905, and *Hacker v. White*, 79 Am. St. Rep. 948, on general subject.

Attorney.—Privileged communications need not be revealed by, but rule does not extend to information acquired elsewhere, p. 377.

Cited to same effect, *Gallagher v. Williamson*, 23 Cal. 333, 83 Am. Dec. 116, and note 117; *Stanhilber v. Graves*, 97 Wis. 518, holding communication not privileged; note to *O'Brien v. Spalding*, 66 Am. St. Rep. 220, on general subject; in note to *DeWolf v. Strader*, 79 Am. Dec. 373, restricting such communications only to those received by the attorney while acting as such; and notes to *Whitney v. Barney*, 86 Am. Dec. 394, and *Gray v. Fox*, 97 Am. Dec. 418, as to privileged communications to attorneys.

12 Cal. 378-394. PEOPLE v. BURBANK.

Statutes—Unconstitutionality.—Courts may declare, though not unless repugnancy to constitution is clear, p. 384.

Cited to same effect, *Cohen v. Wright*, 22 Cal. 308; dissenting opinion in *Bourland v. Hildreth*, 26 Cal. 229; and *Stockton etc. Co. v. Common Council*, 41 Cal. 160.

Constitutional Construction.—Decisions of other states on similar contents are to be considered, p. 387.

Cited to same effect, *Cohen v. Wright*, 22 Cal. 311, holding, however, such constructions not conclusive.

Judges.—Term of office when fixed by constitution cannot be changed by legislature, p. 386.

Cited to same effect, *People v. Templeton*, 12 Cal. 402; dissenting opinion in *Robertson v. State*, 109 Ind. 110; dissenting opinion in *State v. Ware*, 13 Oreg. 406, main opinion holding that election to fill vacancy caused by death or resignation is for unexpired term only (and same rule as in main opinion is applied in *Church v. Colgan*, 117 Cal. 688, where appointment to vacant office was held to be for unexpired term only); dissenting opinion in *Burks v. Hinton*, 77 Va. 44, 48, main opinion, however, distinguishing main case (p. 38) under local constitution and overruling *Ex parte Meredith*, where main case was approved, 33 Gratt. 124, 130, 36 Am. Rep. 775, 779.

Term of Office of officer elected to fill vacancy is for full constitutional period, p. 387.

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Cited in *Smith v. Cosgrove*, 71 Vt. 202, construing local statute.

Term of Office is period for which officer is elected, p. 392.

Cited in *State v. Guinotte*, 156 Mo. 517, defining "during."

Constitutional Law.—Statute may be bad in part only, where provisions are separable, p. 393.

Cited in *Ex parte Gerino*, 143 Cal. 420, noted under *People v.*
7 Cal. 103.

12 Cal. 394-402. **PEOPLE v. TEMPLETON.**

Term of Office, when fixed by constitution, cannot be diminished by legislature, p. 401.

Cited to same effect, *Westbrook v. Rosborough*, 14 Cal. 187, holding act good, however, as to the election. Distinguished, *Halsey v. G.*
2 Lea, 329, holding that legislature may abolish court during term for which judge appointed, and deprive him of salary for rest of term but see dissenting opinion at p. 350.

General citation: *People v. Compton*, 123 Cal. 408.

12 Cal. 402. **RITTER v. STOCK.**

Appeal from Verdict will be affirmed when evidence conflicting, p. 402.

Cited to same effect, *Duff v. Fisher*, 15 Cal. 382, applying rule to verdict on special issues in equity case; and *Wilson v. Cross*, 33 Cal. 68, where trial had by court, holding, however, findings not sustained by evidence.

12 Cal. 403-409. **BURKE v. TABLE MOUNTAIN ETC. CO.**

Answer.—Denial, when negative pregnant, held insufficient, p. 403.

Cited, *Morrill v. Morrill*, 26 Cal. 292, and *Randolph v. Harris*, 28 Cal. 567, 87 Am. Dec. 142, holding like answers not to put in issue as to payment of note before maturity; and *Landers v. Bolton*, 26 Cal. 411, holding to allegation of fact of conveyance.

Admission in Answer is conclusive evidence of fact admitted, p. 404.

Cited to same effect, *Lillienthal v. Anderson*, 1 Idaho, 678, holding plaintiff need not prove fact admitted by failure to deny; and dissenting opinion in *Burke v. McDonald*, 2 Idaho, 319, holding that plaintiff cannot deny his allegation when admitted by defendant.

Secondary Evidence of writing is admissible on nonproduction of original, when within party's power, p. 407.

Cited in *Harloe v. Lambie*, 132 Cal. 136, holding copy admitted under facts stated.

Ejectment—Defendant.—One not in possession is improper defendant, pp. 407, 409.

Cited to same effect, *Hawkins v. Reichert*, 28 Cal. 536.

Res Adjudicata.—Reasons given for judgment are not, p. 408.

Cited to same effect, *Butt v. Herndon*, 36 Kan. 372, as to findings when no judgment rendered, and holding further no appeal lies from such findings.

12 Cal. 409-411. **PEOPLE v. MARTIN.**

Special Election to Fill Vacancy held invalid for want of governor's proclamation, p. 410.

Cited to same effect, *Westbrook v. Rosborough*, 14 Cal. 187, 188; *Kenfield v. Irwin*, 52 Cal. 169 (cited, dissenting opinion in *People v. Hoge*, 55 Cal. 620), as to proclamation of time of special election; *George v. Oxford Township*, 16 Kan. 80, when bond election held invalid for defect in notice; *People v. Palmer*, 91 Mich. 290, when special election held invalid because notice not given by proper persons, although electors voted; *Morgan v. Gloucester*, 44 N. J. L. 143, holding that when time and place not fixed by law notice necessary of special bond election; and distinguishing case of general election; note to *People v. Weller*, 70 Am. Dec. 769, as to necessity for proclamation in such elections; *State v. Martin*, 83 Mo. App. 58; note to *People v. Bates*, 83 Am. Dec. 750, 751, as to necessity of notice or proclamation in special elections.

12 Cal. 414-424. **PICO v. COLUMBET.** S. C. 73 Am. Dec. 550.

Tenant in Common is not liable to cotenant for profits from use and occupation while in exclusive possession, p. 419.

Cited in *Plass v. Plass*, 122 Cal. 11, denying recovery under facts stated; *McCord v. Oakland etc. Co.*, 64 Cal. 139, 49 Am. Rep. 696, refusing cotenant out of possession injunction to prevent other from working mine held in common; *Hamby v. Wall*, 48 Ark. 137, 3 Am. St. Rep. 219, holding tenant not liable for rent for exclusive working of cotton gin; *Bird v. Bird*, 15 Fla. 442, 21 Am. Rep. 299, holding mortgagee of crops grown by tenant in possession not liable as trustee for other; *Humphries v. Davis*, 100 Ind. 371, applying rule when no ouster of one tenant by other, but holding that occupant must account for rents received; *Reynolds v. Wilmeth*, 45 Iowa, 695; *Israel v. Israel*, 30 Md. 125, 127, 96 Am. Dec. 573, 575, and note 576, following principles in *Humphries v. Davis*, *supra*, and holding further occupant not entitled to allowances for expenditures made for own convenience; *Kean v. Connelly*, 25 Minn. 226, 33 Am. Rep. 461, where occupant allowed crops raised by him; *In re Tyler*, 40 Mo. Ap. 384, holding, however, that where occupant was guardian for other cotenants he is liable to account as trustee; *Coleman's Appeal*, 62 Pa. St. 276, as to fructus industriales and discussing liability of cotenants of mines under statute; *McGrady v. McRae*, 1 Tex. App. Civ. 584, holding remedy of nonoccupant to be

partition and accounting thereon; *Ring v. Smith*, 1 Tex. App. C. and notes upon liability between cotenants for use and occupation; *Chambers v. Chambers*, 14 Am. Dec. 587; *Early v. Friend*, 78 Am. Dec. 666; *Billings v. Gibbs*, 92 Am. Dec. 589; *Bruce v. Hastings*, 100 Am. Dec. 595; *Graham v. Pierce*, 100 Am. Dec. 669 (collecting references to prior notes); *O'Connor v. Delaney*, 39 Am. St. Rep. 603, and *Ward*, 52 Am. St. Rep. 926. Explained and distinguished in *Goodenow v. Ewer*, 16 Cal. 471, 76 Am. Dec. 548, and note 550, holding owner liable for rents of common property received by him from tenant; *Abel v. Love*, 17 Cal. 238, where same liability asserted as to rents received from sales of water or profits derived from rents of water and *Howard v. Throckmorton* (quoting opinion of lower court in *Goodenow v. Ewer*, 16 Cal. 86 (see p. 89), following principle stated in *Goodenow v. Ewer*, supra.

12 Cal. 426-432. **M'GARRITY v. BYINGTON.**

Nonsuit.—Ruling on, not considered unless grounds of motion stated in record, p. 429.

Cited to same effect, *People v. Banvard*, 27 Cal. 474, where objection to rule considered "a matter of much practical consequence"; *People v. Greenfield*, 62 Cal. 609, approving denial of motion because motion stated general grounds; *Wright v. Fire Ins. Co.*, 12 Mont. 477, holding motion should be disregarded when made generally on insufficiency of evidence in complaint; *State v. Tamlar*, 19 Oreg. 533, where rule applied to motion for direct acquittal unless failure of proof is total; and *Mattoon v. Montana Mont etc. Co.*, 6 S. Dak. 198, when applied to motion to direct verdict for defendant. Distinguished, *Daley v. Russ*, 86 Cal. 117, where motion for judgment in plaintiff's case not curable even if defects specifically enumerated.

Evidence Apparently Irrelevant must be accompanied with evidence which connect with the other testimony, p. 430.

Cited to same effect, *People v. Clark*, 84 Cal. 578, when apparent evidence as to conspiracy.

Ejectment—Plaintiff's Title.—When action depends on prior possession plaintiff need not show title in himself, p. 431.

Cited to same effect, *Richardson v. McNulty*, 24 Cal. 347, where motion for mining claim.

Mining Claim.—Right to when attached not divested for mere failure to work with diligence, p. 431.

Cited to same effect, *Gore v. McBrayer*, 18 Cal. 588, where agent had posted notices in name of A. tore them down and substituted notices in name of B.

Mining Regulations.—Forfeiture does not follow noncompliance with regulations unless they so provide, p. 431.

Cited in *Emerson v. McWhirter*, 133 Cal. 511, as to rule on motion for location notices; *Last Chance Min. Co. v. Mining Co.*, 131 Fe.

failure of locator of lode claim to record location notice within fifteen days as required by Idaho statute does not invalidate location; *Bell v. Red Rock etc. Co.*, 36 Cal. 219, as to amount of work to be done; *Rush v. French*, 1 Ariz. Ter. 146; *Johnson v. McLaughlin*, 1 Ariz. Ter. 501; and *Jupiter etc. Co. v. Bodie etc. Co.*, 7 Sawy. 114, 11 Fed. Rep. 680, as to failure to record claim; and note to *McClintock v. Bryden*, 63 Am. Dec. 105, as to effect of nonobservance of such regulations. Cited, also, in same note at p. 104, as to validity of local regulations. Denied as to point in syllabus in *King v. Edwards*, 1 Mont. 241, holding no express penalty necessary to effect forfeiture for noncompliance as to amount of work and development.

Estoppel does not arise from merely making improvements on other's land, unless owner commits fraud therein, p. 431.

Cited to same effect, *Houser v. Austin*, 2 Idaho, 199, holding no estoppel in pais as to ore covered by lease, under facts; and note to *McClintock v. Bryden*, 63 Am. Dec. 107, as to estoppel by allowing another to improve mining claim.

Annual Labor.—Work outside claims may be considered as done on claim if necessary relation and proximity exist, p. 432.

Cited to same effect, *Lockhart v. Rollins*, 2 Idaho, 509, 512, holding labor of watchman and custodian of idle mine sufficient to exclude abandonment and within statute, as tending to show good faith.

New Trial.—Order denying not reversed when evidence conflicting, p. 432.

Cited, *Hall v. Bark*, 33 Cal. 525, on point that order granting new trial will be affirmed unless error affirmatively shown.

12 Cal. 433-437. **DECK v. GERKE.** 73 Am. Dec. 555.

Chancery Jurisdiction in Probate Matters held not to extend to case stated, p. 435.

Cited in *Toland v. Earl*, 129 Cal. 154, 79 Am. St. Rep. 104, sustaining exclusive jurisdiction of probate court to construe wills; *Brodrib v. Brodrib*, 56 Cal. 565, as to power of court of equity to open guardian's account after approval by probate court; *Rosenberg v. Frank*, 58 Cal. 400, affirming power of equity to construe will admitted to probate, and to same effect, *Williams v. Williams*, 73 Cal. 104; *Sanderson's Admr. v. Sanderson*, 17 Fla. 831, affirming like jurisdiction in suit of heirs against administrator for settlement of accounts not passed on in probate court, and for distribution; *Deans v. Wilcoxson*, 25 Fla. 1025, affirming jurisdiction of bill by heirs to set aside probate order of sale as void for want of jurisdiction; *Liddicoat v. Treglown*, 6 Colo. 51, holding, however, that equity will not oust jurisdiction of probate court unless latter cannot or will not act or to prevent multiplicity of suits, and denying relief in case of delay or mismanagement in administration. Cited, also, in notes to *Townsend v. Townsend*, 94

Am. Dec. 194, and *Bailey v. Bailey*, 48 Am. St. Rep. 832, as to equity jurisdiction over probate matters; *Hall v. Hall*, 94 Am. Dec. 715, as to its jurisdiction in guardianship matters; *Mix's Appeal*, 95 Am. St. Rep. 224, as to equitable jurisdiction of probate court; and *Clarke v. Peck*, 63 Am. Dec. 84, on limited and special character of probate court jurisdiction.

12 Cal. 437-438. STODDART v. VAN DYKE.

Partnership.—Where several sued as partners on note signed by one, nonsuit is proper unless partnership or authority to bind is proved. See p. 438.

Cited to same effect, *First Nat. Bank v. Simmons*, 98 Cal. 290, holding purchaser of partner's interest not liable for prior firm note on assumption of obligation shown.

12 Cal. 438-440. THORNTON v. BORLAND.

Answer After Demurrer Overruled should not be allowed where meritorious defense is asserted, p. 439.

Cited in *Williamson v. Joyce*, 140 Cal. 671, as distinguishing *Clagher v. Delaney*, 10 Cal. 410. Distinguished in *Green v. Underwood*, 86 Fed. 431, 57 U. S. App. 543, construing Colorado statute; *Smith v. Yreka etc. Co.*, 14 Cal. 202, sustaining judgment against plaintiff who refuses to amend after demurrer sustained; *Lord v. Hopkins*, 30 Cal. 78, holding erroneous refusal to allow plaintiff to amend after demurrer filed and before trial; and *McDonald v. Hope Co.*, 48 Fed. Rep. 100, upon point that right to answer after demurrer overruled is within discretion of court.

12 Cal. 440-449. BORLAND v. THORNTON.

Injunction to Stay Proceedings on judgment will not lie for negation where relief obtainable by motion in original suit, p. 445.

Cited, in following cases denying relief in equity: *Ketchum v. C. C. Pen*, 37 Cal. 227, foreclosure suit—as to subrogation of junior mortgage and satisfaction of judgment; *Ede v. Hazen*, 61 Cal. 360, as to excuse from neglect in failure to plead satisfaction; *Lyme v. Allen*, 51 N. H. 200, and *Morse v. Wafer*, 29 Kan. 282, where remedy existed by appeal from judgment complained of; *United States v. Throckmorton*, 98 U. S. 68 (cited *Brooks v. O'Hara*, 2 McCrary, 652, 8 Fed. Rep. 534), as to action to set aside for fraud decree confirming Mexican title; *Emery v. Palmer*, 107 U. S. 13, as to judgment where counterclaim was omitted through fraud, lack of diligence being shown; and note to *Pay v. McQuown*, 53 Am. St. Rep. 449, on setting aside of judgment because of attorney's neglect. Distinguished, allowing such relief, *Spencer v. Vigneaux*, 20 Cal. 449, where in action on judgment defendant was permitted to set up defense omitted in original action through ignorance.

ance of its facts; *Laithe v. McDonald*, 12 Kan. 350, where relief allowed by independent bill to set aside judgment rendered in defendant's absence, under facts stated; *Baer v. Higson*, 26 Utah, 83, where, in foreclosure proceedings service made by publication and default entered and property sold to innocent purchaser, equity has no jurisdiction over suit to set aside proceedings brought one year after judgment.

Notice of Motion must be written unless given in open court, p. 448.

Cited to same effect, *Plateau v. Lubeck*, 24 Cal. 365; *Mallory v. See*, 129 Cal. 358, applying rule to notice of decision; *Killip v. Empire etc. Co.*, 2 Nev. 40, 45, applying rule to notice of intention.

Ex parte Injunction may be dissolved ex parte, p. 448.

Distinguished in main opinion, *Hefflon v. Bowers*, 72 Cal. 273 (followed in dissenting opinion, p. 276), holding ex parte dissolution improper under facts; approved in *Alpers v. Bliss*, 145 Cal. 572, where defendant in partition obtained ex parte order permitting filing of supplemental cross-complaint, court may strike it from files where relief against plaintiff limited to judgment for rents; *Sullivan v. Triunfo etc. Co.*, 33 Cal. 390, on point that appeal lies from order granting such injunction. Cited, also, in *People v. County Judge*, 27 Cal. 152, as to powers of county and district judges as to dissolution of injunction; and *Pueblo Lbr. Co. v. Danziger*, 7 Colo. App. 151, as to effect of ex parte dismissal of appeal.

12 Cal. 450-456. **FARRELL v. ENRIGHT.**

Aliens.—Disabilities removed by constitution as to bona fide residents only, p. 456.

Cited to same effect, in *People v. Rogers*, 13 Cal. 165, holding constitutional act permitting nonresident aliens to claim in escheat proceedings; *Norris v. Hoyt*, 18 Cal. 219, restricting disabilities to title to real property by descent or operation of law; *Carrasco v. State*, 67 Cal. 386, holding, however, disabilities entirely removed by sections 671 and 672 of the Civil Code.

12 Cal. 457-466. **BUTLER v. COLLINS.** *S. C. Collins v. Butler*, 14 Cal. 227, and *Lamott v. Butler*, 18 Cal. 35.

Fraud.—Ownership of goods is not changed when claim is based on fraudulent representations, p. 461.

Cited to same effect, in *Amer v. Hightower*, 70 Cal. 443, holding right of seller to maintain conversion when no ratification by him; note to *Root v. French*, 28 Am. Dec. 487, holding further as to necessity of prompt disavowal by vendor. Cited, also, in *People v. Rae*, 66 Cal. 428, 429, as to distinction between obtaining goods by false pretenses and by larceny; *Mason v. Vestal*, 88 Cal. 397, 22 Am. St. Rep. 311, upon point that sale fraudulent as to creditors is void, and not merely voidable; note to *Orser v. Storms*, 18 Am. Dec., at page 554, on point that

constructive possession is sufficient basis for trespass de bonis as tatis, and at page 560 extending rule to case where owner has been wrongfully deprived of possession; and note to *Thurston v. Blanch*, 33 Am. Dec. 711, upon point that demand not necessary before where original taking was tortious.

Fraud.—Evidence of subsequent acts is admissible to show intent and character first, p. 464.

Cited in *Maxson v. Llewelyn*, 122 Cal. 198, holding fraud shown by evidence adduced; *Flood v. McClure*, 3 Idaho, 597, following rule; *Brache v. Martin*, 3 Idaho, 580, acts or declarations of party to fraudulent transfer of property are admissible in evidence, though he is not party to suit and not made in presence of purchaser; *Woolridge v. Boardman*, 115 Cal. 77, where applied to evidence of subsequent intent in conveyance as showing fraudulent intent at time of gift; note to *Mason v. Gorton*, 80 Am. Dec. 299, applying rule to evidence in like proceedings on creditor's bill.

Conversion.—Damages cannot include prospective profits, where already for value of goods, p. 466.

Cited to same effect, in *Brown v. Allen*, 35 Iowa, 314, where damages held confined to market value, and not what property worth under particular contract unknown to defendants; *Aber v. Bratton*, 60 Mo. 363, where rule of damages in replevin stated.

12 Cal. 467-469. **McMILLAN v. RICHARDS.** S. C. 9 Cal. 365.

Judgment.—Entry in vacation upon remittitur held proper upon facts, p. 468.

Cited, *Hutchinson v. Bowers*, 13 Cal. 52, holding such entry proper when verdict rendered and motion for new trial submitted in term; *People v. Jones*, 20 Cal. 55, when trial was concluded during term and findings filed within prescribed time thereafter; *Casement v. Richmond*, 28 Cal. 340, sustaining entry in judgment book during vacation of judgment regularly rendered, signed, and filed in term; *In re Coffey*, 77 Cal. 225, 11 Am. St. Rep. 271, sustaining entry of divorce decree after death of party where regularly rendered before death. Cited also, in *Leese v. Clark*, 28 Cal. 36, upon point that entry by clerk is ministerial act; *McMann v. Superior Court*, 74 Cal. 108, holding that order of superior court necessary for entry of judgment of supreme court on remittitur; *Kimpton v. Jubilee etc. Co.*, 22 Mont. 109, holding entry of judgment merely ministerial.

12 Cal. 469-476. **WELLINGTON v. SEDGWICK.**

Assignment for Creditors is incomplete without trust for assignor and third persons, p. 474.

Cited to same effect, in *Sabichi v. Chase*, 108 Cal. 87, discussing d

ference between such assignment and mortgage to creditor, and holding conveyance an assignment.

12 Cal. 476-478. **HART v. GAVEN.**

Street Improvements.—Legislature may compel owner to make in mode conformable to its discretion, p. 478.

Cited to same effect, in *Emery v. San Francisco Gas Co.*, 28 Cal. 352, where applied to street grading, and holding proper an assessment on lots fronting streets; and in same case, page 362, holding requirements as to equality and uniformity of taxation inapplicable to such assessment; *Asphalt etc. Co. v. Gogreve*, 41 La. Ann. 264, holding further that such assessments are not taxes within constitutional limitation as to their amount; *King v. Portland*, 2 Oreg. 158, holding further exercise of such legislative discretion not reviewable by courts.

12 Cal. 479-482. **ZIEL v. DUKES.**

Demand Before Suit not necessary on note payable on demand, p. 482.

Cited to same effect, in *Halleck v. Moss*, 22 Cal. 278, where applied to agreement to make good deficiency "on demand"; *Bell v. Sackett*, 38 Cal. 409, holding statute allowing days of grace applicable to such notes; *Hull v. Meyers*, 90 Ga. 680, holding such note payable immediately and discussing further necessity of protest; *Bartlett v. Rogers*, 3 Sawy. 65, 2 Fed. Cas. 978, holding further barred in four years from date when without interest.

Judgment will not be Annulled because entered by mistake, p. 482.

Cited in *Bond v. Pacheco*, 30 Cal. 534, applying rule to judgment entered by clerk on default.

12 Cal. 483-499. **PAIGE v. O'NEAL.** *S. C. Bridges v. Paige*, 13 Cal. 640, 643.

Instructions to Jury not considered unless embodied in bill of exceptions, p. 492.

Cited to same effect, in *People v. Pettit*, 5 Utah, 242, where oral instructions were taken by stenographer but not included in record.

Challenge for Cause is not good if general, p. 492.

Cited to same effect, in *State v. Squaires*, 2 Nev. 231; *Fstes v. Richardson*, 6 Nev. 129; *Southern Pac. Co. v. Rauh*, 49 Fed. Rep. 701.

Immaterial Errors will not justify reversal especially when no objection raised, p. 493.

Cited to same effect, in *Calderwood v. Tevis*, 23 Cal. 337, where trial was had without objection before demurrer to answer disposed of; *King v. Blood*, 41 Cal. 317, where rule applied to errors in form of summons.

Levy on Third Person's Property cannot be justified by sheriff on claim of fraudulent conveyance unless he prove the judgment as well as execution in the action, p. 495.

Cited in *Darville v. Mayhall*, 128 Cal. 618, holding justification properly pleaded; *Knox v. Marshall*, 19 Cal. 622, where debtor pledged his interest in wheat seized; *Ford v. McMaster*, 6 Mont. 2; *Fisher v. Kelly*, 30 Oreg. 10. Cited, also, in *Fuller Desk Co. v. McDaniel*, 113 Cal. 363, on point that sheriff can levy on any property in defendant's possession unless knowing it to be another's, and that not liable unless after conversion. Commented on in *Franklin v. Gumersell*, Mo. App. 88, holding that creditor of vendor may attack sale for fraud although transfer of possession made before levy.

Conversion.—Demand is unnecessary where original taking tortious, p. 495.

Cited to same effect, in *Sargent v. Sturm*, 23 Cal. 360; 83 Am. Dec. 119; *Boynton v. Faulk Co.*, 7 S. Dak. 425, where rule applied to action against auditor to recover moneys paid for land sold at illegal sale. Cited, also, in *Bonaparte v. Clagett*, 78 Md. 106, applying rule where defendant had obtained possession of plaintiff's goods through misrepresentations of plaintiff's tenant under facts stated; and holding conversion not waived by bringing action for price where amendment made before judgment.

Declarations of Vendor after sale are inadmissible to impeach validity, p. 496.

Cited to same effect, in *Cohn v. Mulford*, 15 Cal. 52; *Jones v. Moore*, 36 Cal. 207, where error held cured under facts; *Garlick v. Bowers*, Cal. 122; *Briswalter v. Palomares*, 66 Cal. 261.

Fraudulent Conveyances are valid as to bona fide purchaser with notice, from fraudulent vendee, p. 496.

Cited to same effect, in *Ricks v. Reed*, 19 Cal. 576, where applied to property originally sold in violation of trust; *Williams v. Borgwarner*, 119 Cal. 83; note to *Root v. French*, 28 Am. Dec. 487, as to title of such purchaser.

12 Cal. 500-533. **McCAULEY v. WELLER.**

Change of Venue.—Bias of judge is not ground for, p. 523.

Cited in *Patterson v. Conlan*, 123 Cal. 455, holding disqualification not shown by petition; *Bryan v. State*, 41 Fla. 658, and *Gaines v. State*, 38 Tex. Cr. App. 215, ruling similarly as to expressions of opinion of judge; denied in *State v. Board*, 19 Wash. 14, 67 Am. St. Rep. 7; construing local statute; *People v. Williams*, 24 Cal. 35, holding further no bias shown under facts; *Bulwer etc. Co. v. Standard etc. Co.*, Cal. 617, where no issue of fact to be tried was raised by pleadings; *re Jones*, 103 Cal. 398, holding presentation of affidavit as to bias

such motion a contempt under facts; *Jones v. State*, 61 Ark. 97, extending rule to application for trial by special judge; *In re Davis*, 11 Mont. 19, where criticised but followed; *Allen v. Reilly*, 15 Nev. 455, where facts to be found by jury; *Johnson v. State*, 31 Tex. Cr. App. 461, excepting case of property interest of judge.

Forcible Entry and Detainer.—Questions of title or right of possession cannot be considered in such actions, p. 524.

Cited in *Kerr v. O'Keefe*, 138 Cal. 421, quoting *Voll v. Hollis*, 60 Cal. 569; *Tarpening v. King*, 60 Neb. 215, sustaining action against owner with present right of possession; *Gore v. Altice*, 33 Wash. 338, reaffirming rule; *Voll v. Hollis*, 60 Cal. 573, 574, holding erroneous the admission of deeds showing title in defendants; *Giddings v. Land etc. Co.*, 83 Cal. 100, as to admission of evidence as to title. Cited, also, in *Romero v. Gonzales*, 3 N. Mex. 8 (19), on point that force must appear to sustain action.

Eminent Domain.—Entry before means of compensation provided is illegal, p. 528.

Cited, to same effect, in *Bensley v. Mountain Lake etc. Co.*, 13 Cal. 314, 316, 73 Am. Dec. 577, 579, where petitioner had allowed decree of condemnation to lie dormant for four years; *Curran v. Shattuck*, 24 Cal. 435, where applied to condemnation for highway by supervisors, without tender of compensation; *San Francisco etc. Co. v. Mahoney*, 29 Cal. 117, holding further that entry might otherwise be enjoined or prosecuted as a trespass, and as to time at which values should be computed. Distinguished, *Fox v. Western Pacific etc. Co.*, 31 Cal. 547, holding act constitutional granting railroads right to entry pending condemnation proceedings and without compensation, if security for damages given. Cited, also, in *Jacksonville etc. Co. v. Adams*, 33 Fla. 612, upon point of validity of amendment of statute as to jury in condemnation proceedings; notes to *Gardner v. Newburgh*, 7 Am. Dec. 534, and *Bloodgood v. Mohawk etc. Co.*, 31 Am. Dec. 372, upon subject of syllabus.

12 Cal. 534-535. DUTCH FLAT ETC. CO. v. MOONEY.

Mining Claim—Forfeiture.—When defense in ejectment facts must be pleaded, p. 534.

Cited, to same effect, in *Johnson v. McLaughlin*, 1 Ariz. Ter. 502, holding further failure to comply with local rules no forfeiture, unless rules so provide; *Wulf v. Manuel*, 9 Mont. 287.

Mining Regulations.—Validity of discussed, p. 535.

Cited in note to *Colman v. Clements*, 23 Cal. 249, as to parol proof of such regulations; note to *Lanfear v. Mestier*, 89 Am. Dec. 665, on point that courts will not take judicial notice of such regulations.

12 Cal. 535-539. **WATERS v. MOSS.** 73 Am. Dec. 561.

Owner of Estray is not liable for its trespass though not inclosed his land, p. 538.

Cited, to same effect, in *Logan v. Gedney*, 38 Cal. 581, construing as to sheep herding; *Hahn v. Garratt*, 69 Cal. 147, holding rule modified however, by special statute, as to Santa Clara County; *Merritt Hill*, 104 Cal. 185, holding defendants not liable unless instigating trespass or with notice thereof; *Morris v. Fraker*, 5 Colo. 432; *Chase v. Chase*, 15 Nev. 262; and in notes to *Tonawanda etc. Co. v. Munger*, 49 Am. Dec. 250; *Holden v. Shattuck*, 80 Am. Dec. 688; *Eames v. Saltonstall etc. Co.*, 96 Am. Dec. 680; and to *Clarendon etc. Co. v. McClelland*, Am. St. Rep. 84, upon general subject; note to *Barnes v. Chapin*, Am. Dec. 711, as to liability of owner of horse running at large; *Union Pacific etc. Co. v. Rollins*, 5 Kan. 187, as to liability of railroad company for injury to estrays upon its tracks.

12 Cal. 539-542. **SANFORD v. BORING.**

Attachment.—Sheriff is liable for amount of debt for releasing property except in due course of law if debt is lost, p. 541.

Cited, to same effect, in *Roth v. Duvall*, 1 Idaho, 154, where rule applied to failure to make return in proper time and for releasing property under belief of its exemption; *Hartlieb v. McLane's Admr.*, 44 St. 514, 84 Am. Dec. 469, where property stolen from sheriff between levy and sale. Cited, also, in note to *Franklin Bank v. Bachelder*, Am. Dec. 609, on dissolution of attachment lien by officer's release of property; *Hawkins v. Roberts*, 45 Cal. 41, distinguishing same case and holding lien not dissolved under facts.

Instructions to Sheriff will not exonerate him unless in writing, p. 541.

Cited, to same effect, in note to *People v. Palmer*, 95 Am. Dec. 4, upon general subject.

12 Cal. 542-555. **ELLISON v. JACKSON WATER CO.**

"Ratification" is applicable only where contracting party acts as if he assumes to act for another, p. 551.

Cited, to same effect, in *Shepardson v. Gillette*, 133 Ind. 128, as to ratification by authorized board of tax levy by unauthorized board without prior request; *Wolf v. Michigan etc. Co.*, 108 Mich. 671, as to ratification by majority of board of trustees of act of minority thereof; *Moore v. Powell*, 6 Tex. Civ. App. 48, as to contract made by one joint owner void under statute of frauds. Cited, also, in *Frink v. Roe*, 70 Cal. 311, upon ratification of acts by agent, and distinguishing between void and voidable transactions; *Minnich v. Darling*, 8 Ind. App. 544, discussing requisites of ratification.

Guaranty.—Contract in suit held void under statute of frauds as collateral agreement, p. 552.

Cited in *Tevis v. Savage*, 130 Cal. 413, holding guaranty void; *Morningstar v. Stratton*, 121 Ala. 442, ruling similarly as to promise to pay another's mortgage of promisor's property; *Bestor v. Roberts*, 58 Ala. 334, holding collateral a promise to indemnify, under facts stated. Denied, *Board v. Cincinnati etc. Co.*, 128 Ind. 249, as "out of line with authority," holding original a promise by owner to pay subcontractor on contractor's default.

Statute of Frauds.—Requisites of form of contract stated, p. 552.

Cited in note to *Siemers v. Siemers*, 60 Am. St. Rep. 434, upon necessity of expressing consideration in such contracts.

Mechanic's Lien—Buildings.—Ditch is not subject to under the statutes, p. 553.

Cited, to same effect, in *Horn v. Jones*, 28 Cal. 203; note to *La Crosse etc. Co. v. Vanderpool*, 78 Am. Dec. 695, as to property subject to mechanic's lien.

Statutes.—Repeal of original act effects repeal of act extending original act, p. 553.

Distinguished, *Schwenke v. Union etc. Co.*, 7 Colo. 516, holding special act adopting procedure by reference to general act not necessarily repealed by repeal of latter.

Mortgage of ditches, etc., to be afterward constructed does not cover such as were merely in contemplation, p. 554.

Cited as dictum, but approved to same effect in *Mitchell v. Amador etc. Co.*, 75 Cal. 489.

12 Cal. 555-559. **FRALER v. SEARS ETC. CO.** 73 Am. Dec. 562.

Dam Owner.—Liability for overflow exists although injuries preventable by plaintiff's reasonable care, p. 558.

Cited in *Western Gas etc. Co. v. Danner*, 97 Fed. 888, sustaining recovery for injuries from fall of smokestack; *McCarty v. Boise City etc. Co.*, 2 Idaho, 228, where parties had equal means to prevent seepage; notes to *McCoy v. Danley*, 57 Am. Dec. 692, *Wabash etc. Canal v. Spears*, 79 Am. Dec. 446, *Bassett v. Salisbury Mfg. Co.*, 82 Am. Dec. 188, and to *Casebeer v. Mowry*, 93 Am. Dec. 768, upon dam-owner's liability; note to *Lancey v. Clifford*, 92 Am. Dec. 565, as to the right of littoral owner to build dams and mills; and *Central Trust Co. v. Wabash etc. Co.*, 57 Fed. Rep. 448, upon point of liability of railway for flood resulting from insufficient culvert, and holding railway not liable under facts. Cited, also, in *Oil Co. v. King*, 6 Tex. Civ. App. 96, where rule of contributory negligence in headnote applied to erection of building next to oil works which catch fire through defendant's negligence; *Union Pacific etc. Co., v. McDonald*, 152 U. S. 278, where same

rule applied to father who allows child to wander into lime-pit negligently left unfenced; and *Marine Ins. Co. v. St. Louis etc. Co.*, 41 F. Rep. 653, where applied to delivery of cotton at sheds, where accumulation of property has caused nuisance likely to occasion loss by fire.

12 Cal. 560-561. **BALDWIN v. SIMPSON.**

Ejectment.—Constructive possession under facts stated held insufficient to maintain, p. 560.

Cited, *Kile v. Tubbs*, 23 Cal. 437, on point that entry in good faith under color of title and actual occupation of part with claim to whole is equivalent to possession of whole tract; to same effect, *Hicks v. Coleman*, 25 Cal. 138, 85 Am. Dec. 116; and *Walsh v. Hill*, 38 Cal. 448; *Polack v. McGrath*, 32 Cal. 22, holding fences described not substantial inclosures for prior possession under facts; *Kendrick v. Lathrop*, 25 Fla. 837, where theory of constructive possession for purposes of adverse claim held to apply to forty acre tract; *Probst v. Trustees of N. Mex.* 377 (267), holding no sufficient proof of such possession; and *Plume v. Seward*, 60 Am. Dec. 604, as to necessity of actual possession where action is based on prior possession. Distinguished, *Cann v. Union Lumber Co.*, 38 Cal. 675, where referred to as "upon extreme verge of the rule" holding theory of constructive possession to apply when entry and claim not made in good faith and under de-

12 Cal. 561-563. **MORLEY v. DICKINSON.**

Sureties are Discharged by release of levy had on sufficient personal property of principal upon judgment on the contract, p. 563.

Cited, to same effect, in *Mulford v. Estudillo*, 23 Cal. 100, holding such levy alone sufficient as satisfaction of judgment as to third person liable collaterally or as sureties; note to *Trapnall v. Richardson*, 38 Am. Dec. 357, upon effect of release of levy as to sureties and other parties. Distinguished, *Mitchell v. Hackett*, 14 Cal. 666, holding return of satisfaction not conclusive as to parties involved.

12 Cal. 564-580. **INGOLDSBY v. JUAN.** *S. C. Hihn v. Courtis*, 31 Cal. 400, 403, 405.

Wife's Deed of Separate Property before act of April 17, 1850, does not need joinder of husband as a grantor, p. 573.

Approved, *Bodley v. Ferguson*, 30 Cal. 516, 517, and applied to wife's contract to convey her separate estate; *Racouillat v. Sansevain*, 32 Cal. 383, as to wife's executory contract made by husband under her power of attorney. Distinguished and explained in *Morrison v. Wilson*, 33 Cal. 497, 73 Am. Dec. 595, where property acquired after act; *Mack v. Love*, 25 Cal. 383; 85 Am. Dec. 143, where marriage was after act. Distinguished, *Meagher v. Thompson*, 49 Cal. 192, under act of 1862, holding concurrence insufficient where husband has given his wife general power of

attorney in advance. Cited, also, in *Douglas v. Fulda*, 50 Cal. 80, holding wife's power of attorney under act of 1863 sufficient when signed by her alone.

Sealed Instrument is not necessary for conveyance of interest in land, p. 577.

Cited, to same effect, in *Owen v. Frink*, 24 Cal. 176, as to transfer of equitable right to conveyance of real estate, and holding, further, unsealed transfer of land good as contract to convey; approved as to same deed in *Hihn v. Curtis*, 31 Cal. 400, 403, 405.

Husband's Concurrence in Wife's Deed is shown by his written approval subscribed to it, though not a party, p. 577.

Cited, to same effect, in *Merrill v. Nelson*, 18 Minn. 374, where husband signed wife's deed; *Newton v. Emerson*, 66 Tex. 146, holding that name in body of deed is sufficient "signing," and intent to convey shown by acknowledgment and delivery; note to *Payne v. Parker*, 25 Am. Dec. 227, on subject of when deed binds one not named as party.

Distinguished in *Hart v. Church*, 126 Cal. 477, 77 Am. St. Rep. 201, as to alienation of homestead; cited in *Morgan v. Snodgrass*, 49 W. Va. 394, but holding acknowledgment by both necessary.

Separate Contemporaneous Papers are to be construed together, p. 577.

Distinguished in *Uhlhorn v. Goodman*, 84 Cal. 189, as to deed by agent in own name as owner's grantee, and agreement by owner to sell to agent.

Acknowledgment.—County clerk may take and certify though having no seal of office, p. 579.

Cited, *Emmal v. Webb*, 36 Cal. 203, as to mistake in recording seal to certificate of acknowledgment; *Summer v. Mitchell*, 29 Fla. 218; 30 Am. St. Rep. 122, holding unnecessary to insert public seal in record, and absence does not overcome presumption of its presence in original.

Statute.—Retrospective construction will not be given to, p. 579.

Cited on the same subject in note to *Grime's Estate v. Morris*, 65 Am. Dec. 547.

VOLUME XIII.

By CHARLES T. BOONE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

13 Cal. 9-11. BARKER v. KONEMAN.

Husband and Wife.—Deed of gift from husband to wife, of his separate real estate, he being at the time free from debts and liabilities, is valid as against creditors, p. 11.

Commented on and distinguished, *Kohner v. Ashenauer*, 17 Cal. 581, in which case the conveyance was not of any separate property of the husband, and it did not appear that the property was transferred as a gift, or in exchange for any separate property of the wife, and it was held that the property therefore continued subject to the disposition of the husband after the title was placed in the wife's name, as it was previously, and that the conveyance in no respect affected the validity of a mortgage subsequently given by the husband on the same property. Explained, *Peck v. Brummagim*, 31 Cal. 445, 447, 89 Am. Dec. 199, 200, extending the rule to a gift of either real or personal property, and to that which at the time was the community property of the husband and wife. And so in *Dow v. Gould etc. Min. Co.*, 31 Cal. 653; *Rico v. Brandenstein*, 98 Cal. 469; 35 Am. St. Rep. 196. Ruling approved, *Furrow v. Athey*, 21 Neb. 672; 59 Am. Rep. 868; and cited as authority, *Cooke v. Bremond*, 86 Am. Dec. 642, note, treating of conveyance from husband to wife. Also cited, *Tillaux v. Tillaux*, 115 Cal. 671, holding that there is no presumption of undue influence in case of a conveyance from one spouse to the other, but the deed prima facie conveys whatever its terms embrace.

Same.—The law favors provisions made by the husband, when in solvent circumstances, for the wife and family, against possible future misfortunes, p. 11.

Approved, *Tillaux v. Tillaux*, 115 Cal. 669, holding that a deed from husband to wife, conveying an absolute title in fee, with an expressed consideration of "love and affection," and "for her better maintenance and support," requires no other consideration to support it. So, to same effect, *Emmons v. Barton*, 109 Cal. 671.

13 Cal. 11-13. **WAUGH v. CHAUNCEY.**

Board of Supervisors.—Powers of are administrative, legislative, and judicial, and jurisdiction over roads, ferries, and bridges, is given to such board by statute, p. 12.

Cited as authority, *Fall v. Payne*, 23 Cal. 303, and *Bixler v. County of Sacramento*, 59 Cal. 702; so in *Kimball v. Alameda County*, 46 Cal. 24, holding that such boards may exercise jurisdiction in opening public highways across public lands; so in *Belser v. Hoffschneider*, 104 Cal. 460, holding that the action of a city council in the matter of an appeal from an assessment was judicial; so in *State v. Ormsby County*, 7 Nev. 397, and applied to duties of county commissioners.

Same.—The judgments or orders of such board cannot be attacked collaterally, any more than the judgments of courts of record, p. 12.

Approved, *Fall v. Paine*, 23 Cal. 303, and *Levee District v. Farmer*, 101 Cal. 181, holding that its judgment may be reviewed upon certiorari, where the jurisdiction of the board has been exceeded. So in *Gilbert v. Commissioners*, 11 Utah, 387, applied to judicial acts of board of police and fire commissioners. Cited as authority for the doctrine stated, 65 Am. Dec. 543, n.

13 Cal. 13-15. **HAFFLEY v. MAIER.**

Estoppel.—Mortgagor having mortgaged land as his own is estopped, as are also his privies in estate, from saying it is public land, p. 14.

Approved, *Kirkaldie v. Larrabee*, 31 Cal. 457; 89 Am. Dec. 206. Principle applied, *De Frieze v. Quint*, 94 Cal. 659; 28 Am. St. Rep. 153, holding that the grantor of land is estopped by his deed of grant, bargain, and sale, purporting to convey an absolute title to the land, from denying that before and at the time of that deed he had such absolute title, and by that deed conveyed it to the grantee.

Mortgage is a Mere Security for a debt, and does not pass the fee, nor give a right of entry, p. 14.

Approved, *Goodenow v. Ewer*, 16 Cal. 468; 76 Am. Dec. 544, and *Dutton v. Warschauer*, 21 Cal. 621; 82 Am. Dec. 768, holding that a mortgage is not a conveyance vesting in the mortgagee any estate in the land either before or after condition broken. So in *Willis v. Farley*, 24 Cal. 498, and *Jackson v. Lodge*, 36 Cal. 39, holding that a mortgage passes by an assignment of the debt, is discharged by a payment of the debt, and is barred by the statute of limitations when the debt is barred. Cited as authority on the ruling stated, *McMillan v. Richards*, 70 Am. Dec. 675, n.

Judgment.—If right, will not be reversed, though a wrong reason was given for it, p. 15.

Approved, holding that an erroneous conclusion of law constitutes

no ground for reversal, if the judgment was right, *Spencer v. Duncan*, 107 Cal. 428.

Parties.—Where land mortgaged is sold, the vendee of the mortgagor cannot be ousted from possession by a purchaser under the decree of foreclosure and sale, unless he was made a party to the foreclosure suit, p. 15.

Principle of the ruling applied, *Barrett v. Blackmar*, 47 Iowa, 570.

13 Cal. 15-24. CRANDALL v. BLEN.

Execution.—Whether a chose in action, calling for a definite sum without condition, is the subject of levy and sale, questioned, p. 22.

Referred to, *Davis v. Mitchell*, 34 Cal. 89, holding that a promissory note, being the property of the defendant in an attachment and execution, is liable to seizure and sale thereunder, and discussing, but not deciding, whether the sale will be valid without a delivery of the note to the purchaser. Also referred to in *McBride v. Fallon*, 65 Cal. 303, in which case it is held that a judgment cannot be levied upon and sold under execution as personal property capable of manual delivery, but only in the mode prescribed in section 542, Code of Civil Procedure. Cited, defining the term "property," 55 Am. Dec. 405, note; also, 92 Am. Dec. 416, note, as questioning *Adams v. Hackett*, 7 Cal. 187.

13 Cal. 24-28. HOUSTON v. WILLIAMS. 73 Am. Dec. 565.

Constitutional Duty of Supreme Court is discharged by the rendition of its decisions, and the legislature cannot require it to give the reasons of its decisions in writing, p. 25.

Cited as authority to the same ruling, *Vaughn v. Harp*, 49 Ark. 161; *Jordan v. Andrus*, 26 Mont. 42, act of March 9, 1901, providing that transcripts on appeal may be printed or typewritten at the election of appellant is invalid; *Ex parte Griffiths*, 118 Ind. 85, 66, 10 Am. St. Rep. 109, holding that a statute requiring judges of the supreme court to prepare syllabi of their decisions was unconstitutional and void; denying power in the legislature to trench upon the powers of the judges, or to prescribe the mode in which they shall discharge their duties, *State v. Smith*, 5 Mo. App. 430, *De Votie v. McGere*, 14 Colo. 592; *Saint Croix Lumber Co. v. Pennington*, 2 Dak. Ter. 473; and *Smythe v. Boswell*, 117 Ind. 366, and referred to in this connection, *Norwalk Street Ry. Co.'s Appeal*, 69 Conn. 593; and *Nudd v. Burrows*, 91 U. S. 442; 13 Bank. Reg. 295. Distinguished, *In re Jessup*, 81 Cal. 485, construing constitutional provision as to the granting of rehearings in bank after decision by a department.

Same.—A decision of the court is its judgment, the opinion is the reasons given for that judgment, p. 27.

Cited in *Wilson v. Wilson*, 64 Cal. 94, holding that the opinion of the judge of the trial court is not a part of the record. Distinguished,

Pierce v. State, 109 Ind. 536, the terms "opinion" and "decision" being sometimes used interchangeably in the Indiana statute, so that an exception to the "opinion" of the court has been sustained as proper; *Board v. State*, 7 Kan. App. 623, *Adams v. Yazoo etc. Co.*, 77 Miss. 304, and *Buckeye etc. Co. v. Fee*, 62 Ohio St. 556, 78 Am. St. Rep. 745, construing local statutes; *Eureka Co. Bank v. Clarke*, 130 Fed. 326, opinion of court is not proper subject for assignment of errors; *State v. Gray*, 42 Or. 268, where terms of decree conflict with statements of fact in court's opinion, decree is controlling; *Hammer v. Downing*, 39 Or. 523, judgment for costs in favor of prevailing party entered before a petition for rehearing has been filed is not premature, and cannot be vacated. Cited as to distinction stated, 85 Am. Dec. 396, note; 87 Am. Dec. 523, note; 7 Am. St. Rep. 245, note; and as to the power of courts over their records, 79 Am. Dec. 437, note; 80 Am. Dec. 192, note; and 82 Am. Dec. 175, note.

13 Cal. 28-31. **DUMPHY v. GUINDON.**

Jurisdiction.—Costs are only incidental to the action, and for the purpose of testing jurisdiction constitute no part of the "matter in dispute," p. 30.

Affirmed, *Zabriskie v. Torrey*, 20 Cal. 174; *Bolton v. Landears*. 27 Cal. 107; and *Henigan v. Ervin*, 110 Cal. 40. Distinguished, *Meeker v. Harris*, 23 Cal. 286, holding that the costs of an action may become a matter in dispute, and that when they amount to a sum sufficient to bring the case within the jurisdiction of the court, its jurisdiction attaches. Distinguished, also, in *Dashell v. Slingerland*, 60 Cal. 657, noting that the constitution of 1849 did not exclude interest in fixing the appellate jurisdiction of the supreme court; and explained in dissenting opinion of Morrison, C. J., in same case. Cited, bearing on jurisdiction of supreme court, 70 Am. Dec. 724, note.

13 Cal. 31-33. **BRADY v. REYNOLDS.**

Guarantor and Indorser.—The contract of indorsement is, primarily, that of transfer; the contract of guaranty is that of security, p. 32.

Cited, *Ford v. Hendricks*, 34 Cal. 675, holding that one who indorses a promissory note, over his signature, "I hereby waive demand, notice of nonpayment and protest," is a guarantor. Also cited, *Fessenden v. Summers*, 62 Cal. 496, in which case it is held that one not a party to a note, who indorses it in blank before delivery, is an indorser, and not a guarantor; and again cited, *First Nat. Bank v. Babcock*, 94 Cal. 102, 28 Am. St. Rep. 96, asserting the rule that one who indorses a non-negotiable promissory note to give it credit is a guarantor. Cited, collecting the authorities on the subject, 56 Am. Dec. 359, note.

13 Cal. 33-40. **ORTMAN v. DIXON.**

Seal.—By the common law, the equitable title to realty may be

conveyed by an instrument not under seal, if otherwise sufficient, p. 36.

Approved in *Marling v. Marling*, 9 W. Va. 95; 27 Am. Rep. 548, holding that a court of equity will effectuate a gift of lands by a father to his child, evidenced only by an unsealed instrument delivered to the child. So in *Le Franc v. Richmond*, 5 Sawy. 603, holding that rights to water privileges on public lands may pass by simple unsealed bills of sale. Distinction between sealed and unsealed instruments abolished, *Garden v. Derrickson*, 95 Am. Dec. 289, note.

Water, Prior Appropriation.—Extent of right to appropriate water depends on the nature and uses of the appropriation, p. 38.

Principle approved, *McKinney v. Smith*, 21 Cal. 381, 383; *Nevada County etc. Canal Co. v. Kidd*, 37 Cal. 313; *Smith v. O'Hara*, 43 Cal. 375, 376; *Lux v. Haggin*, 69 Cal. 447; *Edgar v. Stevenson*, 70 Cal. 290, 291; *De Necochea v. Curtis*, 80 Cal. 405; *Ball v. Kehl*, 95 Cal. 614; *New Mercer Ditch Co. v. Armstrong*, 21 Colo. 365; *Thorp v. Freed*, 1 Mont. 658; *Gassert v. Noyes*, 18 Mont. 222; *Lobdell v. Simpson*, 2 Nev. 277; 90 Am. Dec. 539; *Simmons v. Winters*, 21 Oreg. 42; 28 Am. St. Rep. 731; *Atchison v. Peterson*, 20 Wall. 514, 679; *Boyle v. San Diego Land and Town Co.*, 46 Fed. Rep. 711; *Hewitt v. Story*, 64 Fed. Rep. 515; *Union Mill and Mining Co. v. Danberg*, 81 Fed. Rep. 95, 106; *Lobdell v. Hall*, 3 Nev. 517, holding in the last case cited that an Indian who has appropriated water on the public lands of the United States may maintain an action for its diversion. Cited in *Cache etc. Co. v. Water etc. Co.*, 25 Colo. 171, 71 Am. St. Rep. 139, discussing priority of appropriation; *Colorado etc. Co. v. Larimer etc. Co.*, 26 Colo. 49, *Mattis v. Hosmer*, 37 Or. 530, and *Hague v. Nephi etc. Co.*, 16 Utah, 430, 67 Am. St. Rep. 639, as to limitation of appropriation; *Last Chance Min. Co. v. Bunker Hill etc. Min. Co.*, 49 Fed. Rep. 434, denying the right to change the place of use of water. Distinguished, *Keeney v. Union Mfg. Co.*, 39 Conn. 581, as resting upon the peculiar law of California. Cited, treating of right of prior appropriation, *Heath v. Williams*, 43 Am. Dec. 279, 282, note; and 60 Am. St. Rep. 802, note; and referred to on same subject, *McDonald v. Mining Co.*, 13 Cal. 239, n.

Findings in equity cases will not usually be disturbed, where the proofs are conflicting, p. 40.

Cited, *Lyons v. Lyons*, 18 Cal. 449, holding that when there are findings in an equity case, they are not to be disregarded.

13 Cal. 40-43. CRAVENS v. DEWEY.

The granting of nonsuit on the facts is a question of law, p. 42.

Cited as authority, *Schroeder v. Schmidt*, 74 Cal. 460; *Hammond v. Wallace*, 85 Cal. 527; 20 Am. St. Rep. 240; *Warner v. Darrow*, 91 Cal. 311; *Craig v. Hesperia etc. Water Co.*, 107 Cal. 675; *Kleinschmidt v.*

McAndrews, 4 Mont. 225; Jones Lumber etc. Co. v. Faris, 6 S. Dak. 115; 55 Am. St. Rep. 815; and Sanford v. Elevator Co., 2 N. Dak. 10.

In reviewing ruling by court below in granting a nonsuit, the appellate court will consider every fact as proven which the evidence tended to prove, p. 42.

Approved as authority, Dow v. Gould etc. Min. Co., 31 Cal. 650; and Herbert v. King, 1 Mont. 479; so, to same effect, Masten v. Griffing, 33 Cal. 114. Cited in dissenting opinion, Mulcahey v. Dow, 131 Cal. 80, main opinion holding nonsuit justified.

13 Cal. 43-44. HOLVERSTOT v. BUGBY.

Motion for nonsuit should specify the grounds upon which it is made, p. 44.

Approved, Daley v. Russ, 86 Cal. 117. Cited in Williams v. Hawley, 144 Cal. 99, discussing rule with reference to motion for new trial made upon minutes.

13 Cal. 45-49. HASKELL v. CORNISH.

Agency.—Agent signing his own name to a promissory note made on behalf of his principal is not personally liable as a maker if the instrument itself discloses the intention to bind his principal and not himself, p. 48.

Principle of the decision approved and applied in the similar case of Shaver v. Ocean Min. Co., 21 Cal. 47; so in Hall v. Crandall, 29 Cal. 571; 89 Am. Dec. 66; Love v. Sierra Nevada etc. Min. Co., 32 Cal. 654; 91 Am. Dec. 607; and to same effect, Gillig v. Lake Bizler Road Co., 2 Nev. 223. Cited, Zeigler v. Wells, Fargo & Co., 28 Cal. 265, which was an action against the defendant for not complying with a contract to carry and deliver a draft. The complaint alleged that the draft was signed "John Q. Jackson," and the proof showed that it was signed "John Q. Jackson, Agent," and the variance was held to be immaterial. Cited as authority to the ruling stated, Mott v. Hicks, 13 Am. Dec. 563, note; and Southern Pac. Co. v. Dredger Co., 118 Cal. 371, holding that parol evidence may be employed to determine whose contract it is.

13 Cal. 50-53. HUTCHINSON v. BOURS.

Judgment.—Court may, in term time or vacation, order judgment on a verdict rendered and recorded, if the motion for a new trial was taken under advisement, p. 51.

Cited as authority, Casement v. Ringgold, 28 Cal. 340, holding that the clerk may perform the ministerial duty of entering judgment in vacation; and so in In re Cook, 77 Cal. 225; 11 Am. St. Rep. 271.

13 Cal. 53-54. **RICE v. GASHIRIE.**

New Trial.—Terms of granting are peculiarly within the discretion of the court, p. 54.

Approved in *Garoutte v. Haley*, 104 Cal. 501; and *Brooks v. Railway Co.*, 110 Cal. 174, new trial on condition that moving party should pay the costs. So in *Henderson v. Morris*, 5 Oreg. 27, and applied to the question of allowing or refusing an amendment.

Appeal.—For error of law, excepted to, an appeal lies, without motion for new trial, p. 54.

Approved as authority in *Walls v. Preston*, 25 Cal. 61; *Carpentier v. Williamson*, 25 Cal. 159.

13 Cal. 54-56. **CROWELL v. GILMORE.** S. C. again, affirmed on principle of stare decisis, 17 Cal. 195, and approved in S. C. again, 18 Cal. 371.

Mechanic's Lien.—By relation, will attach from the date of the commencement of the work, p. 56.

Approved in *McCrea v. Craig*, 23 Cal. 525. Cited, *Loonie v. Hogan*, 61 Am. Dec. 690, as authority to the proposition that one having an equitable interest in lands has an estate generally sufficient to be chargeable with a lien. Referred to as authority construing mechanics' lien law, *Welch v. Porter*, 63 Ala. 232.

13 Cal. 58-61. **VISHER v. WEBSTER.**

Costs.—Where judgment below is reversed on appeal, and a new trial had, the costs of the first trial are part of the final bill of costs, p. 60.

Cited as authority and applied *Stoddard v. Treadwell*, 29 Cal. 282.

Fraudulent Conveyance.—Sale of personalty without delivery is good as between the parties, p. 60.

Cited in *Driscoll v. Driscoll*, 143 Cal. 533, discussing retention of possession by grantor after delivery of deed.

Where two parties are living on a ranch, and one sells his interest in the growing crops to the other, the fact that both parties continue to live on the ranch, and that the vendee continues to work for the vendor as a hired man does not make the sale void as to creditors, p. 60.

Affirmed and the principle applied in the similar case of *Bernal v. Hovious*, 17 Cal. 545; 79 Am. Dec. 149; so in *O'Brien v. Ballou*, 116 Cal. 321, and the principle approved in *Davis v. McFarlane*, 37 Cal. 638. Cited on question of delivery, in *Shindler v. Houston*, 49 Am. Dec. 325, note.

Evidence.—Declarations of vendor of personal property, made after the sale, are not good to impeach the title of the vendee, p. 61.

Rule affirmed in *Jones v. Morse*, 36 Cal. 207; and *Garlick v. Boy*, 66 Cal. 122; and approved, *Williams v. Eikenberry*, 25 Neb. 727 Am. St. Rep. 521.

13 Cal. 62-72. **HORN v. VOLCANO WATER COMPANY.** S. C. Am. Dec. 569.

To authorize intervention, the interest must be that created by claim to the demand, or some part thereof, in suit, or a claim to lien upon the property, or some part thereof, which is the subject of litigation, p. 70.

Doctrine approved, *Speyer v. Ihmels*, 21 Cal. 287; 81 Am. Dec. 159; *Gradwohl v. Harris*, 29 Cal. 154; and *Kimball v. Richard Kimball Co.*, 111 Cal. 392, maintaining the right of an attachment execution creditor to intervene in a suit by a prior attaching creditor. So in *Stich v. Goldner*, 38 Cal. 611, holding that in a suit upon a promissory note, by the holder against the maker, a third person, claiming to be the rightful owner of the note has the right to intervene. Ruling also approved, *Henry v. Insurance Co.*, 16 Colo. 185; *Wood v. Denver City Water Works Co.*, 20 Colo. 266; 46 Am. St. Rep. 289; *v. Frazier*, 4 Dak. Ter. 208, on appeal to United States supreme court, 144 U. S. 509; *Murray v. American Surety Co.*, 70 Fed. Rep. 345; *Nett v. Whitecomb*, 25 Minn. 153; *Lewis v. Harwood*, 28 Minn. 436, 437; *Harlan v. Eureka Min. Co.*, 10 Nev. 95; *Yetzer v. Young*, S. Dak. 267; and *McClurg v. State Bindery Co.*, 3 S. Dak. 365, 44 Am. St. Rep. 801, the case last cited holding that the assignee of an interest in a corporation may not intervene in an action against such corporation for the purpose of contesting its liability. Cited in *Westcott v. Patton*, 10 Colo. App. 549, and *Bray v. Booker*, 6 N. Dak. 533, denying right to intervene, under facts stated; *Smith v. Smith etc. Co.*, Mich. 16, denying right to general creditors; *Dickson v. Dows*, 1 N. Dak. 409, denying right of incompetent to intervene in suit to cancel contract of sale, where intervenor claims as owner of land and no interest in contract sued on; *People v. Green*, 1 Idaho, 239, denying right of intervention to actions purely civil in character; *State v. Kansas etc. R. R. Co. v. Fitzgerald*, 33 Neb. 142; and *Thompson v. Huron Lumber Co.*, 4 Wash. St. 606, holding that a mere creditor may not intervene; so, to the same effect, *Marx v. Parker*, 9 Wash. 474; 43 Am. St. Rep. 850. Cited, *Brown v. Saul*, 16 Am. Dec. 181; *note*; 79 Am. Dec. 586, *note*; 92 Am. Dec. 548, *note*; and 38 Am. St. Rep. 501.

Fraudulent Conveyances.—As against subsequent creditors, a conveyance, even if voluntary, is not void, unless fraudulent in fact, p.

Approved, *Plunkett v. Plunkett*, 114 Ind. 488; *Rudy v. Austin*, Ark. 73; 35 Am. St. Rep. 88; and *Walsh v. Byrnes*, 39 Minn. 528. Cited, *Jenkins v. Clement*, 14 Am. Dec. 707, *note*; 84 Am. Dec. 464, *note*.

Am. Dec. 108, note; *Hagerman v. Buchanan*, 14 Am. St. Rep. 752, note: and 31 Am. St. Rep. 665, note.

Pleading.—A general denial without verification admits the genuineness and due execution of the note sued on, p. 69.

Approved, *Parkison v. Boddiker*, 10 Colo. 510. Cited in *Apache County v. Barth*, 177 U. S. 548, applying rule under Arizona statute to action on county warrants.

General Citation.—In *Cunnington v. Scott*, 4 Utah, 448, and *Smith v. Ford*, 48 Wis. 151, as authority bearing on practice in intervention.

13 Cal. 73-74. **RHINE v. BOGARDUS.**

Appeal.—When no motion for new trial is made, the finding of facts by the court below is conclusive, p. 74.

Affirmed, *Allen v. Fennon*, 27 Cal. 69.

13 Cal. 74-75. **NELSON v. HIGHLAND.**

Pleading.—It is no ground of demurrer to complaint that the Christian name of one of the plaintiffs does not appear, p. 75.

Cited, *Meads v. Lasar*, 92 Cal. 227, holding that the initials of names of partners in the certificate required by law to be published by partnership is sufficient; *Stever v. Brown*, 119 Mich. 199, permitting amendment by substituting name for initial when identity shown; *Wiebbold v. Hermann*, 2 Mont. 614, in dissenting opinion of Blake, J.: so in *Andrews v. Wynn*, 4 S. Dak. 42, approving the ruling stated.

13 Cal. 75. **McHENDRY v. REILLY.**

Homestead.—Right is subordinate to the vendor's lien for the purchase money of the land, p. 76.

Approved as authority in *Christy v. Dyer*, 14 Iowa, 442; 81 Am. Dec. 495; *Hopper v. Parkinson*, 5 Nev. 238; *Magee v. Magee*, 99 Am. Dec. 574, note.

13 Cal. 76-79. **SCALES v. SCOTT.**

A lien by attachment enables a creditor to maintain a suit to set aside a judgment confessed by a party to defraud his creditors, p. 78.

Cited in *Aigeltinger v. Einstein*, 143 Cal. 611, 612, noted under *Heyne-man v. Dannenberg*, 6 Cal. 376; *Conroy v. Woods*, 13 Cal. 626, 73 Am. Dec. 610, following rule. Cited as authority in *Kahn v. Salmon*, 10 Sawy. 101, 20 Fed. Rep. 806, suit to set aside fraudulent assignment of the property attached. Approved, *Edson v. Cummings*, 52 Mich. 55; and cited in 65 Am. Dec. 521, note.

Fraud.—If any part of the consideration of a note is fraudulent, the entire note is void against creditors, p. 79.

Approved and applied in *Swinford v. Rogers*, 23 Cal. 236, holding that a conveyance of property made and received with intent to defraud creditors is void, though there may have been a full and valuable consideration, and the conveyance will not be allowed to stand even as security for advances actually made. So in *Wilcoxson v. Burton*, 27 Cal. 235, 87 Am. Dec. 71, case of confession of judgment for a sum greater than was due. Explained in *Tully v. Harloe*, 35 Cal. 308, 95 Am. Dec. 105, holding that a mortgage knowingly given for a sum greater than is due, and not in good faith, as a pretended security for future advances, is fraudulent in law as to the creditors of the mortgagor. Distinguished, *Mendes v. Freiters*, 16 Nev. 397, and holding that a party acting in good faith is not guilty of constructive fraud in commencing an attachment suit upon a stated account for a greater sum than is actually due, and that his attachment to the extent of the amount actually due is valid against subsequent attaching creditors.

13 Cal. 79. **MCCARTY v. CHRISTIE.**

Judgment Lien is not divested by acceptance of deed on execution sale under former judgment, p. 81.

Cited in *Knickerbocker v. McKindley etc. Co.*, 172 Ill. 546, 64 Am. St. Rep. 57, discussing rights of purchaser at foreclosure sale.

13 Cal. 81-85. **GOODE v. SMITH.**

In Acknowledgment to Deeds, substantial conformity with the statute is sufficient, p. 83.

Approved, *Overman etc. Min. Co. v. American Min. Co.*, 7 Nev. 318, and cited in *Livingston v. Kettelle*, 41 Am. Dec. 179, 182, note, where the subject is discussed at length.

Evidence.—Where a party permits his antagonist to prove a fact by secondary evidence, he cannot afterward object that it was not proved by the best, p. 84.

Affirmed, *Wright v. Roseberry*, 81 Cal. 91; and approved as authority in *Warden v. Ingli*, 1 S. Dak. 157.

Procedure.—In cases in equity the court below may disregard the verdict of a jury, p. 85.

Approved as authority in *Mantle v. Noyes*, 5 Mont. 287; and *Galagher v. Basey*, 20 Wall. 681.

13 Cal. 85-87. **BRYANT v. WATRISS.**

Witnesses.—In suit against maker of note, or acceptor of bill, the indorser is a competent witness for either party, p. 87.

Affirmed, *Smith v. Richmond*, 19 Cal. 485; and *Priest v. Bounds*, 25 Cal. 189.

13 Cal. 87-106. **BAKER v. BAKER.**

In action for divorce, confessions or admissions of party are admissible in evidence, but a decree will not be granted on them alone, p. 94.

Approved in *Clopton v. Clopton*, 11 N. Dak. 218, where fact of intermarriage was alleged in divorce complaint, admitted in answer and testified to by plaintiff, such testimony does not require corroboration; *Evans v. Evans*, 41 Cal. 107; *Andrews v. Andrews*, 120 Cal. 186, as to sufficiency or corroborative evidence. Cited, *Richardson v. Richardson*, 30 Am. Dec. 545, note.

In affirmance of the common law, statutes are to be construed as was the rule by that law, p. 95.

Cited in *Board v. Van Cleave*, 19 Ind. App. 647, and *Peterson v. Gittings*, 107 Iowa, 311, construing local statutes; *Nelson v. Great Northern Ry.*, 28 Mont. 322, under Civil Code, sections 2876, 2877, 2912, common carrier cannot, by special contract, limit its liability for delay in transportation arising from its own or its servant's negligence; *Emeric v. Alvarado*, 90 Cal. 454, construing section 764 of the Code of Civil Procedure. Approved, *Lyle v. State*, 31 Tex. Cr. 117; and *Laird v. Morris*, 23 Nev. 38.

Marriage is a civil contract, and may be avoided for fraud in its procurement; and antenuptial pregnancy by a stranger, concealed from the husband, vitiates the contract ab initio, and authorizes a divorce, p. 102.

Cited, *Barnes v. Barnes*, 110 Cal. 422, holding that previous unchaste conduct, although concealed, does not invalidate a marriage. So in *Varney v. Varney*, 52 Wis. 126, 38 Am. Rep. 731. Ruling approved in *Reynolds v. Reynolds*, 3 Allen, 611; *Carris v. Carris*, 24 N. J. Eq. 525; *Sissung v. Sissung*, 65 Mich. 171, 180; *Harrison v. Harrison*, 94 Mich. 561; 34 Am. St. Rep. 366. Denied in *Long v. Long*, 77 N. C. 312; 24 Am. Rep. 449. Cited, *Allen's Appeal*, 99 Pa. St. 201; 44 Am. Rep. 104, holding that where the woman conceals her pregnancy, it is for the jury to determine whether this is such fraud as avoids the marriage. Also, cited in 24 Am. Rep. 454, note; 44 Am. Rep. 105, note; and *Van Houten v. Morse*, 44 Am. St. Rep. 383, 384, note, collecting and collating the authorities.

Marriage may be avoided for fraud in its procurement, p. 102.

Cited in *Smith v. Smith*, 171 Mass. 406, 68 Am. St. Rep. 441, sustaining annulment for fraud on facts stated.

Same.—Child born in lawful wedlock is presumed to be the child of the husband, p. 99.

Cited as authority in 56 Am. Dec. 459, note; 60 Am. Dec. 698, note; and 12 Am. St. Rep. 101, extended note.

13 Cal. 107-116. **SMITH v. BRANNAN.**

Party in Possession Who Claims under deed which creates an equitable estate or a right of possession may sue to quiet title, p. 114.

Approved in *Fulkerson v. Chisna Min. etc. Co.*, 122 Fed. 786, under Alaska Code, section 475, one in possession of mining claim under valid location has such title as will support action to quiet title against adverse claimant; *Pralus v. Pacific etc. Min. Co.*, 35 Cal. 34, an action to quiet title to mining claim on public lands. So in *Pennie v. Hildreth*, 81 Cal. 130, holding that suit to quiet title may be brought by anyone who has the right of possession against anyone who claims an estate or interest adverse to such right.

Record of court below, cannot be altered or amended by proof made in the appellate court, p. 115.

Approved, *Boyd v. Burrel*, 60 Cal. 284; *Ward v. Insurance Co.*, 12 Wash. St. 633.

Trial.—Party cannot try his cause before a judge without objection, and, after losing it, complain that the case was not tried by a jury, p. 115.

Ruling approved, holding that objections to pleading must be taken on trial, in *Baker v. Joseph*, 16 Cal. 177. So, to same effect, in *Leadbetter v. Lake*, 118 Cal. 516.

Deed.—Whether conditions of are complied with or not, is matter between grantor and grantee, with which strangers have nothing to do, p. 115.

Cited, *Cross v. Carson*, 44 Am. Dec. 758, note, treating of who may exercise right of defeating estate for breach of condition.

13 Cal. 116-133. **PIERCE v. ROBINSON.**

Assignment.—Agreement of mortgagor that mortgagee in possession may pay claims of third persons from surplus funds, is an equitable assignment of such surplus, p. 120.

Cited as authority in *Pope v. Huth*, 14 Cal. 407, asserting the doctrine that an order is, per se, an equitable assignment to the payee of the debt due from the drawee to the drawer. So in *Grain v. Aldrich*, 38 Cal. 521, 99 Am. Dec. 426, holding that an assignment of part of an entire demand is valid in equity, without the consent of the debtor. So, as to the doctrine stated, in 7 Am. Dec. 484, note.

Assignment of things having no present actual existence, but resting in mere possibility, is valid in equity, p. 125.

Cited in *Donohoe etc. Co. v. S. P. Co.*, 138 Cal. 188, noted under *Wheatley v. Strobe*, 12 Cal. 92; *In re Lumber Co.*, 92 Fed. 587; *Bibend v. Insurance Co.*, 30 Cal. 86, assignment of policy of insurance as collateral security; so in *Bergson v. Insurance Co.*, 38 Cal. 545; and cited, discussing the subject, in *McCall v. Hampton*, 56 Am. St. Rep. 344, note.

Parol evidence is admissible in equity to show that a deed, absolute on its face, was intended as a mortgage, p. 125.

Cited in *Banta v. Wise*, 135 Cal. 279, holding deed to be of that character; *Kimball v. Tripp*, 136 Cal. 634, discussing equitable jurisdiction in cases of fraud; *Johnson v. Sherman*, 15 Cal. 291, 76 Am. Dec. 485, as settling the rule stated. Approved, *Lodge v. Turman*, 24 Cal. 390; *Cunningham v. Hawkins*, 27 Cal. 606; *Sears v. Dixon*, 33 Cal. 332; *Gay v. Hamilton*, 33 Cal. 690; *Raynor v. Lyons*, 37 Cal. 454; and *Jackson v. Lodge*, 36 Cal. 46, 47, 48, 62, the last case cited reviewing the decisions, and holding that such evidence is admissible at law as well as in equity. Ruling likewise approved and applied in the following cases: *Quinn v. Kellogg*, 4 Colo. App. 160; *Lindsay v. Matthews*, 17 Fla. 585; *First Nat. Bank v. Ashmead*, 23 Fla. 385; *Durham v. Craig*, 79 Ind. 121; *Hoffman v. Ryan*, 21 W. Va. 429; *Vangilder v. Hoffman*, 22 W. Va. 16, 19; *Matheney v. Sandford*, 26 W. Va. 400; *Peugh v. Davis*, 96 U. S. 337. Referred to and the ruling approved in *Bateman v. Burr*, 57 Cal. 482, distinguishing between a mortgage and deed of trust. So in *Vance v. Anderson*, 113 Cal. 538, stating the general proposition, that in California, at least, every conveyance of real property made as security for the performance of an obligation is, in equity, a mortgage, irrespective of the form in which it is made. Explained in *Feusier v. Sneath*, 3 Nev. 131, holding that parol evidence is not admissible to show that a deed absolute upon its face was intended as a deed in trust for the grantor's creditors. Distinguished, *Menzies v. Kennedy*, 9 Nev. 159, and the rule held to apply only where it is sought to establish an equity superior to the terms of the writing. So in *Stephens v. Allen*, 11 Oreg. 190. Applied in *Brick v. Brick*, 98 U. S. 516, showing that a certificate of stock issued to a party as owner was delivered to him as security for a loan. Cited to the ruling stated, in 16 Am. Dec. 577, note; so in *Hutzler v. Phillips*, 4 Am. St. Rep. 707, note, collecting and collating the authorities.

Parol evidence is admissible in equity for purpose of showing fraud, p. 127.

Cited in *Donnelly v. Rees*, 141 Cal. 61, applying rule in action by heir to set aside deed obtained by fraud and undue influence.

General citation: *Alexander v. Rodriguez*, Fed. Cas. No. 172.

13 Cal. 133-145. **WELLS, FARGO & CO. v. ROBINSON.**

Implied Trust.—Where an agent, trusted by a principal with money used in trade, buys property for his own use and benefit, and the property can be identified as that so bought, the agent will be held as trustee for the owner of the money, p. 139.

Principle of the decision approved and applied in *George v. Ransom*, 14 Cal. 660, in which case the husband was treated as having taken his wife's money without her assent, converting it into shares of stock, and it was held that he thereby became trustee for the wife. So in

Bayles v. Baxter, 22 Cal. 578, and Simson v. Eckstein, 22 Cal. 593--cases where one person paid the consideration for land, and the conveyance was made to another, the latter holding the title in trust for the former. And, so in Atkinson v. Ward, 47 Ark. 537, a similar case of funds of a principal converted by agent. Cited, Union Nat. Bank v. Goetz, 32 Am. St. Rep. 125, note, treating of right to pursue and recover trust funds.

Doctrine of Election of Remedies applies only when the party is cognizant of all the facts, and then makes a free and deliberate choice, p. 142.

Approved, Madden v. Louisville etc. Ry. Co., 66 Miss. 276. So in Standard Oil Co. v. Hawkins, 74 Fed. Rep. 399, as authority for equitable relief where an election is made under mistake of law. Cited as authority for exercise of right of election in Greiner v. Greiner, 58 Cal. 122. So in Hanly v. Kelly, 62 Cal. 159, case of estoppel to pursue fund in equity by election of remedy at law. Harmonized in Lathrop v. Bampton, 31 Cal. 23, 89 Am. Dec. 145, holding that when the cestui que trust can identify the trust fund, either in its original or in a substituted form, he may elect to hold the original or substituted property, or may hold the trustee personally liable. Cited in Detroit etc. Co. v. Stevens, 20 Utah, 249, holding doctrine of election inapplicable under facts stated. Explained and distinguished in Holt Mfg. Co. v. Ewing, 109 Cal. 358, case of election to retake property sold or recover its possession in claim and delivery upon default of the purchaser, or to treat the sale as absolute and bring an action for the contract price. Fowler v. Bowery Sav. Bank, 10 Am. St. Rep. 488, note, treating of doctrine of election.

Administration.—Judgment against administrator is little, if any, better than an allowance by him and approval by the probate judge, p. 143.

So cited in Moore v. Hillebrant, 65 Am. Dec. 121, 123, note, discussing effect of allowance of claim against estate of decedent.

General citation: Thum v. Wolstenholme, 21 Utah, 488.

13 Cal. 145-156. SAUNDERS v. HAYNES.

Referred to in statement of case in Turner v. Melony, 13 Cal. 622.

Constitutional Law.—Act giving jurisdiction over subject of contested elections construed, holding this to be one of the "special cases," of which the constitution provides that the county judge may take cognizance when authorized by the legislature, p. 150.

Approved, Stone v. Elkins, 24 Cal. 126, maintaining jurisdiction in the county court. So in Jacks v. Day, 15 Cal. 92; Dorsey v. Barry, 24 Cal. 452; Keller v. Chapman, 34 Cal. 640; Appeal of Houghton, 42 Cal. 62, 68; and Bixler's Appeal, 59 Cal. 555, wherein the nature of "special cases" and proceedings are discussed, in connection with the

matter of original and appellate jurisdiction. So in *Lord v. Dunster*, 79 Cal. 483, 484, holding that the supreme court has appellate jurisdiction over contested election cases, under the constitution of 1879. And cited, discussing jurisdiction and procedure in such cases, in *Thomas v. Franklin*, 42 Neb. 312, and *Ex parte Towles*, 48 Tex. 447, 450.

Office.—Fact that the candidate receiving the highest number of votes at an election by the people is ineligible does not give the office to the next highest on the list, p. 153.

Affirmed, *Crawford v. Dunbar*, 52 Cal. 41; *People v. Hecht*, 105 Cal. 631; 45 Am. St. Rep. 104; *People v. Rodgers*, 118 Cal. 396, 399. Cited in *Crovatt v. Mason*, 101 Ga. 257, as "supported by an undoubted preponderance of authority"; *Lewis v. Boynton*, 25 Colo. 491, on point that votes improperly cast for one candidate cannot be counted for opponent. And approved as a correct statement of the American rule in the following cases: *Sweepston v. Barton*, 39 Ark. 555; *Darrow v. People*, 8 Colo. 425; *Polster v. Rucker*, 16 Kan. 114; *Sublett v. Bedwell*, 47 Miss. 275; 12 Am. Rep. 341; *State v. Vail*, 53 Mo. 116; *State v. Boyd*, 31 Neb. 708; *Bull v. Southwick*, 2 N. Mex. 388; *In re Corliss*, 11 R. I. 644; 23 Am. Rep. 543; *Batterton v. Fuller*, 6 S. Dak. 268; *Dryden v. Swinburne*, 20 W. Va. 137. So in *People v. Clute*, 50 N. Y. 465, 10 Am. Rep. 514, in the absence of proof that those who voted for the ineligible candidate did so with notice of his disqualification; and so in *Barnum v. Gilman*, 27 Minn. 472; 38 Am. Rep. 307, if the ineligibility does not appear on the ballots. Cited, *State v. Giles*, 52 Am. Dec. 152, note, collecting and collating the authorities on the subject. So in *People v. Bates*, 83 Am. Dec. 753, note, and 12 Am. Rep. 341, note.

13 Cal. 156-158. BURNETT v. WHITESIDES.

Injunction ought not to be granted, unless equitable circumstances, beyond the mere allegation of irreparable injury, be shown, as insolvency, impediments to a judgment at law or to adequate legal relief, or a threatened destruction of the property, or the like, p. 158.

Approved, *Real Del Monte Min. Co. v. Pond Min. Co.*, 23 Cal. 85, holding the question of the solvency of the defendant to be an important one in cases where the title to property is in dispute. So in *Robinson v. Russell*, 24 Cal. 473, denying injunction at suit of mortgagee to restrain waste upon the mortgaged premises. Ruling approved in *McClung v. Livesay*, 7 W. Va. 334.

Same.—Where an answer is filed denying all the equities of the complaint, and there is no support of the complaint, the injunction will be dissolved, p. 158.

Ruling approved in *Real Del Monte Min. Co. v. Pond Min. Co.*, 23 Cal. 84.

13 Cal. 159-166. **PEOPLE v. ROGERS.**

State Constitution is a limitation on the general powers of a legislative character, and restrains only so far as the restriction appears either by express terms or by necessary inference, p. 165.

Construction approved in *Cohen v. Wright*, 22 Cal. 308, and *Road Co. v. City of Stockton*, 41 Cal. 162. Cited, 60 Am. Dec. 595, n.

Same.—Provisions of (article 1, section 17), do not inhibit legislation extending the right of inheritance to nonresident alien heirs, p. 165.

Cited in *Blythe v. Hinckley*, 127 Cal. 437, construing and sustaining section 671, Civil Code; *Estate of Billings*, 65 Cal. 595, and *Lyon State*, 67 Cal. 383, holding that under the provisions of the California codes, nonresident alien heirs may inherit property in the state, there is nothing in the constitution to the contrary. Ruling approving construing similar constitutional provisions, in *Nicrosi v. Phillipi*, Ala. 307; *Purzell v. Smidt*, 21 Iowa, 544; *McConville v. Howell*, McCrary, 321; 17 Fed. Rep. 106; *State v. Preble*, 18 Nev. 253. Refer to in *Norris v. Hoyt*, 18 Cal. 219, relative to acquisition of title to property by aliens under the common law.

13 Cal. 168-170. **GOODWIN v. HAMMOND.** 73 Am. Dec. 574.

Fraud.—An instrument fraudulent ab initio is void for all purposes of protection to the fraudulent actor, and will not be allowed to stand even as security for advances made, p. 170.

Doctrine approved, *Swinford v. Rogers*, 23 Cal. 236; *Bull v. Ford*, Cal. 177; *Burke v. Koch*, 75 Cal. 359; and *Philbrick v. O'Connor*, Oreg. 15; 3 Am. St. Rep. 139—cases of fraudulent conveyance. Cited, 84 Am. Dec. 606, note; 92 Am. Dec. 713, note; and 33 Am. St. 137, note.

Pleading.—Answer responsive to bill in chancery is not evidence for defendant, though the bill be sustained by one witness only, p. 169.

Cited, 84 Am. Dec. 162, note.

13 Cal. 171-172. **DE WITT v. PORTER.**

Pleading.—Use of common counts in complaint sustained, p. 172.

Followed on principle of stare decisis, in *Abadie v. Carrillo*, 32 Cal. 175; and *Tivnen v. Monahan*, 76 Cal. 131.

13 Cal. 172-173. **PEOPLE v. RAMIREZ.**

Instruction.—If refused for the reason that it has already been given, the reason of the refusal should be stated, especially in criminal cases, p. 173.

Affirmed, *People v. Williams*, 17 Cal. 148; but disapproved in *State v. O'Connor*, 11 Nev. 426.

13 Cal. 173-175. **CLARY v. HOAGLAND.**

Certiorari.—Writ of will not lie where a party has an adequate legal remedy by appeal, p. 175.

Affirmed, *Stuttmeister v. Superior Court*, 71 Cal. 323.

Cross-Reference.—See S. C. 5 Cal. 476.

13 Cal. 175-189. **PATTISON v. SUPERVISORS OF YUBA.**

Constitutional Law.—To render a law unconstitutional, because opposed to the general policy of the constitution, that policy must be manifested by the terms of the constitution, fixing with precision the particular rule, and not as gathered by general inference, p. 182.

Construction approved in *Cohen v. Wright*, 22 Cal. 322; *Bourland v. Hildreth*, 26 Cal. 259, dissenting opinion of Sanderson, C. J., and *Stockton etc. R. R. Co. v. City of Stockton*, 41 Cal. 162, 201, declaring the constitutionality of a subsidy act aiding the construction of a city railroad. Cited as authority in *Cory v. Carter*, 48 Ind. 337, 17 Am. Rep. 745, sustaining constitutionality of statute establishing separate schools for colored children. The ruling is likewise approved in *Williamson v. Commissioners*, 23 Colo. 92, and *North Pac. Ry. Co. v. Roberts*, 42 Fed. Rep. 743. Cited, 55 Am. Dec. 288, note.

Constitutional Law.—Statute is valid unless opposed to terms of constitution fixing with precision the particular rule, p. 182.

Cited in *Talcott v. Pine Grove etc.*, 1 Flipp. 135, 170, construing local (Michigan) statutes.

Taxation.—The legislature has a right to authorize a local tax for the purpose of internal improvements, and may authorize the local authorities to impose the tax, p. 189.

Approved, *People v. Seymour*, 16 Cal. 345, 76 Am. Dec. 527, sustaining legality of county road tax and tax for erection of agricultural hall. So in *Napa Valley R. R. Co. v. Napa County*, 30 Cal. 437, county subscription for railroad stock. So in *Commissioners etc. v. Miller*, 7 Kan. 496, 506, 12 Am. Rep. 433, 440; and to the same effect in *Harcourt v. Good*, 39 Tex. 472; *Chicago etc. R. R. Co. v. County of Otoc*, 2 Neb. 499; 16 Wall. 674. Cited, 59 Am. Dec. 783, 787, note, and 64 Am. Dec. 573, note, where the authorities bearing upon the subject are collected and collated.

13 Cal. 190. **BRANCH TURNPIKE CO. v. SUPERVISORS OF YUBA COUNTY.**

Injunction not granted, unless the facts set forth by the complainant satisfy the court that the apprehensions of great and irreparable mischief are well founded, p. 190.

Cited in *California etc. Co. v. Union etc. Co.*, 122 Cal. 643, and *Sang Lung v. Jackson*, 85 Fed. 504, holding complainant's complaints insuffi-

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cient; *L. A. University v. Swarth*, 107 Fed. 803, holding injunction improperly granted; *Linden v. Case*, 46 Cal. 174, denying injunction to restrain board of supervisors from incurring illegal liabilities. So in *Mechanics Foundry v. Ryall*, 75 Cal. 603, denying injunction to restrain trespass merely because of the insolvency of the trespasser. So in *Wells, Fargo & Co. v. Dayton*, 11 Nev. 169, holding that the mere allegation of the insolvency of the assessor will not authorize the issue of an injunction to restrain the collection of a tax. So, as an established rule, in *Mining etc. Co. v. Gas etc. Co.*, 55 Kan. 180; *Hale v. Railway Co.*, 23 W. Va. 455; and *Sang Lung v. Jackson*. Cited, *San Francisco etc. R. R. Co. v. Dinwiddie*, 8 Sawy. 316; 16 Fed. Rep. 625, as sustaining the proposition that money paid under a void assessment cannot be recovered back. Also, cited in *Dudley v. Hurst*, 1 Am. St. Rep. 379, note collecting the authorities on the subject.

County.—Allowance of illegal claim against, by board of supervisors, creates no legal liability, p. 190.

Cited as authority, *Linden v. Case*, 46 Cal. 174; and 55 Am. St. Rep. 209, note, collecting and collating the authorities.

13 Cal. 191-203. HOLMES v. ROGERS.

Authority of attorney who appears will be presumed, and his action will bind the party, unless in cases of fraud or insolvency of the attorney, p. 200.

Ruling approved, *Sampson v. Ohleyer*, 22 Cal. 210. Cited in dissenting opinion in *Blythe v. Swenson*, 15 Utah, 363, main opinion holding appearance unauthorized. Distinguished, *Preston v. Hill*, 50 Cal. 53, 19 Am. Rep. 652, where the attorney entered into a compromise in defiance of the protest of his client, and it was held that the client was not bound thereby. Cited as supporting the English doctrine, in *Whipple v. Whitman*, 13 R. I. 514, 43 Am. Rep. 45, which holds, however, that an attorney has no implied authority to settle his client's suit without his assent. Cited, *Jackson v. Brown*, 82 Cal. 278, holding that a consent to a judgment is a waiver of errors by a party consenting thereto. So in *Bunton v. Lyford*, 75 Am. Dec. 148, note, treating of judgment by unauthorized appearance of attorney. So in *Clark v. Randall*, 76 Am. Dec. 259, note, and 87 Am. Dec. 167, note, treating of attorney's authority to control the action.

13 Cal. 203-214. HASTINGS v. HALLECK. S. C. before, 10 Cal. 31.

Stipulation to the effect that a statement may "be used on the motion for a new trial in this cause, and also on the appeal to the supreme court," includes an appeal from the judgment, as well as an appeal upon the decision of the motion for new trial, p. 207.

Referred to as recognizing the doctrine that an appeal from the judgment may be taken without waiting for the determination of a

motion for a new trial, or the two appeals may be prosecuted together, in *Carpentier v. Williamson*, 25 Cal. 168. Approved, *Cardinell v. O'Dowd*, 43 Cal. 588, case of a similar stipulation.

Attorney cannot be Charged with Negligence when he accepts as a correct exposition of the law a decision of the supreme court, p. 210.

Cited as authority in *Isham v. Parker*, 3 Wash. St. 780, holding that reasonable diligence and skill constitute the measure of an attorney's engagement with his client. So in *Fitch v. Scott*, 34 Am. Dec. 91, note, treating of attorney's liability for negligence and want of skill.

13 Cal. 220-239. **MCDONALD v. BEAR RIVER ETC. MINING COMPANY.** S. C. again, 15 Cal. 145.

Waters.—Ownership of waters accrues from appropriation for mining or other beneficial purposes, and the first appropriator is, to the extent of his appropriation, the owner, p. 232.

Cited, bearing on right of appropriation, in *Lux v. Haggin*, 69 Cal. 358, 436, 447; *Boyle v. San Diego Land etc. Co.*, 46 Fed. Rep. 711; and *Heath v. Williams*, 43 Am. Dec. 279, 280, note, collecting and collating the authorities. Also, cited in opinion of Knowles, J., in *Thorp v. Freed*, 1 Mont. 658, discussing the subject, in which case there was, however, no opinion of the court.

Appropriation is the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use, p. 233.

Definition approved in *Larimer County R. Co. v. People*, 8 Colo. 616; *Fort Morgan Land etc. Co. v. Ditch Co.*, 18 Colo. 4; 36 Am. St. Rep. 262; *Taughenbaugh v. Clark*, 6 Colo. App. 244; *Nevada Ditch Co. v. Bennett*, 30 Oreg. 89; *Walsh v. Wallace*, 26 Nev. 327, there is not an appropriation of water by settling on land on a river and having it surveyed, and marking its boundaries, or by cultivating wild grass produced by overflow of river or by grazing land; 60 Am. St. Rep. 786, 802, extended note on subject.

Water Rights acquired by appropriation pass by deed of the land as appurtenant thereto, p. 235.

Cited as authority to the ruling stated, in *Hindman v. Rizor*, 21 Oreg. 118; *McShane v. Carter*, 80 Cal. 316; *Katz v. Walkinshaw*, 141 Cal. 136, noted under *Eddy v. Simpson*, 3 Cal. 253.

Same.—Residue after prior appropriation may be appropriated by others out of the water of the same stream, p. 239.

Cited as authority to this ruling in *Heath v. Williams*, 43 Am. Dec. 282, note, collecting the authorities.

Same.—Abandonment of title to the water must be shown by clear proof, p. 239.

Cited, *Wyman v. Hurlburt*, 40 Am. Dec. 464, note, discussing subject

at length. So, in *Trambley v. Luterman*, 6 N. Mex. 27, holding that right is not lost by change of use to which the water is applied.

Agency.—Where the name of the principal, and the intention to bind him, appear in an instrument not under seal, the agent having authority, the principal alone will be bound, though the instrument be signed in the agent's name only, p. 235.

Principle approved in *Love v. Mining Co.*, 32 Cal. 654; S. C. 91 Am. Dec. 607; and *Chase v. Savage Min. Co.*, 2 Nev. 13. *Mullaney v. Evans*, 33 Or. 333, holding principal bound by ratification. Cited in *Andrews v. Estes*, 26 Am. Dec. 525, note, treating of agent's liability in case of contract not under seal.

Pleading.—Sufficiency of complaint in action of damages for diverting water from plaintiff's mill, considered, pp. 222, 230.

Approved in *James v. Goodenough*, 7 Nev. 327.

Appeal.—Question of statute of limitations cannot be raised on, unless presented in some form on the trial below, even though it be pleaded, p. 239.

Approved in *Kraft v. Greathouse*, 1 Idaho, 258. Distinguished in *Vassault v. Seitz*, 31 Cal. 229, holding that if the statute is pleaded, and the court finds all the facts necessary to sustain this issue, and gives judgment for the party pleading it, the fact that the prevailing party did not urge the statute in his argument in the court below, does not preclude him from raising it in the supreme court.

Exceptions.—An objection which should have been taken on the trial, either by motion for nonsuit, or upon instructions to the jury, cannot be urged for the first time on appeal, p. 237.

Cited as authority in *Anderson v. Black*, 70 Cal. 231, case of an objection to the validity of the location of a mining claim on the ground of the extent of the claim.

13 Cal. 242-290. **FORBES v. SCANNELL.**

Assignment in Trust.—Foreign assignment is governed by the law of the place where made, and the title of the assignee will be maintained here against execution creditors of the assignor, pp. 276, et seq.

Cited in *Winslow v. Fletcher*, 55 Am. Rep. 133, note, where the authorities bearing on the subject are collected and collated. Referred to in *The Henry B. Hyde*, 82 Fed. Rep. 684, treating of presumption as to law of place of contract.

Same.—May be made by one partner in the firm name, p. 288.

Cited in *First Nat. Bank v. Hackett*, 61 Wis. 344, discussing the question, and upholding an assignment in which one partner did not join. So, in *Lord v. Devendorf*, 54 Wis. 496, holding that one member of a firm may assign his individual property so as to prefer his indi-

vidual creditors to the creditors of the firm. Cited to the ruling stated in 30 Am. Dec. 290, note; and 40 Am. Dec. 565, note.

Same.—Made to partners is good, and acceptance of the trust by one of the firm is sufficient, p. 288.

Approved as authority in *Douglass v. Cissna*, 17 Mo. App. 59.

Same.—Assignment need not be delivered, if trust is accepted and possession taken, p. 287.

Cited in *Milling Co. v. Eaton*, 86 Tex. 406, holding that, under Texas law, the assignment is valid without the assent of creditors.

Same.—Absence of schedule does not invalidate the assignment, p. 288.

Approved in *Sadler v. Immel*, 15 Nev. 270. Referred to in *McCart v. Maddox*, 68 Tex. 458, construing the Texas statute, and holding that the assignment is not void for failure to specify that the property is not all of the assignor's estate.

Same.—Valid assignment, after possession taken by the assignee is irrevocable, p. 288.

Affirmed in *Bryant v. Langford*, 80 Cal. 543; and approved in *Douglass v. Cissna*, 17 Mo. App. 60. Cited to the ruling stated, in 90 Am. Dec. 508, note, collecting the authorities on the subject.

13 Cal. 290-295. **CURTIS v. COUNTY OF SACRAMENTO.**

Constitutional Construction.—City recorders are not within the provisions of the constitution, inhibiting judicial officers, except justices of the peace, from taking fees, p. 294.

Examined at length in *Prince v. City of Fresno*, 88 Cal. 411, and cited as authority that a recorder of a city may have a dual jurisdiction and functions, and may be a justice of the peace as to certain matters, and a recorder as to others.

13 Cal. 295-306. **RIDDLE v. BAKER.**

Judgment will not be set aside in equity on any ground which might have been availed of or avoided by the party in the action in which the judgment was rendered, p. 304.

Cited in *Bell v. Thompson*, 147 Cal. 693, holding insufficient complaint for relief against judgment for fraud in procurement which does not show fact constituting defense on merits nor constituting ability of plaintiff to present those facts to court; referred to as clearly stating the rules on the subject, in *El Dorado County v. Elstner*, 18 Cal. 149; *Spencer v. Vigneaux*, 20 Cal. 449. So, to same effect, in *Brooks v. O'Hara*, 2 McCrary, 652. When remedy by original action in equity may be had to set aside judgment, in *Hill v. Beatty*, 61 Cal. 295. Vacation of order fraudulently procured, in *Smith v. Sims*, 77 Mo.

274. For what frauds relief in equity may be had, in *United States v. Throckmorton*, 98 U. S. 68. That equity will not relieve against a judgment at law where the party has been guilty of laches, in *Brown v. County of Buena Vista*, 95 U. S. 161. And that the law approves compromises of unsettled and disputed claims, in *Hart v. Gould*, 62 Mich. 270. Distinguished in *Laithe v. McDonald*, 12 Kan. 349, case of fraud practiced by the successful party.

Sureties on bond given by the party in the original suit must occupy the place of the principal, so far as the judgment is concerned, p. 305.

Ruling approved in *Murdock v. Brooks*, 38 Cal. 601; *Schott v. Younke*, 142 Ill. 243, *McFall v. Dempsey*, 43 Mo. App. 374. So, to same effect, in *Pico v. Webster*, 14 Cal. 204; S. C. 73 Am. Dec. 648; *Rodine v. Lytle*, 17 Mont. 451. Cited in *March v. Barnet*, 121 Cal. 423, 66 Am. St. Rep. 47, applying Civil Code, section 2847; *State v. Nutter*, 44 W. Va. 389, holding judgment conclusive on sureties on indemnity bond. Cited as authority, holding that the sureties may collaterally impeach a judgment procured by fraudulent collusion between their principal and the defendant in the action, in *Hogg v. Link*, 90 Ind. 356, and to same effect, in *Evans v. Cook*, 11 Nev. 74. Cited, also, in *Charles v. Hoskins*, 83 Am. Dec. 380, note on subject; so, in *Robinson v. Baskins*, 22 Am. St. Rep. 204, note.

Appeal lies from order setting aside a final decree in equity and granting a rehearing, p. 302.

Cited as authority in *Gagliardo v. Hoberlin*, 18 Cal. 396, holding that the finding of fact in the court below will not be reviewed on appeal, unless there was a motion for new trial.

General citation: *Provins v. Lovi*, 6 Okla. 103.

13 Cal. 306-320. **BENSLEY v. MOUNTAIN LAKE WATER COMPANY.**
73 Am. Dec. 575.

Condemnation of Land.—Just compensation must be paid or secured to the owner, and such compensation must be made within a short period, or the privilege of taking the property under the condemnation be deemed abandoned, pp. 312, 316.

Cited in *Pool v. Butler*, 141 Cal. 53, sustaining plaintiff's right to abandon proceedings under facts stated. Approved as authority in *Curran v. Shattuck*, 24 Cal. 435; S. F. etc. R. R. Co. v. *Mahoney*, 29 Cal. 117; *Gear v. Dubuque etc. R. R. Co.*, 20 Iowa, 531; S. C. 89 Am. Dec. 554; *Oregonian Railw. Co. v. Hill*, 9 Oreg. 380. Cited in 31 Am. Dec. 372, 375, note, 80 Am. Dec. 494, note; 81 Am. Dec. 647, note; and 89 Am. Dec. 556, note.

Same.—To acquire title under condemnation strict compliance with the statutory mode of proceeding is required, p. 315.

Approved in *Gilmer v. Lime Point*, 19 Cal. 60; *Curran v. Shattuck*, 24 Cal. 432; *Stanford v. Worn*, 27 Cal. 174; *Smith v. Davis*, 30 Cal. 537; *Trumpler v. Bemerly*, 39 Cal. 490; *Chase v. Putnam*, 117 Cal. 368, sale of animals taken damage feasant; *New Orleans etc. R. R. Co. v. Frederic*, 46 Miss. 11; *Godchaux v. Carpenter*, 19 Nev. 419; *Beattie v. Railroad Co.*, 108 N. C. 436; *Adams v. Clarkburg*, 23 W. Va. 207; and *Umatilla Irrig. Co. v. Umatilla Imp. Co.*, 22 Oreg. 388. Cited to the proposition stated, in 93 Am. Dec. 729, note; and 97 Am. Dec. 601, note. Examined and distinguished in *Fox v. Railroad Co.*, 31 Cal. 547.

Same.—Bona fide purchaser of land, without notice of proceedings pending for its condemnation, no notice of his pendens being filed, is not affected by the proceedings, p. 319.

Cited in *Sampson v. Ohlever*, 22 Cal. 211, discussing subject of effect of actual notice; when notice of his pendens should be filed, in *Empire etc. Co. v. Engley*, 18 Colo. 393; that his pendens statutes should be strictly followed, in *Pennington v. Martin*, 146 Ind. 637; conclusiveness of judgment of dismissal of condemnation proceedings, in Ind. etc. R. R. Co. v. Allen, 113 Ind. 308; S. C. 3 Am. St. Rep. 654. Limited in *Scammon v. Chicago*, 44 Ill. 276.

General Citations.—Party seeking specific performance must show that he has used due diligence, in 70 Am. Dec. 739, note; injunction to prevent unlawful taking of property for public use, in 78 Am. Dec. 737, note; so, in 83 Am. Dec. 772, note; and so, in 91 Am. Dec. 757. *Indiana etc. R. R. v. Allen*, 113 Ind. 312. *Burnham v. Smith*, 82 Mo. App. 46.

13 Cal. 321-325. WATTS v. WHITE.

Party seeking to rescind a contract, must restore the other party to the condition in which he was prior to the contract, p. 323.

Approved as authority on matter of rescission in *Loaiza v. Superior Court*, 85 Cal. 31; S. C. 20 Am. St. Rep. 206, restoration of property in Mexico. So, in *Caldwell v. Davis*, 10 Colo. 491; S. C. 3 Am. St. Rep. 601.

Distinguished in commissioners' opinion, *Westerfield v. New York etc. Co.*, 129 Cal. 85, holding tender essential under facts stated.

Venue.—Where suit for real estate is brought in wrong county, change of the venue is a matter of right, p. 324.

Affirmed in *Hennessy v. Nicol*, 105 Cal. 141. And referred to with approval discussing the question, in *Fletcher v. Stowell*, 17 Colo. 97; *Smith v. People*, 2 Colo. App. 105; *Johnson v. Benedict*, 4 S. Dak. 390; *Elliott v. Whitmore*, 10 Utah, 251; and *Clarke v. Lyon County*, 8 Nev. 166. Cited in 74 Am. Dec. 243, note.

Same.—The court is not bound of its own motion to change the venue, p. 324.

Overruling *Vallejo v. Randall*, 5 Cal. 461, so far as it conflicts with this ruling. Approved as authority in *Elliott v. Whitmore*, 10 Utah, 251.

Mining Claims.—Are real estate within the act relating to the place of trial of civil actions, p. 325.

Approved in *Hughes v. Devlin*, 23 Cal. 506. So, in *Aspen Min. etc. Co. v. Rucker*, 28 Fed. Rep. 222, holding that a mining claim is subject to partition.

13 Cal. 325-330. **PATTEN v. GREEN.**

Taxation.—An assessment of land not describing it by "metes and bounds," but giving the quantity of acres and the name of the ranch, held sufficient, p. 329.

Examined and approved in *High v. Shoemaker*, 22 Cal. 372. And see, as to sufficiency of description, *Reclamation District 531 v. Phillips*, 108 Cal. 306.

Same.—Board of equalization has no power to raise the valuation of land as fixed by the assessor, without notice to the owner, p. 329.

Approved in *Wells v. State Board of Equalization*, 56 Cal. 206; *Spring Valley W. W. v. Schottler*, 62 Cal. 103; *Hagenmeyer v. Mendocino County*, 82 Cal. 217; *Allison Ranch Min. Co. v. Nevada County*, 104 Cal. 164; *Reclamation District v. Phillips*, 108 Cal. 315. Cited as authority, holding that it is essential to the validity of an assessment that the person to be assessed shall be notified and given an opportunity to be heard at some time in the progress of the proceeding, in *Campbell v. Dwiggin*, 83 Ind. 482; and to the same effect, in *Gatch v. Des Moines*, 63 Iowa, 723; *Mayor, etc. v. Hospital*, 56 Md. 46, dissenting opinion of Alvey and Irving, J. J.; *Ulman v. Mayor, etc.*, 72 Md. 593; *State v. Lindell Hotel Co.*, 9 Mo. App. 455; *Relfe v. Life Ins. Co.*, 11 Mo. App. 379; *South Pac. Land Co. v. Buffalo Co.*, 7 Neb. 259; *Barker v. Omaha*, 16 Neb. 270; *Stuart v. Palmer*, 74 N. Y. 192; S. C. 30 Am. Rep. 295; *Oreg. Steam Nav. Co. v. Wasco County*, 2 Oreg. 209; *Avant v. Flynn*, 2 South Dak. 163; *Railroad Tax case*, 8 Sawy. 291; S. C. 13 Fed. Rep. 765; and *Hagar v. Reclamation District*, 111 U. S. 712. So, in *Cent. Pac. R. R. Co. v. Standing*, 13 Utah, 493, but holding that appearance waives objections to form of notice. Cited, as to necessity of notice of assessment, in *Flint River Steamboat Co. v. Foster*, 48 Am. Dec. 278, note.

General Citations.—In *Lent v. Tillson*, 72 Cal. 435, as to when a tax deed may create a cloud on title. *Gray v. Stiles*, 6 Okla. 493. *Wallace v. Bullen*, 9 Okla. 7.

13 Cal. 330-335. **GLADWIN v. GARRISON.**

An outstanding liability as surety or indorser is a sufficient consideration for a note for the amount of indebtedness assumed, p. 332.

Ruling approved in *Harmon v. McRae*, 91 Ala. 410, and *Smith v. Rankin*, 45 Kan. 178. *Carty v. Connolly*, 91 Cal. 19, holding that a promise by a grantee of land to pay off a mortgage upon the land, made by the grantor to a third party, is a valuable consideration for the conveyance; *Simmons etc. Co. v. Thomas*, 147 Ind. 316, holding indemnity mortgage based on sufficient consideration; to same effect, in *Saunderson v. Broadwell*, 82 Cal. 133.

13 Cal. 335-342. **WHITNEY v. BUTTERFIELD.** 73 Am. Dec. 584.

Sheriff is responsible only for want of reasonable diligence and celerity in executing process, p. 338.

Approved as authority in *State v. Leland*, 82 Mo. 265; and *State v. Finn*, 87 Mo. 314; and cited as authority, discussing the degree of diligence required, in *McDonald v. Neilson*, 14 Am. Dec. 457, note, *People v. Palmer*, 95 Am. Dec. 424, 426, 427, 440, note; and 76 Am. Dec. 573, note.

Same.—Cannot officially receive writ on Sunday, p. 341.

Cited in *Housewirth v. Sullivan*, 6 Mont. 206, holding that, by the common law, all judicial proceedings which take place on Sunday are void.

Same.—And his deputy are one person in law, so far as to make the former responsible for the acts of the latter, p. 342.

Cited as authority in *Hirsch v. Rand*, 39 Cal. 318, holding that a trespass committed by a deputy sheriff, in his official character, is considered, in law, as committed directly and personally by his principal. Also, to same effect, in *Albrecht v. Long*, 25 Minn. 173; 80 Am. Dec. 773, note; 86 Am. Dec. 679, note; and 99 Am. Dec. 561, note.

General Citations.—In *Arms Co. v. Strong*, 3 Wash. Ter. 65, maintaining priority of an attachment lien under an attachment levied by sheriff's deputy.

13 Cal. 343-359. **BLANDING v. BURR.**

Legislature may authorize a municipal corporation to pay claims invalid in law, but equitable and just in themselves, p. 349.

Ruling approved in *People v. Pacheco*, 27 Cal. 209; *People v. Stewart*, 28 Cal. 395; *Sinton v. Ashbury*, 41 Cal. 530; *Creighton v. San Francisco*, 42 Cal. 450; *Stockdale v. Wayland School District*, 47 Mich. 227; *Coles v. County of Washington*, 35 Minn. 127; *Wilcox v. Deer Lodge Co.*, 2 Mont. 579; *Warder v. Commissioners*, 38 Ohio St. 643; *New Orleans v. Clark*, 95 U. S. 654. Cited in *State v. Council*, 96 Wis. 84, sustaining local statute delegating powers to city; *Owen v. Baer*, 154 Mo. 516, quoting *Sutherland on Statutory Construction*; *Guthrie etc. Bank v. City*, 173 U. S. 536, quoting *New Orleans v. Clark*, 95 U. S. 654; *Glaspell v. Jamestown*, 11 N. Dak. 88, Revised Codes, sections 2440, 2441,

authorizing district courts to exclude territory from corporate limits of cities are void as vesting legislative powers on courts. Explained in *Conlin v. Board of Supervisors*, 114 Cal. 408, holding that the legislature has no power to control municipal funds for other than municipal purposes. Cited in 80 Am. Dec. 733, note; 16 Am. St. Rep. 369, note; and 35 Am. St. Rep. 534, note, where the authorities upon the subject are collected.

Same.—Only limitation upon taxing power of legislature is the constitutional provision for equality and uniformity, p. 350.

Approved as to power of taxation for local purposes, in *People v. Seymour*, 16 Cal. 345; S. C. 76 Am. Dec. 527; *Kelsey v. Trustees of Nevada*, 18 Cal. 631; *People v. Coon*, 25 Cal. 646; *People v. Alameda County*, 26 Cal. 650; *Napa Valley R. R. Co. v. Napa County*, 30 Cal. 438; *Beals v. Amador County*, 35 Cal. 632; *Perry v. Keene*, 56 N. H. 547; *Railroad Co. v. County of Otoe*, 2 Neb. 501; S. C. 16 Wall. 676; *State v. Dodge County*, 8 Neb. 130; S. C. 30 Am. Rep. 823; *State v. Tappan*, 29 Wis. 674; S. C. 9 Am. Rep. 625. So, as to power of taxation generally, in *Wells v. Coles*, 27 Ark. 615; *Cheney v. Jones*, 14 Fla. 610; *Ex parte Cooper*, 3 Tex. App. 497; and *Kimball v. Mobile*, 3 Woods, 561; and cited, bearing on this subject, in 55 Am. Dec. 288, note; 59 Am. Dec. 515, note; and 59 Id. 789, note. Distinguished in *Matter of Market Street*, 49 Cal. 549, holding claim properly rejected; cited in *Eureka v. Wilson*, 15 Utah, 64, sustaining delegation of power to pass ordinances as to highways. Commented on in *People v. Lynch*, 51 Cal. 35, 38; S. C. 21 Am. Rep. 693, 694, 695, in which case it is held that the legislature has not the power to levy an assessment not uniform and equal, in an incorporated city, for the purpose of improving a street, nor can it, after an assessment has been made by the municipal authorities for such purpose which is void for want of uniformity and equality, validate it.

Judgment Will not be Set Aside in equity on any ground which might have been availed of or avoided by the party in the action in which the judgment was rendered, p. 354.

Approved in *McMillan v. Wooley*, 6 Idaho, 43, bill of review must affirmatively show that judgment was obtained by fraud, mistake or surprise, which he could not by reasonable diligence protect himself against in original action.

Same.—Laws may be absolute, or may be subject to such conditions as the legislature may impose, p. 357.

Cited as authority and the ruling approved, in *Hobart v. Supervisors*, 17 Cal. 31, holding that the legislature may make a local law depend for effect upon the will of all the voters of a locality, or a majority, or upon the assent of a few. Approved, also, in *People v. Nally*, 49 Cal. 481; *People v. McFadden*, 81 Cal. 494; S. C. 15 Am. St. Rep. 69; *People v. Fleming*, 10 Colo. 558; *State v. Cooley*, 65 Minn. 408; *People v. City*

of Butte, 4 Mont. 210; 47 Am. Rep. 350; In re Oliver, 17 Wis. 684; State v. Burdge, 95 Wis. 402; S. C. 60 Am. St. Rep. 128; and Dowling v. Insurance Co., 92 Wis. 69.

General Citations.—In *Wooster v. Plymouth*, 62 N. H. 208, that municipal corporations are the agents and instruments of the state. So, in *Territory v. Scott*, 3 Dak. Tr. 416, scope of exercise of legislative authority. *Bailey v. Raleigh*, 130 N. C. 212. *Civic Federation v. Salt Lake Co.*, 22 Utah 17.

13 Cal. 359-362. SNODGRASS v. RICKETTS.

Owner of land who stands by and sees another sell the land without making known his claim, is estopped from setting up title as against an innocent purchaser, p. 362.

Cited in *Peabody v. Lloyds*, 6 N. Dak. 33, holding privies estopped in pais under facts stated; *Toole v. Toole*, 107 Ga. 478, on point that unrecorded deed is valid as against subsequent voluntary deed; *Thistle v. Buford*, 50 Mo. 281, holding that all persons in privity with such owner are likewise estopped, unless they are purchasers for valuable consideration, without notice. Cited to ruling stated, in argument of counsel, in *Connor v. Nichols*, 31 Ill. 151. Distinguished in *Hayes v. Livingston*, 34 Mich. 390; S. C. 22 Am. Rep. 538, holding that under the statute of frauds it is not permissible that an estoppel in pais should work a transfer of the legal title to land.

Redelivery of Deed does not divest title, p. 362.

Cited in *Brown v. Hartman*, 57 Neb. 344 (from brief), holding similarly also as to its destruction.

13 Cal. 363-368. STEINBACH v. LEESE.

Contract.—Rule that where a party to a contract has, by his own acts, rendered the performance of the conditions of the contract impossible, therefore the conditions are dispensed with, recognized, p. 367.

Cited as authority in *Griffith v. Happersberger*, 86 Cal. 614, in which case the plaintiff failed to procure the approval of work by certain architects named in the contract, as provided by its terms, by reason of the act of the defendant in dismissing such architects from his employ.

13 Cal. 369-373. ORD v. STEAMER UNCLE SAM.

Pleading.—A specific allegation of a contract, in a verified complaint, is not sufficiently controverted by an answer stating that defendant has no knowledge or information respecting the same, and therefore denies the same, p. 372.

Cited as authority in *Humphreys v. McCall*, 70 Am. Dec. 625, 632, 635, note, treating of denial on information and belief.

13 Cal. 373-422. **WATERMAN v. SMITH.** Affirmed in **WATERMAN v. SAMUELS**, 16 Cal. 124.

Mexican Grant.—Passed a right of possession to the land, but conferred only a vested interest in the specific quantity designated, to be afterward measured and laid off by the officers of the government, which right of segregation passed to the government of the United States, pp. 410, 411.

Doctrine affirmed in *Moore v. Wilkinson*, 13 Cal. 486; *Estrada v. Murphy*, 19 Cal. 270; *Thornton v. Mahoney*, 24 Cal. 580; explained, as to right of location, in *Riley v. Heisch*, 18 Cal. 202; *Johnson v. Van Dyke*, 20 Cal. 228, 229. Cited in dissenting opinion of *Crockett, J.*, in *Yates v. Smith*, 38 Cal. 66, 67.

Same.—A patent issued by the United States upon a confirmed Mexican grant is conclusive upon the United States government and all claiming under it, and also as between the patentee and a third person, who has not a superior title from a source of paramount proprietorship, p. 419.

Affirmed in *Stark v. Barrett*, 15 Cal. 366; *Leese v. Clark*, 18 Cal. 572; and *Adair v. White*, 85 Cal. 315, fully discussing effect of patent; *Pioche v. Paul*, 22 Cal. 111, holding that patent could not be attacked in collateral proceeding; *Boggs v. Merced M. Co.*, 14 Cal. 362, *Minturn v. Brower*, 24 Cal. 669, and *De Arguello v. Greer*, 26 Cal. 626, 627, who to be regarded as third persons unaffected by patent; so, in *Miller v. Dale*, 44 Cal. 576. Cited, discussing nature of title after patent issued, in *Amesti v. Castro*, 49 Cal. 330; so, in *Grigsby v. Schwarz*, 82 Cal. 282, applying doctrine of relation. So, in *Byrne v. Alas*, 74 Cal. 639, affirming right of occupancy by Mission or Pueblo Indians to land within Mexican grant as against the patentee from the United States government and his grantees. Approved, conclusiveness of patent, in *Houck v. Kelsey*, 17 Kan. 336. And cited in this connection in *United Land Assoc. v. Knight*, 85 Cal. 458, holding that the pueblo of San Francisco derived its title to its lands from the grant of the government of Mexico, and not from the United States, and overruling *Peopie v. San Francisco*, 75 Cal. 389, so far as it determines the conclusiveness of the patent to the city of San Francisco. But the doctrine of the case last cited is affirmed in *Knight v. U. S. Land Assoc.*, 142 U. S. 204, reversing S. C. 85 Cal. 448.

Same.—Patent is evidence only of the pre-existing title made perfect by confirmation and survey, p. 419.

Cited in *Seale v. Ford*, 29 Cal. 107, wherein it is held that the confirmed survey of a confirmed Mexican grant has the same effect and validity as if a patent for the land surveyed had been issued by the United States. So to same effect, in *Mahoney v. Van Winkle*, 33 Cal. 456, and *Merrill v. Chapman*, 34 Cal. 253, S. C. 35 Cal. 88. Distinguished in *Treadway v. Semple*, 28 Cal. 657, noting that the system of locat-

ing, by final survey, Mexican and Spanish grants of land in California, under the act of Congress of 1851, was essentially modified by the act of 1860. Examined in *Bissell v. Henshaw*, 1 Sawy. 565, 580; S. C. affirmed, 18 Wall. 265, 267, wherein the rule is asserted that the elder patent gave the better title. So in *Clark v. Hills*, 67 Tex. 146.

Same.—Patent to heirs and representatives of deceased patentee, p. 420.

Affirmed in *Chipley v. Farris*, 45 Cal. 537, holding that if the patentee, under the act of 1851, dies before the patent is issued, the title to the lands therein designated becomes vested in the heirs, devisees, or assignees of the deceased patentee, the same as if the patent had issued during his life.

General citation: *United States v. Armigo*, Fed. Cas. No. 14466

13 Cal. 422-427. PARKS v. ALTA CALIFORNIA TELEGRAPH COMPANY. 73 Am. Dec. 589.

Telegraph Companies are common carriers, and are subject to the rules of law governing common carriers, p. 424.

Referred to, denying that telegraph companies are common carriers in the strict sense of the term, in *Tyler v. West Un. Tel. Co.*, 60 Ill. 427; S. C. 14 Am. Rep. 41; *Fowler v. West Un. Tel. Co.*, 80 Me. 388; S. C. 6 Am. St. Rep. 214; *Smith v. Tel. Co.*, 57 Mo. App. 264; *Telegraph Co. v. Griswold*, 37 Ohio St. 309; S. C. 41 Am. Rep. 502; *Gillis v. West Un. Tel. Co.*, 61 Vt. 464; S. C. 15 Am. St. Rep. 918; *Marr v. Telegraph Co.*, 85 Tenn. 535; and *Abraham v. Telegraph Co.*, 11 Sawy. 31; S. C. 23 Fed. Rep. 316. So, under the provisions of the California Civil Code as amended in 1874, telegraph companies are not common carriers, but must use "great care and diligence in the transmission and delivery of messages." Cal. Civ. Code, sec. 2162; *Hart v. West Un. Tel. Co.*, 66 Cal. 579; S. C. 56 Am. Rep. 119. Referred to in this connection in *Kirby v. West. Un. Tel. Co.*, 4 S. Dak. 109; S. C. 46 Am. St. Rep. 768, holding that under the laws of South Dakota a telegraph company offering to carry telegraphic messages for the public is a common carrier of such messages. Cited as authority, holding telegraph companies strictly liable for the consequences of carelessness or negligence in the conduct of their business to those sustaining loss or damage thereby, in the following cases: *West. Un. Tel. Co. v. Buchanan*, 35 Ind. 440; S. C. 9 Am. Rep. 752; *Daughtery v. Am. Un. Tel. Co.*, 75 Ala. 178, delaying message; so in *Martin v. Tel. Co.*, 1 Tex. Civ. App. 150; *West Un. Tel. Co. v. Reeves*, 8 Tex. Civ. App. 44; *Wann v. West. Un. Tel. Co.*, 37 Mo. 481; S. C. 90 Am. Dec. 397, may not contract against consequences of their own negligence; so in *Garrett v. Telegraph Co.*, 83 Iowa, 262; *Thompson v. West. Un. Tel. Co.*, 64 Wis. 536; S. C. 54 Am. Rep. 647; *West. Un. Tel. Co. v. Linn*, 87 Tex. 13; S. C. 47 Am. St. Rep. 64. Cited, treating of the nature of the business of telegraph com-

panies, their duties, and liabilities, in the following cases: *White v. West. Un. Tel. Co.*, 5 *McCrary*, 115, 120, note; 81 *Am. Dec.* 613, 616, note; 90 *Am. Dec.* 399, note; 93 *Am. Dec.* 754, note; 1 *Am. Rep.* 460, note; 9 *Am. Rep.* 153, note; 46 *Am. Rep.* 732, note; 6 *Am. St. Rep.* 218, note; 10 *Am. St. Rep.* 634, note; 40 *Am. St. Rep.* 494, note.

Telegraph Company is liable for debts lost through negligence in sending messages, p. 425.

Cited as authority sustaining the principle of the decision in *Manville v. West. Un. Tel. Co.*, 37 *Iowa*, 218; *S. C.* 18 *Am. Rep.* 12; *State Insurance Co. v. Jamison*, 79 *Iowa*, 252; *True v. Telegraph Co.*, 60 *Me.* 27; *S. C.* 11 *Am. Rep.* 168; *Grindle v. Eastern Ex. Co.*, 67 *Me.* 327; *S. C.* 24 *Am. Rep.* 38, case of failure by express company to deliver premium on insurance policy; *Alexander v. West. Un. Tel. Co.*, 66 *Mass.* 171, 175; *S. C.* 14 *Am. St. Rep.* 559, 562; *Mackey v. West. Un. Tel. Co.*, 16 *Nev.* 228; *First Nat. Bank v. Telegraph Co.*, 30 *Ohio St.* 566, 568; *S. C.* 27 *Am. Rep.* 489, 491; *West. Un. Tel. Co. v. Wilhelm*, 48 *Neb.* 915; *West. Un. Tel. Co. v. Sheffield*, 71 *Tex.* 576; *S. C.* 10 *Am. St. Rep.* 794; *West. Un. Tel. Co. v. Linn*, 87 *Tex.* 13; *S. C.* 47 *Am. St. Rep.* 64; *Bierhaus v. Telegraph Co.*, 8 *Ind. App.* 254; *West. Un. Tel. Co. v. Reynolds*, 77 *Va.* 173, 187; *S. C.* 46 *Am. Rep.* 721, 726. Examined, and held not in point, in *Beapre v. Telegraph Co.*, 21 *Minn.* 162. Cited, collecting the authorities on the subject, in *White v. West. Un. Tel. Co.*, 5 *McCrary*, 120, note; 1 *Am. St. Rep.* 229, note; 10 *Am. St. Rep.* 782, note.

Distinguished in *Pacific etc. Co. v. Western Union Tel. Co.*, 123 *Cal.* 431, denying recovery under facts stated.

13 Cal. 427-430. TERRY v. SICKLES.

Nonprejudicial Error.—Error in giving instructions to the jury which could not have injured the party complaining is not ground for reversal, p. 429.

Approved as authority in *Caulfield v. Sanders*, 17 *Cal.* 573; *Pico v. Stevens*, 18 *Cal.* 378; *Tompkins v. Mahoney*, 32 *Cal.* 235; *Robinson v. Railroad Co.*, 48 *Cal.* 424; *Watson v. Damon*, 54 *Cal.* 279; *Gaudette v. Travis*, 11 *Nev.* 161, in which case it is held nonprejudicial error for the court, in its instructions, to assume as true a fact in regard to which there is no conflict in the evidence.

Account Stated.—Failure to object within a reasonable time to an account rendered makes it an account stated, p. 429.

Approved as authority in *Hendy v. March*, 75 *Cal.* 567; *McKinster v. Hitchcock*, 19 *Neb.* 105; *Fleischner v. Kubli*, 20 *Oreg.* 338; *Godbe v. Young*, 1 *Utah*, 57, holding assent to be assumed from acquiescence. Cited in *Mayberry v. Cook*, 121 *Cal.* 590, holding account stated impliable from circumstances. So in *Benites v. Hampton*, 3 *Utah*, 374, in which case the circumstances were held insufficient to establish an

account stated. Ruling approved in *Wilkins v. Stidger*, 22 Cal. 239; S. C. 83 Am. Dec. 68, but holding that this doctrine of acquiescence does not apply to proceedings on trials of controversies. Referred to in *Anding v. Levy*, 57 Miss. 64; S. C. 34 Am. Rep. 439, as an instance of the application of the rule to transactions between other parties than merchants, and disapproving the ruling to this extent. Cited, discussing subject of account stated, in *Lockwood v. Thorne*, 62 Am. Dec. 85, 88, note.

Same.—Objection to one item of account only is an admission of the rest, p. 429.

Approved in *Tuggle v. Minor*, 76 Cal. 100. *Ketchum v. Stetson* etc. Mill Co., 33 Wash. 95, agreed price for goods sold sufficiently shown by vendor, where vendee made statement of account at price contended for, and statement is conclusive as to items specified, notwithstanding disputed counterclaim for damages.

Same.—In an action on an account stated, evidence that the items of the account are overcharged is not admissible, the complaint being verified, and the answer not averring fraud or mistake in the accounting, p. 430.

Cited as authority in *Auzerais v. Naglee*, 74 Cal. 75; *Hendy v. March*, 75 Cal. 568; *Fleischner v. Kubli*, 20 Oreg. 338, holding that the answer must set forth fully the fraud, error, or mistake relied upon. Referred to on matter of pleading in this connection in *Hawkins v. Borland*, 14 Cal. 413, headnote; *Goble v. Dillon*, 86 Ind. 336; S. C. 44 Am. Rep. 315.

13 Cal. 430-431. GOULD v. SCANNELL.

Claim and Delivery.—Defendant in action of, has judgment for a return of the property or its value, unless he has claimed a return in his answer, p. 431.

Affirmed in *Pico v. Pico*, 56 Cal. 459; *Banning v. Marlean*, 101 Cal. 239. Cited in *Lavelle v. Lowry*, 5 Mont. 500, holding that where, in such action, there is an issue as to the title and right of possession and a finding in favor of the defendant, a judgment for the return of the property follows as a matter of course, even if the complaint does not contain a formal prayer for a return thereof. Referred to, but no opinion expressed as to the ruling, in *Wilson v. Fuller*, 9 Kan. 192.

13 Cal. 431-434. HERRICK v. HODGES.

Agency.—Agent who undertakes to act gratuitously is bound to the exercise of ordinary diligence, p. 433.

Approved in *Samonset v. Mesnager*, 108 Cal. 358, holding that a gratuitous agent for the lending of the money of his principal is bound to exercise good faith and ordinary diligence, and to act with a sound discretion in investing it.

13 Cal. 434-444. PATRICK v. MONTADER.

Attachment issued before maturity of debt is *prima facie* void as to creditors injured, but if the debt was contracted fraudulently, it is equitably due, and the attachment will stand, p. 442.

Distinguished in *Davis v. Eppinger*, 18 Cal. 381; S. C. 79 Am. Dec. 185, in which case the debt was not due either legally or equitably. So in *Crane v. Hirshfelder*, 17 Cal. 585, in which case the defendants sought to enforce a judgment void in itself for want of authority in the clerk to enter it. So in *Espenhaim v. Meyer*, 74 Wis. 384, the Wisconsin statute permitting a creditor whose claim is not due to proceed by attachment. Cited as authority in *Mendes v. Freiters*, 16 Nev. 397, holding that a party who acts in good faith is not guilty of constructive fraud in commencing an attachment suit upon a stated account for a greater sum than is actually due. So in *Davis v. Claffin Co.*, 63 Ark. 165; S. C. 58 Am. St. Rep. 105, as authority for obtaining relief in a proper case against attachments based on demands not due.

Attachment is Valid for debt equitably due, there being no actual fraud against subsequent creditors, p. 443.

Approved as authority in *Shea v. Johnson*, 101 Cal. 457. So in *Mendes v. Freiters*, 16 Nev. 395, holding that where the pleader made a mistake in the original complaint, the defendant alone could take advantage of the error. Cited in dissenting opinion, *Standard etc. Co. v. Lansing W. Works*, 58 Kan. 134, main opinion sustaining attachment as against junior attaching creditors; *Hadden v. Dooley*, 92 Fed. 280, 282, 63 U. S. App. 185, 187, ruling similarly under facts stated. Referred to in *Freidenberg v. Pierson*, 18 Cal. 155; S. C. 79 Am. Dec. 164, holding that a junior attaching creditor cannot take advantage of irregularities in the affidavit or bond given by a prior attaching creditor of a common debtor. So, to same effect, in *McComb v. Reed*, 28 Cal. 287; S. C. 87 Am. Dec. 120.

Same.—A creditor setting aside an attachment for fraud cannot claim priority over prior attachment, but is entitled to disbursements and counsel fees before distribution, p. 444.

Examined and distinguished in *Miller v. Kehoe*, 107 Cal. 344, holding that a plaintiff who brings suit for himself and others interested with him cannot recover counsel fees against a defendant who denies the right of each and all of the plaintiffs, and sets up in himself an adverse and independent title to the thing in litigation.

13 Cal. 444-458. HYMAN v. READ.

Land Grants.—Act of 1851, known as the San Francisco Water Lot Act, should be construed favorably to the city, and includes all land within the boundaries fixed by the survey referred to in the act, p. 455.

Approved in *United States v. Mission Rock Co.*, 189 U. S. 405, Presi-

dent's order reserving Mission Rock in San Francisco bay for naval purposes did not constitute appropriation of surrounding tide land. Examined in *Pac. Gas Imp. Co. v. Ellert*, 64 Fed. Rep. 432, 433, discussing subject of title to tide lands. And see *San Francisco v. Straut*, 84 Cal. 124. Commented on in *Oakland v. Oakland Water Front Co.*, 118 Cal. 173, 174.

13 Cal. 458-477. SCOTT v. WARD.

Community Property.—One-half-interest in, by Mexican law, vested in the wife upon the death of the husband, and was not subject to his testamentary disposition, and so under the California statute, p. 469.

Approved in *Lataillade v. Orena*, 91 Cal. 579; S. C. 25 Am. St. Rep. 225; and referred to as authority, discussing rights of surviving husband as regards the community estate, in *Yancy v. Batta*, 48 Tex. 77.

Same.—What constitutes, stated at length and fully considered, p. 471.

Approved in *Noe v. Card*, 14 Cal. 596, 610, defining "donations." Cited in *Kircher v. Murray*, 54 Fed. Rep. 623, 624, approving definition of "onerous title." So in *Rouquier v. Rouquier*, 16 Am. Dec. 187, note. And in discussing what is community property, is cited in *Cooke v. Bremond*, 86 Am. Dec. 628-636, extended note on subject; also, in 63 Am. Dec. 128, note; 73 Am. Dec. 537, 543, note.

Mexican Grant.—Land granted under the colonization laws of Mexico to married men becomes their separate property, and not the common property of themselves and their wives, p. 476.

Doctrine affirmed in *Fuller v. Ferguson*, 26 Cal. 565; *Wilson v. Castro*, 31 Cal. 433; *Hood v. Hamilton*, 33 Cal. 702.

13 Cal. 478-489. MOORE v. WILKINSON.

Mexican Grant.—If a grant called for a specific quantity, to be afterward located within certain larger exterior limits, the government had the exclusive right to locate the quantity granted, and this right of location passed to the United States, as the successor of the former sovereign. The right is political, and cannot be exercised by the judicial department, p. 486.

Approved in *Yates v. Smith*, 38 Cal. 66, dissenting opinion of Crockett, J. So in *Younger v. Pagles*, 60 Cal. 525. Cited in *Riley v. Heisch*, 18 Cal. 202, and construed as referring to a definite and permanent location, by which the title becomes attached absolutely to some particular tract.

Same.—Patent is conclusive evidence of the validity of the original grant, and of its recognition and confirmation, and of the survey, and its conformity with the confirmation, and of the relinquishment to the patentee of all the interest of the United States in the land, p. 487.

Affirmed in *Biddle Boggs v. Merced Min. Co.*, 14 Cal. 362; *Yount v. Howell*, 14 Cal. 469; *Leese v. Clark*, 20 Cal. 424; *People v. San Francisco*, 75 Cal. 394, 395; *Adair v. White*, 85 Cal. 315; *Valentine v. Sloss*, 103 Cal. 220; *De Guyer v. Banning*, 91 Cal. 402; S. C. affirmed 167 U. S. 743, conclusiveness of patent in action of ejectment. Approved in *Knight v. United States Land Assoc.*, 142 U. S. 204, reversing S. C. 85 Cal. 448, and holding that the patent of the United States is evidence of the title of the city of San Francisco under Mexican laws to the pueblo lands, and is conclusive, affirming doctrine of *People v. San Francisco*, *supra*. Ruling also approved in *Silver Bow Min. Co. v. Clark*, 5 Mont. 424; *Lee v. Summers*, 2 Oreg. 268; and *South End Min. Co. v. Tinney*, 22 Nev. 54, dissenting opinion of Murphy, C. J. Examined and distinguished in *Henshaw v. Bissell*, 1 Sawy. 563, 569; S. C. affirmed, 18 Wall. 265.

Same.—Patent cannot be attacked collaterally, even for fraud, p. 487.

Affirmed in *Pioche v. Paul*, 22 Cal. 111; *Turner v. Donnelly*, 70 Cal. 604; and approved in *Houck v. Kelsey*, 17 Kan. 335; and *Smelting Co. v. Kemp*, 104 U. S. 641.

Mexican Grant is conclusive as to validity of original grant, confirmation and survey, p. 487.

Cited in department decision, *Miller v. Grunsky*, 141 Cal. 457, discussing effect of state patent as against collateral attack.

Mexican Grant.—Patent takes effect by relation, at date of presentation of petition to board, p. 488.

Cited in *McDonald v. McCoy*, 121 Cal. 67, sustaining claims derived from petitioner, irrespective of patentee.

Same.—Patent takes effect by relation, at the date of the presentation of the petition of the patentee to the board of land commissioners, p. 488.

Ruling affirmed in *Stark v. Barrett*, 15 Cal. 366, and *Leese v. Clark*, 18 Cal. 571, holding that the patent operates as an absolute bar to all claims under the United States arising subsequent to the petition. So, to same effect, in *Teschemacher v. Thompson*, 18 Cal. 26; S. C. 79 Am. Dec. 158; *Touchard v. Crow*, 20 Cal. 160; S. C. 81 Am. Dec. 114; *Merrill v. Chapman*, 34 Cal. 253; S. C. 35 Cal. 88. Approved in *Silver Bow Min. Co. v. Clark*, 5 Mont. 424; and *Talbott v. King*, 6 Mont. 106, and applied to patent to a mining claim.

General Citations.—Referred to and followed in *Moore v. Roff*, 13 Cal. 489. In *Burling v. Thompkins*, 77 Cal. 261, and *Dreyfus v. Badger*, 108 Cal. 63, holding that a person seeking to have a patentee of land declared his trustee, in the absence of any contract between the parties, must connect himself with the paramount source of title, and also show that he has prosecuted his claim with diligence.

Cross Reference.—*Waterman v. Smith*, 13 Cal. 373, note.

13 Cal. 490-494. **TRYON v. SUTTON.**

Husband and Wife.—Property conveyed to either spouse during coverture is, *prima facie*, common property, the control and disposition of which is given, by statute, to the husband, p. 493.

Affirmed in *Adams v. Knowlton*, 22 Cal. 288. Cited in *Peiser v. Griffin*, 125 Cal. 12; denying wife's control over community property although in her name. *Tolman v. Smith*, 85 Cal. 283, holding that the husband may mortgage the community property without the consent of the wife. Cited to ruling stated in *Cooke v. Bremond*, 86 Am. Dec. 636, note.

Mortgagor cannot Complain of indefinite description of mortgaged premises in foreclosure complaint, p. 491.

Approved as authority in *Graham v. Stewart*, 68 Cal. 381, and *Blake v. McCosh*, 91 Iowa, 548. Approved in *German Loan Soc. v. Kern*, 38 Or. 237, mortgagor cannot object to defective description in complaint for foreclosure where complaint follows mortgage.

Pleadings.—In equity cases party must recover according to the pleadings, and not the proof, when there is no variance, p. 494.

Approved in *Gregory v. Ford*, 14 Cal. 143; S. C. 73 Am. Dec. 643, holding that the complainant's equity must be shown by the bill.

Same.—Amendments of pleadings which facilitate the production of all the facts bearing upon the question involved, should be liberally allowed, p. 494.

Approved in *Burns v. Scoofy*, 98 Cal. 276, allowing amendment of answer. So in *Farmers' Nat. Gold Bank v. Stover*, 60 Cal. 396, holding that an amendment of pleadings should be allowed at any stage of the trial when it is necessary for the purposes of justice. So in *Knidel v. Lithographing Co.*, 19 Colo. 312, holding that error in the entry of judgment of trial court may be corrected in that court *nunc pro tunc*, pending appeal; and cited to this effect in *Rew v. Barker*, 14 Am. Dec. 518, note.

13 Cal. 494-502. **MORRISON v. WILSON.** 73 Am. Dec. 593. S. C. 30 Cal. 344.

Ejectment.—A perfect equity united with possession is, for all purposes of defense, equivalent to a legal title, p. 497.

Ruling affirmed in *Blum v. Robertson*, 24 Cal. 141, stating when and how equitable title must be pleaded. Approved and applied in *Love v. Watkins*, 40 Cal. 566; S. C. 6 Am. Rep. 633; *Arguello v. Bours*, 67 Cal. 450; *Meeker v. Dakton*, 75 Cal. 158; *Grigsby v. Shwarz*, 82 Cal. 283; and *Rose v. Treadway*, 4 Nev. 460; S. C. 97 Am. Dec. 549. Distinguished in *Hough v. Waters*, 30 Cal. 311. Cited in *Flickinger v. Shaw*, 87 Cal. 133, protection of equitable title by injunction. Cited in 99 Am. Dec. 397, note; 5 Am. St. Rep. 400, note; 9 Am. St. Rep. 467, note;

21 Am. St. Rep. 611, note; 46 Am. St. Rep. 493, note; Linnertz v. Dorway, 67 Am. St. Rep. 237, note.

Husband and Wife.—Wife could not convey her separate estate, acquired prior to act of 1850, whether legal or equitable, without her husband joining in the deed, p. 497.

Affirmed in *Harrison v. Brown*, 16 Cal. 290; *Dow v. Gould etc. Co.*, 31 Cal. 645, 654. Referred to, construing act of 1850, in *Bodley v. Ferguson*, 30 Cal. 517. Cited, 95 Am. Dec. 417, note; and *Id.* 640, note.

Same.—Doctrine of estoppel in pais has no application to the estates of married women, p. 497.

Cited, excepting cases of fraud from the operation of the rule, in *Palmer v. Murray*, 8 Mont. 184; *Galbraith v. Lunsford*, 87 Tenn. 102. So, in *Rannells v. Gerner*, 80 Mo. 484, excepting cases where married women are regarded as feme soles in consequence of the possession of separate estates. So, to same effect, in *Reis v. Lawrence*, 63 Cal. 129, 141, *McKee and Thornton, JJs.*, dissenting. Cited as authority in *Griswold v. Boley*, 1 Mont. 561, holding that a married woman who has duly recorded her property is not estopped from asserting her rights thereto, if she was silent when her husband stated that he had the title to the same. So, in *Childs v. McChesney*, 20 Iowa, 436; S. C. 89 Am. Dec. 548, as authority doubting estoppel of wife. Cited in *Cook v. Walling*, 117 Ind. 12; S. C. 10 Am. St. Rep. 20, asserting the rule that when a married woman deals, or assumes to deal, in respect to a matter concerning which her common-law disabilities have been removed, she will be bound by an estoppel in pais as any other person. And cited generally on subject, in 80 Am. Dec. 406, note; *Id.* 525, note; 87 Am. Dec. 758, note; 28 Am. Rep. 375, note; 12 Am. St. Rep. 504, note; 59 Am. St. Rep. 819, note.

Same.—Generally, a conveyance by a feme covert not executed according to the forms prescribed by statute, is invalid, p. 498.

Affirmed in *Maclay v. Love*, 25 Cal. 374; S. C. 85 Am. Dec. 135; so in *Leonis v. Lazzarovich*, 55 Cal. 57, holding that a court of equity cannot reform the deed of a married woman. Approved in *Wambole v. Foote*, 2 Dak. Ter. 23; so in dissenting opinion of *McKee, J.*, in *Reis v. Lawrence*, 63 Cal. 135. Cited, power to alienate separate estate, in 82 Am. Dec. 128, note; 100 Am. Dec. 653, note; 51 Am. Rep. 460, note; 11 Am. St. Rep. 244, note; 23 Am. St. Rep. 610, note.

Same.—Deed to married woman is prima facie valid, and where it recites that the consideration is paid by another, for her exclusive benefit, the deed, prima facie, creates a separate estate in her, p. 500.

Referred to and explained in *McComb v. Spangler*, 71 Cal. 427, 428. Cited in 96 Am. Dec. 424, 425, note; 98 Am. Dec. 577, note.

General Citations.—As authority in *Linnville v. Smith*, 6 Oreg. 204, holding that where a conveyance is taken by a husband in his own

name, without the wife's consent, of land purchased with the wife's money, and with the understanding on her part that the conveyance is to be made to her, she is in equity the owner of the land, and the husband is her trustee. *Burns v. Scooby*, 98 Cal. 276.

13 Cal. 502-510. **DORE v. COVEY.**

In undertaking on appeal, names of the sureties need not appear in the body of the paper, p. 507.

Distinguished in *Bennett v. Superior Court*, 113 Cal. 443, Beatty, C. J., dissenting, case of substitution of new surety for one who failed to justify. Approved in *Brown v. Jessup*, 19 Oreg. 290.

Undertaking on appeal is not vitiated by reason of noncompliance with the directory provisions of the statute, intended for the benefit of the respondent, p. 509.

Approved in *Murdock v. Brooks*, 38 Cal. 602; so, to same effect. in *State v. Mining Co.*, 13 Nev. 212; and *State v. Hays*, 2 Oreg. 319, sustaining sufficiency of undertaking. Cited in *Coughran v. Sunbach*, 13 S. Dak. 120, 79 Am. St. Rep. 889, holding sureties liable as on common-law bond; notes to *Babcock v. Carter*, 67 Am. St. Rep. 199, 200, 203, on general subject. Distinguished in *Chapin v. Broder*, 16 Cal. 420, holding that if an undertaking on appeal be insufficient in amount to stay proceedings, the lien of the judgment is not extended by the appeal beyond two years from the time of its docketing.

Delivery of Undertaking will be presumed from its presence among files, p. 510.

Cited in *Howard etc. Co. v. Silverberg*, 89 Fed. 172, holding delivery shown by clerk's acceptance.

13 Cal. 510-512. **SMITH v. DALL.**

Possession of tenant is not notice of his landlord's title, p. 511.

Explained in *Havens v. Dale*, 18 Cal. 367; and overruled in *Dutton v. Warschauer*, 21 Cal. 628; S. C. 82 Am. Dec. 774. Disapproved in *Cowles v. McDonald*, 15 Neb. 189. Cited to the point stated in 73 Am. Dec. 549, note. Distinguished in *Randall v. Lingwall*, 43 Or. 387, possession of tenant of real property is of itself sufficient to put an intending purchaser from third person upon inquiry as to landlord's title.

Record.—Omission in record of deed to make a copy of the seal or some mark to indicate it does not vitiate the record, p. 512.

Ruling approved as authority in *Summer v. Mitchell*, 29 Fla. 218; S. C. 30 Am. St. Rep. 122; *Beardsley v. Day*, 52 Minn. 453; *Gearv v. City of Kansas*, 61 Mo. 379; *McCoy v. Cassidy*, 96 Mo. 434; *Calvin v. Land A.*, 23 Neb. 78; S. C. 8 Am. St. Rep. 116; *Flowery M. Co. v. North Bonanza M. Co.*, 16 Nev. 305; *Rensens v. Lawson*, 91 Va. 249;

and *Le France v. Richmond*, 5 Sawy. 604. Doubtcd in *Putney v. Cutler*, 54 Wis. 70.

13 Cal. 512-514. **DINGMAN v. RANDALL.**

Mortgage Lien.—Case stated in which clear evidence of fraud would be required to induce a court of equity to interfere, and give the mortgage priority over intervening liens, pp. 513, 514.

Doctrine approved in *New Eng. Mort. Co. v. Hirsch*, 96 Ala. 235, presenting a somewhat similar state of facts. Cited in *Bridges v. Cooper*, 98 Tenn. 388; *Dumell v. Terstegge*, 85 Am. Dec. 471, note; and *Young v. Shaner*, 5 Am. St. Rep. 708, note.

13 Cal. 514-518. **HARRIS v. REYNOLDS.** 73 Am. Dec. 600.

Execution Sale.—Purchaser at execution sale of real property is entitled to the rents and profits from the date of sale till the expiration of the time for redemption, as well from the judgment debtor in possession as from his tenant, p. 517.

Approved as authority settling the principles governing such cases, in *Kline v. Chase*, 17 Cal. 597; *Knight v. Truett*, 18 Cal. 115; *Hill v. Taylor*, 22 Cal. 194; *Walls v. Walker*, 37 Cal. 432, 99 Am. Dec. 295; *Webster v. Cook*, 38 Cal. 425, 99 Am. Dec. 407; and *Walker v. McCusker*, 71 Cal. 596, construing section 707 of the California Code of Civil Procedure. Whithed v. St. Anthony etc. Co., 9 N. Dak. 227, 232, noted under *Reynolds v. Lathrop*, 7 Cal. 43. So in *Clement v. Shipley*, 2 N. Dak. 432; and cited as authority in *Hardy v. Herriott*, 11 Wash. St. 464; and *Knipe v. Austin*, 13 Wash. St. 194, 196, construing statutory provisions substantially similar. Cited in 99 Am. Dec. 412, note.

Same.—During the time allowed for redemption the occupant is trustee for the use of the purchaser, if a redemption is not affected, p. 518.

Ruling approved in *Connelly v. Dickson*, 76 Ind. 449.

Statutes.—Words and phrases in, of a well known and definite meaning in the law, are to be expounded in the same sense in the statute, p. 518.

Cited as authority to the ruling stated in *Funk v. Railway Co.*, 52 Am. St. Rep. 613, note.

13 Cal. 519-521. **INDIAN CANYON ROAD CO. v. ROBINSON.**

Franchise.—Grant of, is not exclusive, unless it is expressly made so by the grant itself, p. 520.

Ruling affirmed in *Fall v. Sutter County*, 21 Cal. 252; *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 423; *Bartram v. Central Turnp. Co.*, 25 Cal. 288; and approved in *Douglas County Road Co. v. Canyon-*

ville etc. Road Co., 8 Oreg. 108; and Canyonville etc. Road Co. v. Stephenson, 8 Oreg. 267.

13 Cal. 521-526. **WHITE v. FRATT.**

Equity.—Bill quia timet, and to enforce the specific execution of an agreement, lies only where there is no adequate remedy at law, p. 523.

Approved in Ketchum v. Crippen, 37 Cal. 228, the party having a plain and speedy remedy by motion in the action. So in Archbishop of San Francisco v. Shipman, 69 Cal. 593, denying an injunction to restrain a sale under a judgment for the foreclosure of a lien.

Appeal.—Where bill in equity shows on its face that plaintiff is not entitled to relief, the defect may be taken advantage of on appeal, though no demurrer be filed, p. 525.

Cited and approved as authority in Gorman v. Commissioners, 1 Idaho, 662.

13 Cal. 526-531. **SWIFT v. KRAEMER.** S. C. 73 Am. Dec. 603.

Mortgage—Subrogation.—Where one mortgage is substituted for another, equity will keep the first mortgage alive when the interests of justice require it, p. 530.

Cited in White v. Stevenson, 144 Cal. 110, 111, noted under Birrell v. Schie, 9 Cal. 104. Principle approved and applied in Tolman v. Smith, 85 Cal. 289; Shaffer v. McCloskey, 101 Cal. 580; Van Sandt v. Alvis, 100 Cal. 168, 169; S. C. 50 Am. St. Rep. 27, 28; Walters v. Walters, 73 Ind. 428; Poinder v. Ritzinger, 102 Ind. 575; Bowlus v. Phenix Ins. Co., 133 Ind. 114; Ayres v. Probasco, 14 Kan. 191; Causler v. Sallis, 54 Miss. 449; Roby v. Bismarck Nat. Bank, 4 N. Dak. 162, 163; S. C. 50 Am. St. Rep. 637, 638; Hammond v. Barker, 61 N. H. 57; and Hicks v. Morris, 57 Tex. 664, 665. Explained and distinguished in Barber v. Babel, 36 Cal. 23, holding that the execution of a new note and mortgage by the husband alone, in place of a prior one given on the homestead before the declaration of homestead was filed, does not continue the old mortgage in life, as to the homestead interest, beyond the time when it would otherwise be barred by the statute of limitations. Limited and distinguished in Burnap v. Cook, 16 Iowa, 154; S. C. 85 Am. Dec. 509; so in Bridges v. Cooper, 98 Tenn. 386, 387. Cited to the ruling stated in Young v. Shaner, 5 Am. St. Rep. 706, note, collecting and collating the authorities. So in 70 Am. Dec. 742, note, as authority for the statement that the last mortgagee is in equity the assignee of the debts which he pays, and is subrogated to the rights of his assignor. So in 80 Am. Dec. 746, note, as to when the execution of new mortgages will be considered as merely changing the form of old encumbrances, and not as the creation of new ones; and in 85 Am. Dec. 513, as to when mortgagee of homestead is subrogated to vendor's rights.

13 Cal. 531-534. SMITH v. MAYOR AND COMMON COUNCIL OF SACRAMENTO.

Municipal Corporations.—City authorities may employ counsel, in addition to the city attorney, to protect city interests, p. 533.

Cited in *Colusa v. Welch*, 122 Cal. 432, but denying power to employ special counsel to influence legislation; *Knight v. Eureka*, 123 Cal. 194, denying power to delegate to its attorney the discretion of appointing an associate; *Denver v. Webber*, 15 Colo. App. 513, 514, reaffirming rule. Ruling affirmed, holding that the board of supervisors of a county may employ counsel other than the district attorney, to transact the legal business of the county, if in the judgment of the board the public interest will thereby be subserved, in *Hornblower v. Duden*, 35 Cal. 670, and *Lassen County v. Shinn*, 88 Cal. 512, 513. Approved in *Ellis v. Washoe County*, 7 Nev. 293, employment of counsel by county commissioners. So in *Martin v. Whitman County*, 1 Wash. St. 537. *Reclamation District v. Hagar*, 6 Sawy. 572; S. C. 4 Fed. Rep. 371, employment of counsel by officers of such district; *City of Huron v. Campbell*, 3 S. Dak. 321, employment by city council; *Miller v. Finegan*, 26 Fla. 28, recognizing such authority in municipal corporations generally, but held inapplicable in the particular case; and referred to as inapplicable under Kansas statutes, in *Clough v. Hart*, 8 Kan. 493. Approved in *Scollay v. Butte County*, 67 Cal. 254, but denying the authority of boards of supervisors to delegate to others the power to conduct litigation. So in *Merriam v. Barnum*, 116 Cal. 622, 623, limiting the power of such boards to employ special counsel to the assistance of the district attorney in the prosecution or defense of suits in which the county may be a party. Cited to the ruling stated in 38 Am. St. Rep. 910, note, where the authorities bearing on the subject are collected.

13 Cal. 534. FINDLA v. SAN FRANCISCO.

City is not Liable on implied covenants of warranty in alcalde's deed, p. 535.

Cited in *Harrison v. Palo Alto*, 104 Iowa, 388, denying right of county to give covenant of warranty.

13 Cal. 536-539. WHITNEY v. BUCKMAN.

In action to foreclose, mortgagor cannot be heard to complain of an indefinite description of the property mortgaged, whatever might be the effect of a sale under the description, p. 538.

Approved in *Graham v. Stewart*, 68 Cal. 381; *German Loan Soc. v. Kern*, 38 Or. 237, mortgagor cannot be heard to object to defective description in complaint for foreclosure of mortgage where complaint follows mortgage. So, as to sufficiency of description in mortgage, in *Blake v. McCosh*, 91 Iowa, 548. See *Tryson v. Sutton*, 13 Cal. 490, ante.

Same.—Mortgagor of a pre-emption claim is estopped from asserting the invalidity of the mortgage, p. 539.

Approved and the principle applied in *Kirkaldie v. Larrabee*, 31 Cal. 457; S. C. 89 Am. Dec. 206. So, in *Stewart v. Powers*, 98 Cal. 520, holding that a mortgage by a pre-emption claimant before entry is not void, and does not fall within the terms of the Revised Statutes of the United States declaring that "all assignments and transfers" of the right of pre-emption "prior to the issuing of the patent shall be null and void"; and so in *Norris v. Heald*, 12 Mont. 287; S. C. 33 Am. St. Rep. 586. Cited as authority in *Digman v. McCollum*, 47 Mo. 377, that one in possession of land under a contract of purchase may mortgage the same. Cited, also, in *Wilcox v. John*, 52 Am. St. Rep. 261, note, where the subject is discussed at length.

General Citation.—In *McCabe v. Caner*, 68 Mich. 184, holding that the relinquishment by a homesteader of his rights is a good consideration for notes given to secure the payment of the price to be paid for his interest in the land.

13 Cal. 540-553. **CITY OF OAKLAND v. CARPENTIER.** S. C. 21 Cal. 642.

Municipal Corporations.—Charters of, are special grants of power from the sovereign authority, and whatever is not given expressly, or as a necessary means to the execution of expressly given powers, is withheld, p. 545.

Affirmed in *Douglass v. Mayor of Placerville*, 18 Cal. 648. Cited in *Aid Society v. Reis*, 71 Cal. 633, denying power of city to provide for reformation of criminal minors. *Wallace v. Mayor of San Jose*, 29 Cal. 186, discussing power of common council to bind a city by contract. Referred to and explained in *Oakland v. Oakland Water Front Co.*, 118 Cal. 177, 191, 192, 195, 196. Distinguished in *Indianapolis v. Gas Light Co.*, 66 Ind. 406, sustaining contract by city for lighting streets.

Same.—Powers delegated to, are trusts, not subject to be delegated by the corporations, p. 545.

Approved in *Matthews v. City of Alexandria*, 68 Mo. 119; S. C. 30 Am. Rep. 779, holding that a city authorized to fix the rates of wharfage could not empower any one else to do so. So in *Smith v. Duncan*, 77 Ind. 95, and *McCrowell v. City of Bristol*, 89 Va. 667, and applied to cases of street improvements. So in *Maxwell v. Bay City Bridge Co.*, 41 Mich. 465, construction of bridge over a navigable river. Cited in 29 Am. Rep. 108, 110, note; and *Davis v. King*, 50 Am. St. Rep. 118, note, discussing subject at length.

Same.—Where city charter vests the corporate powers in a board of trustees, and the law provides that at all meetings of the board a majority shall constitute a quorum to do business, a majority of those

elected can organize and act at the first meeting, as well as at any subsequent meeting, p. 550.

Approved and the principle applied in *People v. Hecht*, 105 Cal. 623; S. C. 45 Am. St. Rep. 102, case of board of freeholders elected to frame city charter.

Same.—Knowledge on the part of guilty officers and agents of a corporation of fraudulent acts of themselves and their associates is not notice to the corporation, so as to give the advantage of such notice to such agents and associates, p. 552.

Approved and applied in *Ryan v. Railroad Co.*, 21 Kan. 405.

An equitable action to set aside a fraudulent conveyance, where the effect would be to restore possession to the defrauded party, is an action for the recovery of real estate, and governed by the statute of limitations applicable to such actions, p. 552.

Cited in *Murphy v. Crowley*, 140 Cal. 145, 148, 149, applying rule to action by heir to set aside ancestor's conveyance procured by fraud and undue influence; *Duff v. Duff*, 71 Cal. 529, a similar case, in which the court holds that conceding the provision that actions for relief on the ground of fraud must be commenced within three years after the discovery of the fraud, does not apply to actions of that nature in relation to real property, then the limitations affecting such actions are to be determined by the rules of equity, which are substantially the same. Ruling applied in *Goodnow v. Parker*, 112 Cal. 444, 446, action to compel a conveyance to quiet title. Examined and disapproved in *Morgan v. Morgan*, 10 Wash. St. 106. Referred to in *Lady Washington etc. Co. v. Wood*, 113 Cal. 489; *City of Fort Scott v. Schulenberg*, 22 Kan. 658; *Lakin v. Mining Co.*, 11 Sawy. 243; S. C. 25 Fed. Rep. 344; and 12 Am. Dec. 372, note, discussing subject of defense of statute of limitations. So in *Pfister v. Dasey*, 65 Cal. 406, as authority that a cause of action to set aside certain fraudulent conveyances may be joined with a cause of action to recover possession of the property.

General citation: *State v. St. Louis*, 161 Mo. 384.

13 Cal. 553-558. PALMER v. VANCE.

Where the statute merely prescribes the form of undertaking in attachment, without a prohibition of any other, an undertaking which varies from it may be good at common law, p. 556.

Ruling approved in *Smith v. Fargo*, 57 Cal. 159; *Bunneman v. Wagner*, 16 Oreg. 436, 8 Am. St. Rep. 309, *Easton v. Ormby*, 18 R. I. 314, and *Denson v. Horn*, 4 Tex. Civ. App. 379. Cited in *Rosenthal v. Perkins*, 123 Cal. 244, holding sureties liable, although no order for release of property made; *Ebner v. Heid*, 125 Fed. 683, bond under seal to release attachment reciting as consideration release of all property attached and discharge of attachment is based on sufficient consideration.

Same.—Mistake in recitals in undertaking may be explained and corrected by parol, p. 556.

Approved in *Hathaway v. Brady*, 23 Cal. 124, showing omission of words in promissory note. Cited as authority in *Pierce v. Whiting*, 63 Cal. 540, holding that recitals in undertaking are conclusive as between the parties thereto.

Same.—Bond given voluntarily to the sheriff, on delivery of the property, is valid at common law, p. 556.

Approved as authority in *Lightle v. Berning*, 15 Nev. 394.

General Citations.—In *Seawell v. Cohn*, 2 Nev. 311, as to liability of sureties in undertaking to release property held under attachment.

13 Cal. 558-562. **CHESTER v. MILLER.**

Appearance in general terms, for defendants, will be confined to those who have been served with process, p. 561.

Distinguished, and restricted to recital of appearance in docket of justice of the peace, in *Rowland v. Coyne*, 55 Cal. 3. Cited as authority in *Garzan v. School District*, 4 Colo. 57, and *Seedhouse v. Broward*, 34 Fla. 528, dissenting opinion of Lidden, C. J.

Judgment.—Equity has jurisdiction to vacate a judgment fraudulently altered, p. 560.

Cited in *Little Rock etc. R. R. Co. v. Wells*, 54 Am. St. Rep. 250, note, discussing at length the subject of relief in equity against judgments.

13 Cal. 562-579. **GREGORY v. McPHERSON.**

Mexican Grant.—The expediente, filed in the archives of the Mexican government, is an original document, and an exemplification of such original is admissible in evidence, p. 572.

Approved in *Donner v. Palmer*, 31 Cal. 510, and *Palmer v. Low*, 98 U. S. 11. So in *Lidden v. Hodnett*, 22 Fla. 451, and *Brown v. Warren*, 16 Nev. 241, holding that exemplification of records of the general land office are admissible in evidence.

Estate of Decedent.—Petition by executor or administrator for sale of real estate must set forth the amount of the personal estate that has come to his hands, this being the jurisdictional fact, p. 576.

Cited in *Preyor v. Downey*, 50 Cal. 398, and *Needham v. Salt Lake*, 7 Utah, 323, holding petitions insufficient. Referred to as leaving this question open, the case not being authority, because the judges did not concur in the grounds of the judgment, in *Stuart v. Allen*, 16 Cal. 501; 76 Am. Dec. 557. Principle approved in *Townsend v. Gordon*, 19 Cal. 208, 209; and so in *Gregory v. Taber*, 19 Cal. 408, 409, 410, 79 Am. Dec. 219, 220, 221; but denied in *Melms v. Pfister*, 59 Wis. 195.

13 Cal. 579-580. GEIZER v. CLARK.

Guaranty.—Guarantor is entitled to notice of nonpayment, p. 580.

Ruling approved in *Reeves v. Howe*, 16 Cal. 153; *Ford v. Hendricks*, 34 Cal. 675; *Crooks v. Tully*, 50 Cal. 257; *Fessenden v. Summers*, 62 Cal. 486; and *Chafoin v. Rich*, 77 Cal. 477, cases of guaranty of promissory notes. So in *Milroy v. Quinn*, 69 Ind. 413; S. C. 35 Am. Rep. 232, case of a collateral guaranty of a debt to be created. *German Sav. Bank v. Drake Roofing Co.*, 112 Iowa, 187. Cited in 56 Am. Dec. 359, note on indorsement of negotiable paper by one not holder or payee.

13 Cal. 581-585. PEOPLE v. KEENAN.

Criminal Trial.—Courts have a large discretion over the conduct of proceedings before them, and may limit counsel to a reasonable time for argument before the jury, p. 584.

Approved in *State v. Hoyt*, 47 Conn. 537; S. C. 36 Am. Rep. 93, limiting argument in a murder case to four hours on each side. So in *State v. Collins*, 70 N. C. 245; S. C. 16 Am. Rep. 775, limiting argument for prisoner to one hour and a half; *Williams v. Commonwealth*, 82 Ky. 642, 644, limiting each side to five minutes in a felony case, the defendant making no claim that more time was necessary; *Lee v. State*, 51 Miss. 569; *Douglass v. Hill*, 29 Kan. 529; and *Kizer v. State*, 12 Lea, 569, holding that the matter rests in the exercise of a sound judicial discretion. So in *Tooke v. State*, 23 Tex. App. 12, and *Roe v. State*, 25 Tex. App. 66, holding that opportunity must be afforded for a complete defense. Cited as authority in *People v. Green*, 99 Cal. 567, 569, in which case an order limiting counsel for defendant charged with felony to one hour within which to sum up and argue the case was held to be an abuse of discretion. So in *Wingo v. State*, 62 Miss. 314; *White v. People*, 90 Ill. 120; S. C. 32 Am. Rep. 14, limiting arguments of counsel to five minutes each; *Jones v. Commonwealth*, 87 Va. 68, restricting argument to thirty minutes, against objection of prisoner; and in *People v. Harrington*, 42 Cal. 167; S. C. 10 Am. Rep. 297, asserting right of prisoner to appear for trial without irons, unless there is danger of his escape. Cited, collecting the authorities on the subject, in 27 Am. Rep. 413, note; and 46 Am. St. Rep. 24, 28, note.

13 Cal. 585-588. PRADER v. GRIM.

Restraining Order.—Vitality of, is not necessarily limited by the date mentioned therein, p. 587.

Cited as authority in *Miles v. Edwards*, 6 Mont. 183.

Same.—Counsel fees for dissolving restraining order are recoverable in an action on the bond, p. 587.

Approved as authority in *Miles v. Edwards*, 6 Mont. 183; and so, to the same effect, in *Behrens v. McKenzie*, 23 Iowa, 342; S. C. 92 Am. Dec. 430; *Territory v. Rindacoff*, 5 N. Mex. 97; and *Noble v. Arnold*,

23 Ohio St. 270. *Territory v. Rindscoff*, 4 N. Mex. 364, applying rule to attachment bonds. Cited in 77 Am. Dec. 158, 159, note on dissolution of injunctions.

13 Cal. 588-591. **PRADER v. PURKETT.**

Parties.—Suit on injunction bond is properly brought in name of party beneficially entitled to the fruits of recovery, though there be several obligees, p. 591.

Disapproved in *Montana Min. Co. v. Milling Co.*, 19 Mont. 320, 321, holding that all the obligees are necessary parties.

13 Cal. 591-596. **GREGORY v. HAYNES.**

Lis Pendens.—Purchaser of land subsequent to a suit brought against his vendor to quiet title, and after a notice of lis pendens has been filed, is a mere volunteer, who takes subject to any decree in the suit, p. 594.

Ruling affirmed in *Haynes v. Calderwood*, 23 Cal. 410.

Color of Title.—A defendant in ejectment, entering under a deed executed by order of a court of competent jurisdiction, enters under color of title, p. 595.

Referred to in *Weber v. Clarke*, 74 Cal. 16, holding an entry under a sheriff's deed to be an entry under color of title.

Prior Possession will not prevail as against claim of title derived from rightful owner, p. 595.

Cited in *Jones v. Memmott*, 7 Utah, 343, as overruled by *Payne v. Treadwell*, 16 Cal. 242.

Collateral Attack.—Decree is not subject to, where the recitals clearly show the suggestion of the death of the original plaintiff, and a continuance of the cause in the name of the executor, although there may be irregularity in this respect, p. 594.

Cited as authority in *Kittle v. Bellegarde*, 86 Cal. 561, in which case it is held that the substitution of the executor as plaintiff does not require an amendment of the complaint, though all subsequent proceedings should be in the name of the substituted party. So in *Brandt v. Albers*, 6 Neb. 506, holding that the failure of the clerk to change the title of the case accordingly is not fatal to the judgment subsequently rendered, and that the mistake may be remedied on motion, even after judgment. Referred to in *Gregory v. Haynes*, 21 Cal. 446.

General Citations.—In *Clark v. Hornthal*, 47 Miss. 497, construction of wills; 60 Am. Dec. 616, note, prior possession as evidence of title.

13 Cal. 596-598. **SMITH v. SPARROW.**

Bill in equity to enjoin the collection of a note, or to cancel it,

simply averring that the complainant has a good defense to the note, is insufficient, p. 597.

Approved as authority in *Shain v. Belvin*, 79 Cal. 263, holding that the circumstances which show a right to equitable relief should be averred; *Ada Co. v. Bullen Br. Co.*, 5 Idaho, 97, 196, denying equity jurisdiction to decree cancellation of county warrants illegally issued, as under Revised Statutes, section 4928, county has legal remedy.

13 Cal. 598-599. **LIENING v. GOULD.**

Pleadings in justices' courts are not required to be in any particular form, p. 599.

Approved in *Ancker v. McCoy*, 56 Cal. 526, sustaining sufficiency of complaint; and so in *Lataillade v. Santa Barbara Gas Co.*, 58 Cal. 5.

13 Cal. 599-605. **FAIRCHILD v. CALIFORNIA STAGE COMPANY.**

Common Carriers.—In suits against, damages for pain of mind are recoverable, p. 601.

Examined in *Johnson v. Wells, Fargo & Co.*, 6 Nev. 233, 234, in which case it is held error to instruct the jury in estimating damages to take into consideration the plaintiff's pain of mind," as distinct from his bodily suffering. Cited in 7 Am. St. Rep. 535, note on subject, collecting the authorities.

Same.—Proprietors of stage coaches are held to extraordinary diligence and care, and are liable for the slightest neglect, p. 602.

Ruling approved in *Jamieson v. Railroad Co.*, 55 Cal. 598; *Treadwell v. Whittier*, 80 Cal. 585, 587; S. C. 13 Am. St. Rep. 185, 186, case involving responsibility of operator of elevator; *Ryan v. Gilmer*, 2 Mont. 522; S. C. 25 Am. Rep. 748, 750; *Kennon v. Gilmer*, 5 Mont. 271; *Taylor v. Grand Trunk Ry. Co.*, 48 N. H. 316; S. C. 2 Am. Rep. 234; and *Sears v. Street Ry. Co.*, 6 Wash. St. 235.

Same.—In case of injury, the presumption, *prima facie*, is, that it occurred by the negligence of the coachman, p. 604.

Ruling approved in *Lawrence v. Green*, 70 Cal. 420; S. C. 59 Am. Rep. 430, break of wheel of stage coach; *Wall v. Livezey*, 6 Colo. 473; *Condy v. Railroad Co.*, 85 Mo. 86; *Dougherty v. Railroad Co.*, 9 Mo. App. 481; and *Ryan v. Gilmer*, 2 Mont. 525, 526. And cited, discussing the subject, in 43 Am. Dec. 355, 363, note; 62 Am. Dec. 682, 688, note; 64 Am. Dec. 521, note; 50 Am. Rep. 558, note.

13 Cal. 606-608. **CANFIELD v. BATES.**

Pleadings.—Granting or refusing amendment of, is a matter resting in the discretion of the court, p. 608.

Cited as authority in *Buddee v. Spangler*, 12 Colo. 222, relative to amendment of answer.

13 Cal. 609-619. **KELSEY v. ABBOTT.**

Party made defendant in foreclosure, who claims some interest in the land, and sets up, as a full defense, a tax title, cannot object afterward that equity has no jurisdiction over tax title, p. 616.

Cited in *Pancoast v. Insurance Co.*, 79 Ind. 177, holding that a mortgagor, with covenants for title, is estopped from pleading that he had, when the mortgage was executed, no title to the mortgaged premises. So in *Hefner v. Insurance Co.*, 123 U. S. 754, holding that a court of equity, in a foreclosure suit, may permit a person, to whom the land has been sold and conveyed for nonpayment of taxes assessed after the date of the mortgage, to be made a party, and may determine the validity of his title. Cited, discussing the question, in *King v. Mason*, 89 Am. Dec. 434, 435, note; 68 Am. St. Rep. 360, note.

An assessment for taxes must be made against the owner, when known, p. 617.

Cited in *Weinreich v. Hanley*, 121 Cal. 659, holding assessment void under Political Code, section 3461; *State v. Ernst*, 26 Nev. 127, order of board of equalization to assessor to add to certain party's assessment name of certain company, and to add certain property to assessment of that person and the company, is void where there was evidence that property belonged to third person; *People v. Sneath*, 28 Cal. 615, holding that an assessment of the personal property of a former member of a firm made to the firm after its dissolution is void. So in *Grotefend v. Ultz*, 53 Cal. 667, holding that an assessment to "D. B. M. and all owners and claimants known or unknown" is void; and so in *Grimm v. O'Connell*, 54 Cal. 523; likewise to same effect, in *Blatner v. Davis*, 32 Cal. 332; *Lake County v. Sulphur Bank etc. Min. Co.*, 66 Cal. 21; and *Emeric v. Alvarado*, 90 Cal. 465. So in *Pearson v. Creed*, 69 Cal. 539, holding that an assessment in the name of a decedent made prior to amendment of 1880 to section 3628 of the Political Code, is void.

Same.—Assessment must be certain as to the person taxed, amount of tax, and the property. Strict conformity with the law is required, p. 619.

Ruling affirmed in *People v. Sneath*, 28 Cal. 615; *Smith v. Davis*, 30 Cal. 538; *Crawford v. Schmidt*, 47 Cal. 617, uncertainty as to person; *Hellman v. Los Angeles*, 147 Cal. 658, where bonds of specific kind were described in ordinance making levy as being bonds of previous year, in which no bonds were issued, levy is void, and ordinance not correctable by averment that bonds issued ten years prior to date described in levy; *People v. Mahoney*, 55 Cal. 289, insufficient description of property; and approved to same point in *Tilton v. Railroad Co.*, 3 Sawy. 24. So approved generally as sustaining the doctrine stated, in *Roughkot v. Quick*, 34 La. Ann. 126; *Huntington v. Railroad Co.*, 2 Sawy. 508; and *Young v. Joslin*, 13 R. I. 678.

Same.—If the owner of land does not pay the taxes assessed thereon, the party in possession must pay, p. 619.

Explained in *Brown v. Winter*, 14 Cal. 34, as simply maintaining the doctrine that a party in possession and bound to pay money due for taxes, and failing to do so, and buying in the property at a sale thereof, cannot hold it as against the assessed, for whom he is trustee; and cited as authority to this effect in *McMinn v. Whelan*, 27 Cal. 318; *Bernal v. Lynch*, 36 Cal. 146; *Barrett v. Amerein*, 36 Cal. 326; *Garwood v. Hasting*, 38 Cal. 223; *Reily v. Lancaster*, 39 Cal. 356; and *Christy v. Fisher*, 58 Cal. 259, in all of which cases the rule is asserted that a party in possession, whose duty it is to pay the tax, shall derive no advantage from a sale for the tax, which he ought to have paid without a sale. Ruling stated approved in *Wambole v. Foote*, 2 Dak. Ter. 27, and *Battin v. Woods*, 27 W. Va. 67. Cited in *Stearns v. Hollenbeck*, 38 Iowa, 551, holding that one in possession claiming title acquires no additional right by a tax deed, if the taxes were a lien upon the land; and in *Curtis v. Smith*, 42 Iowa, 671, holding that any one may purchase at a tax sale who has no interest in the property sold, and is under no obligation to pay the taxes thereon. *Blake v. Howe*, 15 Am. Dec. 685, 686, 690, note, discussing the subject at length; note to *Cone v. Wood*, 75 Am. St. Rep. 250, 251, on purchase of tax titles.

General Citations.—In *People v. Seymour*, 16 Cal. 344; S. C. 76 Am. Dec. 526, discussing subject of taxing power of the state. *Bender v. King*, 111 Fed. 67.

13 Cal. 620-621. **KNOWLES v. JOOST.**

Mechanic's Lien.—Under act of 1856, owner of building is not liable to materialmen until notice served on him, and then only to the extent of the sum due the contractor at the date of the notice, p. 621.

Cited as authority, construing act of 1858, in *McAlpin v. Duncan*, 16 Cal. 127. So in *Kellogg v. Howes*, 81 Cal. 175, and approved as applicable to cases where there is a valid contract between the owner and contractor. Also approved in *Hunter v. Truckee Lodge*, 14 Nev. 42, construing the Nevada statute. Distinguished in *Colter v. Freese*, 45 Ind. 110, the provisions of the Indiana statute differing as regards notice.

13 Cal. 621-623. **TURNER v. MELONY.**

Office.—Question of eligibility of incumbent cannot be tried on mandamus, p. 623.

Cited as authority in *Satterlee v. San Francisco*, 23 Cal. 320, holding that such question can only be raised by a direct proceeding to contest the election, or by a writ of quo warranto.

13 Cal. 623-625. **KLINK v. COHEN.**

Ejectment must be brought against terre tenant, or party in possession, p. 624.

Approved as authority in *Easton v. O'Reilly*, 63 Cal. 308.

Same.—Defect of inconsistent defenses in answer must be reached by motion to strike out, or, in some cases, by demurrer, p. 625.

Approved in *Uridias v. Morrell*, 25 Cal. 37; *Buhne v. Corbett*, 43 Cal. 269; and *Conway v. Clinton*, 1 Utah, 222. Criticised in *People v. Lothrop*, 3 Colo. 449; and denied in *Butler v. Kaufback*, 8 Kan. 671. Cited as authority in *Clarke v. Lyon County*, 7 Nev. 83, holding that if advantage is to be claimed or reliance placed upon an implied admission in a pleading, it must be done before the opportunity for amendment has passed. So in 11 Am. Dec. 130, note, as authority that each plea should be permitted to stand or fall by itself.

13 Cal. 626-634. **CONROY v. WOODS.** 73 Am. Dec. 605.

Lien of Creditors.—Where one partner buys out his copartner, agreeing to pay the debts of the firm, the partnership property remains bound for firm debts, as before the sale, p. 631.

Principle of the decision approved and applied in *Durham v. Craig*, 79 Ind. 123. Examined in *Darby v. Gilligan*, 33 W. Va. 249; and *Thayer v. Humphrey*, 91 Wis. 290; S. C. 51 Am. St. Rep. 899, and the application of the rule limited to cases where the partnership is insolvent and the transfer made in bad faith. Denied, as being in conflict with the weight of authority, in *Schleicher v. Walker*, 28 Fla. 698. Cited, 83 Am. Dec. 705, note; *Thayer v. Humphrey*, 51 Am. St. Rep. 911, note, collecting and collating the authorities.

A lien by attachment enables a creditor to file a creditor's bill, without waiting for judgment and execution, p. 633.

Approved as authority in *Chicago etc. Bridge Co. v. Provision Co.*, 46 Fed. Rep. 589. Cited in *Aigeltinger v. Einstein*, 143 Cal. 611, 612, noted under *Heyneman v. Dannenberg*, 6 Cal. 376; note to *Ladd v. Judson*, 66 Am. St. Rep. 288, on creditor's bills; *Massey v. Gorton*, 90 Am. Dec. 289, extended note; *Benham v. Ham*, 34 Am. St. Rep. 856, note.

Same.—Fact that an individual creditor obtains judgment, issues execution, and levies on firm property, gives him no right to the property as against firm creditors, who have not yet obtained judgment, pp. 632, 633.

Ruling affirmed in *Burpee v. Bunn*, 22 Cal. 199; *Jones v. Parsons*, 25 Cal. 106, 107; *Whelan v. Shain*, 115 Cal. 329; and *Bullock v. Hubbard*, 23 Cal. 501; S. C. 83 Am. Dec. 131, applying the principle as between the creditors of several partnership firms. Approved as authority in *Powers v. Large*, 69 Wis. 625; S. C. 2 Am. St. Rep. 769, holding it to be wholly immaterial that the creditor of the individual obtained a lien first, so long as the property has not been sold before

the lien of the creditor of the firm attaches. Cited, 18 Am. Dec. 283, note; 83 Am. Dec. 131, note; 83 Id. 513, note; 95 Am. Dec. 519, note; 2 Am. St. Rep. 771, note; *Smith v. Smith*, 43 Am. St. Rep. 372, 379, extended note; *Russell v. Cole*, 57 Am. St. Rep. 443, note.

Creditor's Bill—Partnership.—In case of conflict between individual and firm creditors equity has jurisdiction, p. 634.

Cited as authority, granting equitable relief, in *Wehrman v. Conklin*, 155 U. S. 329; *Conway v. Stealey*, 44 W. Va. 173, holding sale to one partner of firm assets invalid as against firm creditors.

General Citations.—In 80 Am. Dec. 395, note, interest of one partner may be levied on to satisfy individual debt; 80 Id. 533, note, partnership property is primarily subject to firm debts. Referred to and distinguished in *Reddington v. Waldon*, 22 Cal. 187, holding that where, on appeal from a judgment in favor of defendant, error is disclosed in the admissions on the trial of improper evidence in defendant's favor, the judgment will be reversed and a new trial ordered without considering whether or not the plaintiff proved a case entitling him to relief.

13 Cal. 634-635. WOODBURY v. BOWMAN.

Effect of Appeal is to suspend the judgment for all purposes, and as evidence upon questions at issue, even between the parties, p. 635.

Cited in *People v. Gibbs*, 98 Cal. 665, holding judgment so suspended not admissible in evidence between parties; *Di Nola v. Allison*, 143 Cal. 112, holding judgment not admissible in evidence pending appeal although execution not stayed; *McGarrahan v. Maxwell*, 28 Cal. 91, holding that an appeal from a judgment of a federal court, affirming a survey of a Mexican grant of land, destroys the value and effect of the judgment as evidence during the pendency of the appeal. So in *Murray v. Green*, 64 Cal. 369; *People v. Treadwell*, 66 Cal. 401, case of an appeal from the judgment of a justice's court to the superior court; *Harris v. Barnhart*, 97 Cal. 550; and *People v. Beevers*, 99 Cal. 290. Approved in *Glenn v. Brush*, 3 Colo. 35; *Creighton v. Keith*, 50 Neb. 814; *Sharon v. Hill*, 11 Sawy. 305, 370, 371; S. C. 26 Fed. Rep. 347, 391; and *Sharon v. Terry*, 13 Sawy. 422; S. C. 36 Fed. Rep. 361. Cited in *Ketchum v. Thatcher*, 12 Mo. App. 188, holding that a judgment appealed from, with supersedeas, will not, pending the appeal, support a plea of *res adjudicata*. Examined in *Gilmore v. H. W. Baker Co.*, 14 Wash. St. 55, holding that an appeal pending will not prevent action upon the judgment in the lower court, unless the appellant has filed a supersedeas bond as provided by the statute. *Smith v. Smith*, 134 Cal. 119.

13 Cal. 637. HANCOCK DITCH CO. v. BRADFORD.

Nonsuit may be taken by plaintiff at any time before the jury retires, there being no counterclaim, p. 637.

Commented on in *Brown v. Harter*, 18 Cal. 77, holding that the plaintiff cannot take a nonsuit after the case has been finally submitted and the jury has retired. So, to the same effect, in *State v. Scott*, 22 Neb. 640. Cited in *Beals v. W. U. Tel. Co.*, 53 Neb. 602, affirming right of voluntary dismissal under local statute; *Goldtree v. Spreckels*, 135 Cal. 668-672, but denying right to dismiss after order sustaining demurrer without leave to amend; *Hopkins v. Superior Court*, 136 Cal. 553, holding payment of adversary's costs not essential prerequisite; *Westbay v. Gray*, 116 Cal. 667, holding that where an order of submission of a cause has been set aside and leave given to amend the pleadings, the court may grant a dismissal of the cause without prejudice to another action. So in *Sheldon v. Gunn*, 56 Cal. 588, case of dismissal of complaint in intervention; *Burns v. Rodefer*, 15 Nev. 63, nonsuit after plaintiff's evidence stricken out. Approved in *Denver etc. R. Co. v. Copley*, 9 Colo. 153.

13 Cal. 638-639. **SKINKER v. FLOHR.**

Evidence.—Affidavit by party to suit that the original deed is "not in his possession, or under his control," is sufficient to admit in evidence a duly certified copy from the recorder's office, p. 638.

Approved in *Hicks v. Coleman*, 25 Cal. 129; *S. C. 85 Am. Dec. 109*; *Landers v. Bolton*, 26 Cal. 413; and *Hurlbutt v. Butenop*, 27 Cal. 55.

13 Cal. 640-643. **BRIDGES v. PAIGE.**

Pleading.—In an action by an attorney on a quantum meruit for professional services, anything showing that the services were not of the value claimed may be given in evidence under the issue of value, p. 641.

Approved in *Hawkins v. Borland*, 14 Cal. 415, holding that where the plaintiff avers that defendant is indebted to him for goods sold and delivered, and the answer denies the averment, the defendant may show anything disproving the contract as averred. Principle of the decision likewise approved in *Foltz v. Cogswell*, 86 Cal. 550, 551; *Gates v. Newman*, 18 Ind. App. 409; *Goble v. Dillon*, 86 Ind. 336; *S. C. 44 Am. Rep. 315*; and *Jacobus v. Wood*, 84 Ga. 640.

13 Cal. 643-649. **PFEIFFER v. RIEHN.**

Homestead.—Validity of mortgage of homestead executed by husband and wife, sustaining, p. 649.

Cited in *Connecticut Mut. L. Ins. Co. v. Jones*, 1 McCrary, 391; *S. C. 8 Fed. Rep. 305*, asserting power of husband and wife in Missouri to mortgage or sell the homestead.

Decree in Equity is not vitiated because based on the verdict of a jury, although it might have been made without a jury, p. 649.

Cited in *Londoner v. People*, 15 Colo. 570.

VOLUME XIV.

By JOSEPH A. JOYCE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

14 Cal. 9-12. THORNTON v. HOOPER.

Constitutional Law.—The act of 1858 authorizing the commissioners of the funded debt to purchase stock or bonds issued by them at a premium of five per cent is constitutional, although the Funding Act of 1851 declared that no stock should be purchased by them at a price higher than par. Such act of 1858 was beneficial to the bondholders and did not impair the security provided for the payment of the funded debt. The act of 1851 was a law as well as a contract; some of its provisions were in the nature of a law, and so far as it did not impair the obligations of a contract it could be amended, pp. 10-12.

Cited, *Babcock v. Middleton*, 20 Cal. 658, construing the act of 1851 and quoting at length from the principal case (pp. 11, 12), holding that such act constituted a contract between the city of San Francisco and its creditors, the obligation of which could not be impaired by a subsequent modification or repeal of the act, but that the act of 1862 authorizing the commissioners to compromise and settle certain claims to real estate and convey the same was not unconstitutional; *City of Richmond v. Richmond etc. R. R. Co.*, 21 Gratt. 617, holding that where a state legislature authorizes a city to borrow money, issue bonds, and tax all property in the city to pay them, this is not a contract securing to the city the absolute power of taxation beyond the control of the legislature; *Smith v. City of Appleton*, 19 Wis. 472, construing an act to authorize the city to exchange bonds with its bondholders and forbidding the issue of bonds except in payment of the bonded debt. This last section was held to constitute a material element of a new contract when accepted and new bonds issued and as such that it was not the subject of legislative repeal or enactment so as to impair the security of creditors without their consent.

14 Cal. 12-18. ATTORNEY GENERAL v. SQUIRES.

Office.—Legislature having vested certain duties in a public officer and allowed compensation therefor may take these duties and fees from the office before the expiration of the term and confer them

upon another officer, although the office is a constitutional one, pp. 15, 17.

Cited, *Cohen v. Wright*, 22 Cal. 319, to the point that the legislature may destroy an office during the term of an incumbent. This case determined the right to disbar an attorney, *Miner v. Solano Co.*, 26 Cal. 118, holding that the legislature may change the fees of a justice of the peace at any time during his continuance in office; *People v. Banvard*, 27 Cal. 475, holding that the legislature may shorten the term of a county treasurer; *Mitchell v. Crosby*, 46 Cal. 100, where it is declared that the collection of poll, license, or any taxes may be transferred from one to another class of officers by the legislature; *Miller v. Kister*, 68 Cal. 144, to the same point as the principal case in affirmance; *Pennie v. Reis*, 80 Cal. 269, also affirms the rule in connection with the law creating a police, life, and health insurance fund out of a part of the monthly salaries of police officers of San Francisco; *Ford v. Harbor Commrs.*, 81 Cal. 26, 27, to the point that an office created by the legislature under the constitution may be destroyed during the term of the incumbent. This case related to wharfingers and collectors appointed by the state harbor commissioners. *Lane v. Kolb*, 92 Ala. 641, to the point that subject to constitutional provisions limiting the legislative authority all offices are subject to the legislative will and with such exception there is no vested right in the office or its salary, and both the time may be shortened and the salary diminished; *Oldham v. Mayor etc. of Birmingham*, 102 Ala. 365, holding that the power to create includes the power to abolish an office; *People ex rel. v. Van Gaskin*, 5 Mont. 366, 367, quoting from the principal case (p. 17) with approval and applying the rule to an act vacating the office of county commissioners; *Denver v. Hobart*, 10 Nev. 31, where the rule was applied to the lieutenant governor as ex-officio warden of the state's prison; extended note, 25 Am. Dec. 703; *Reals v. Smith*, 8 Wyo. 173, sustaining similar local statute.

General Citation.—*People v. Supervisors of Santa Barbara Co.*, 14 Cal. 103, where it is said: "It is not necessary to decide the question of the constitutionality of the twentieth section of the act creating a board of supervisors (Wood's Digest, 694; Stats. 1855, p. 51), though it is difficult to see how it conflicts with the constitution." *State v. Evans*, 166 Mo. 357.

14 Cal. 18-25. JACKSON v. FEATHER RIVER W. CO.

On Appeal, court will look only to errors assigned by appellant, p. 21.

Cited, *Maier v. Swift*, 14 Nev. 332, following the same rule.

Parol Sale of Mining Claim with delivery of possession is valid, p. 22.

Cited, *Gatewood v. McLaughlin*, 23 Cal. 179; *Antoine Co. v. Ridge*

Co., 23 Cal. 222; *Patterson v. Keystone M. Co.*, 23 Cal. 576, in express affirmance; *Patterson v. Keystone M. Co.*, 30 Cal. 363, states that such was the rule prior to statute of 1860, and the effect of that statute was discussed, and it was held to apply only to gold claims until the amendment of 1863, when it applied to all mining claims; *Betz v. People's Bldg. etc. Assn.*, 23 Utah, 605, when plaintiff does not appeal he cannot obtain review of ruling against him though he excepted when ruling made.

Cross-examination cannot go beyond the subject matter of the evidence in chief, but it ought to be allowed a very free range within it, and witness may be sifted as to every fact touching the matters to which he testifies, so that his temper, learning, relations to the parties and the cause, his intelligence, the accuracy of his memory, his disposition to tell the truth, his means of knowledge, his general and particular acquaintance with the subject matter may be fully tested, p. 24.

Cited, *Aitken v. Mendenhall*, 25 Cal. 213, affirming the rule confining the cross-examination to the subject matter in chief; *Harper v. Lamping*, 33 Cal. 648, quoting in full the rule of the principal case, and questions were permitted calculated to illustrate witness's attitude to the parties, even though not strictly cross-examination; *People v. Lee Ah Chuck*, 66 Cal. 667, where the defendant was permitted to cross-examine to show witness' hostility to the accused; *Watrous v. Cunningham*, 71 Cal. 32, holding that if part of a conversation is testified to in chief the entire conversation is admissible on cross-examination; *People v. Ebanks*, 117 Cal. 665, to the general point that the cross-examination being within the rules of the court in prior decisions, there is no ground of reversal; *Resurrection etc. Min. Co. v. Fortune etc. Min. Co.*, 129 Fed. 674, 676, applying rule in action of trespass for removal of ore where boundaries and survey were in dispute; *Whipple v. Preece*, 24 Utah, 372, in action for conversion of property sold under execution against plaintiff and another, where plaintiff testified that he was sole owner, extent of cross-examination to ownership and possession fraudulent is in discretion of court; *Rush v. French*, 1 Ariz. Ter. 135, where the court adopts rules declared to be in substantial accordance with the practice in California; *Wendt v. St. P. M. & O. Ry. Co.*, 4 S. Dak. 484, quoting from the principal case (p. 24) as being the true rule; *Ferguson v. Rutherford*, 7 Nev. 390, affirming the rule of the principal case; *Buckley v. Buckley*, 12 Nev. 441, in approval of the rule; *State v. Henderson*, 29 W. Va. 162, quoting from the principal case (p. 24) in approval and applied to a refusal to permit a question to witnesses on cross-examination as to whether they were indebted to the prosecuting witness.

Every Error of the Court Below is prima facie an injury to the party against whom it is made, and the other party must show clearly that no hurt was or could have been done by the error, p. 25.

Cited, *Carpentier v. Williamson*, 25 Cal. 167, to the same point, quoting from the principal case (p. 25); so, also, in *Rice v. Heath*, 39 Cal. 612; *Buckers Irr. Co. v. Platte Valley Irr. Co.*, 28 Colo. 191, ruling that burden of proof to show stream was tributary, in action to restrain diversion of waters from source alleged to be tributary to stream from which plaintiff was entitled to prior appropriation, was on defendant, is erroneous. *Burdick v. Haggart*, 4 Dak. 18, holding that error is prima facie an injury; *Territory v. Keyes*, 5 Dak. Ter. 258, in dissenting opinion, quoting from the principal case (p. 25) to the same point; *State v. Security Bank*, 2 S. Dak. 546, quoting from the principal case (p. 25) and so holding in effect.

14 Cal. 25-29. **GALE v. TUOLUMNE WATER CO.**

Amendment of Complaint after demurrer sustained, plaintiff waives the error, if any, in the rulings of the court, p. 28.

Cited, *Ganceart v. Henry*, 98 Cal. 283; *Brittan v. Oakland Bank of Savings*, 112 Cal. 2; *Perkins v. Davis*, 2 Mont. 474; *Collier v. Ervin*, 3 Mont. 144, all in express affirmance.

Objection to the Want of Answer to an amended complaint must be taken below. Plaintiff cannot go to trial and after verdict against him object for the first time in the supreme court, p. 28.

Cited, *Wedel v. Herman*, 59 Cal. 516, in affirmance of the principle holding that one cannot on appeal from the judgment avail himself of defects in the complaint which might have been reached and corrected below; *Payne v. Davis*, 2 Mont. 384, affirming the principle as to a waiver of irregularities in taking an appeal from a probate court by proceeding to trial after motions to dismiss; *Beck v. Beck*, 6 Mont. 287, to substantially the same effect as the principal case and under similar conditions.

14 Cal. 29-31. **PEOPLE v. SAVIERS.**

Indictment may give a statement of the facts constituting the offense in ordinary and concise language and in such a manner as to enable a person of ordinary understanding to know what is intended. It must be direct and certain as to the party charged, the offense charged, and the particular circumstances of the offense when necessary to constitute a complete offense, p. 30.

Cited, *People v. Garcia*, 25 Cal. 533, to the point that it is sufficient if the circumstances of its commission are fully set out; *People v. Shaber*, 32 Cal. 38, where the offense of burglary was charged with all the particularity of the two hundred and thirty-fifth section of Criminal Practice Act; *People v. Nelson*, 58 Cal. 106, in affirmance of the principal case in an indictment for burglary; *State v. Hanscom*, 28 Oreg. 432, affirming the rule.

Indictment may follow language of statute even if new offense is thereby created, pp. 30, 31.

Cited in the cases noted under the preceding heading herein in affirmance as to following the statute; also followed in *Foster v. Territory*, 1 Wash. St. 413; *State v. Williamson*, 22 Utah, 254, sustaining indictment for rape. *United States v. Cannon*, 4 Utah, 130, 146, also affirms both points of the principal case; extended note, 94 Am. Dec. 255.

14 Cal. 35-38. **GARFIELD v. KNIGHTS F. & T. M. W. CO.**

Evidence.—An agent is empowered to act for the principal, but has no power to make admissions to bind him unless such admissions are part of the *res gestae*, p. 37.

Cited, *Birch v. Hale*, 99 Cal. 301, quoting the same rule from the principal case and so holding; notes, 12 Am. Dec. 326; 54 Am. Dec. 308; 70 Am. Dec. 655.

14 Cal. 38-39. **CASTRO'S EXECUTORS v. ARMESTI.**

Appeal.—Exceptions cannot be gathered from the clerk's minutes, but must be embodied in a bill, p. 39.

Cited, *Spence v. Scott*, 97 Cal. 182, as supporting the point that the question whether the trial court erred in striking out parts of an answer cannot be presented on appeal from a judgment without a bill of exceptions; *Lobdell v. Hall*, 3 Nev. 530, in affirmance of the principal case that the rule is well settled that an exception cannot be shown from such entries alone.

14 Cal. 39-42. **THOMPSON v. LYON.**

Pleas in Abatement are not favored and must be proven as averred, p. 42.

Cited, *Larco v. Clements*, 36 Cal. 134; *Dyer v. Scalmanini*, 69 Cal. 639; *Ontario State Bank v. Tibbits*, 80 Cal. 70; *California Sav. & Loan Soc. v. Harris*, 111 Cal. 136, all in express affirmance and asserting the rule also that such pleas must be strictly construed; *Green v. Underwood*, 86 Fed. 430, 57 U. S. App. 540, holding plea defective in substance.

14 Cal. 43-47. **PALMER v. WOODBURY.**

Quo Warranto—Office.—Allegation of possession of office by the defendant without lawful authority is a sufficient averment of intrusion and usurpation, p. 45.

Cited in *People v. Reclamation Dist.*, 121 Cal. 526, sustaining complaint; *People v. Los Angeles*, 133 Cal. 341, holding complaint insufficient and discussing use of different forms; *People v. Cohn*, 7 Utah, 355, sustaining joinder of relators under local statute; *People v. Superior Court of S. F.*, 114 Cal. 477, in dissenting opinion in a discussion concerning the effect of a failure of the defendant to make a plea other than an oral one. This case was one of usurpation of an office by the insurance commissioners; *Town of Enterprise v. State ex rel.*, 29 Fla.

140; *People ex rel. v. Cooper*, 139 Ill. 488, both cases following the rule of the principal case; *Bullard v. Northern Pac. R. R. Co.*, 10 Mont. 168, to the point that if the usurpation by defendant is sufficiently stated the complaint must stand; *People v. Clayton*, 4 Utah, 436, in affirmance of the principal case; also deciding that the defendant must establish his title or suffer judgment.

Same.—If the complaint is not sufficient in such respect, the defect must be reached by special demurrer, p. 45.

Cited, *People v. Superior Court of S. F.*, 114 Cal. 477, in dissenting opinion in a case holding that where there was an oral plea of "not guilty" mandamus would not lie to compel the entry of judgment by default for want of a written answer to the complaint; *People v. McIntyre*, 10 Mont. 168, holding that if the complaint is sufficient it must stand whether relator's rights are well pleaded or not; *People v. Clayton*, 4 Utah, 436, declaring that defendant must establish his title or suffer judgment; extended note, 30 Am. Dec. 51, to the point of the sufficiency of complaint and demurrer; see, also, next heading herein.

Office.—Applicant for must have prescribed qualifications, p. 46.

Cited in *Ward v. Crowell*, 142 Cal. 589, but held not to apply to county surveyor under statutes construed.

Board of Pilot Commissioners must appoint pilots in the manner provided by law; such board cannot transcend the powers conferred upon it by the legislature, pp. 45, 46.

Cited, *Flynn v. Abbott*, 16 Cal. 366, to substantially the same effect, but the case also decides (although the principal case is not cited to such point) that a general demurrer will not reach the averments in the complaint.

Pilot.—Quo warranto lies to test the right to be a pilot, p. 46.

Cited, extended note, 30 Am. Dec. 47, considering also the point, against the usurpation of what other offices the information lies.

General citation: *Petterson v. Board of Pilot Commrs.*, 24 Tex. Civ. App. 42.

14 Cal. 47-53; 73 Am. Dec. 610. **TAFFTS v. MANLOVE.**

Writ of Attachment is only effectual to change the title of goods from the time of the levy, p. 50.

Cited, note, 5 Am. St. Rep. 41, to the same point.

Attachment.—Levy may be good as against defendant, although not good as to third persons. This distinction rests rather upon estoppel or waiver by acts of defendant than upon any difference in the legal requisites of a levy, p. 45.

Cited, extended note, 21 Am. Dec. 679.

Attachment.—Levy upon goods in a store cannot be made by standing at the store door with no writ or memorandum of the levy. The levy only takes place from the time of seizing, taking possession or attaching the goods, pp. 50-51.

Cited in *People v. Sylva*, 143 Cal. 63, noted under *Dutertre v. Driard*, 7 Cal. 549; *Moore v. Brown*, 107 Ga. 142, but holding constructive seizure shown under facts stated; *Bolling & Son v. Vandiver & Co.*, 91 Ala. 380, holding that to constitute a valid levy on personal property it must be so described as that it can be claimed and taken possession of and it must be brought under the dominion of the levying officer; *State ex rel. v. Harrington*, 28 Mo. App. 292, to the same effect as the principal case; extended notes, 21 Am. Dec. 678, as to what is necessary to attach personalty; 39 Am. Dec. 607, as to attachment liens, etc.; note, 90 Am. Dec. 381, as to what constitutes a valid levy.

Insolvency.—Completed levy of attachment is not divested by insolvency proceedings, but the levy cannot be completed after petition is filed and a restraining order signed, though not served, pp. 51, 52.

Cited, *Cerf v. Oaks*, 59 Cal. 134, where the order to stay proceedings is declared to operate of its own force and no notice is required to be given of it to the sheriff; *Berryman v. Stern*, 14 Nev. 418, but only noted generally in a case regarding the preservation of an attaching creditor's lien and its enforcement notwithstanding an order staying proceedings against an insolvent; *State v. District Court*, 18 Nev. 288, in a discussion concerning the point that an order in insolvency staying proceedings did not divest the district court of its authority in the matter of an appeal from the judgment of a justice's court.

14 Cal. 54-59. **HASKELL v. MANLOVE.**

Execution Sale—Redemption.—Statutes construed, p. 57.

Cited in *Pollard v. Harlow*, 138 Cal. 392, but holding earlier statutes superseded by code provisions.

Creditor Seeking Statutory Redemption must comply strictly with the statute and must present the specified evidence as well as have a judgment, pp. 57, 58.

Cited, *Robertson v. Van Cleave*, 129 Ind. 228, holding that to entitle a holder of a sheriff's certificate to redeem he must show what the statute requires—the amount and date of the judgment, as well as the amount due and unpaid; *Webb v. Martin*, 18 Iowa, 544, but as having no application since a debtor to redeem from sale under execution is required to make no showing to establish his right. "He stands undeniably interested in the property and need not, as in the case of an encumbrancer, produce evidence of his judgment or lien and the amount thereof."

14 Cal. 59-73. **MERRITT v. JUDD.**

Fixture is anything annexed to the freehold. It may exist on public

land, and an engine or boilers firmly affixed to the ground of a quartz ledge used to work the ledge is a fixture or trade fixture, pp. 64-68.

Cited, *Pennybecker v. McDougal*, 48 Cal. 164, holding that a building set upon blocks and not annexed to the soil was personal property; *Fratt v. Whittier*, 58 Cal. 131; 41 Am. Rep. 255, holding that the gas fixtures and fittings, kitchen range, and boiler, a patent water filter, tanks, and mosquito screens passed by a deed of an hotel; *Roseville Alta M. Co. v. Iowa G. M. Co.*, 15 Colo. 32; 22 Am. St. Rep. 375, examining the principal case and holding that an engine and boiler with its attachments placed upon and securely attached to public lands of the United States to operate a mining claim was a part of the realty; *Brown v. Lillie*, 6 Nev. 248, to the point that a fixture must be affixed to the freehold; *Treadway v. Sharon*, 7 Nev. 42, where a steam boiler, engine, and machinery were firmly affixed to a foundation planted in the ground were held fixtures; *Potter v. Cromwell*, 40 N. Y. 294; 100 Am. Dec. 490, holding that the annexation of property for the purpose of permanent improvement of or use with realty makes it a fixture, and that a portable gristmill is a fixture as between a purchaser of the land at execution sale and a receiver in supplementary proceeding, where such mill is permanently affixed for use for the neighborhood; *Honeyman v. Thomas*, 25 Oreg. 542, holding that a derrick erected in a quarry by a tenant is a fixture; note, 38 Am. Dec. 376, that buildings, etc., placed on mortgaged premises are fixtures; note, 42 Am. St. Rep. 795, that a derrick in a quarry is a fixture.

Mining Claims are legal estates of freehold, with all the incidents thereof, for all practical purposes, if some doctrine of abandonment be excepted, p. 64.

Cited, *Hughes v. Devlin*, 23 Cal. 505, in affirmance, quoting from the principal case (p. 64); *Spencer v. Winselman*, 42 Cal. 482, also in affirmance, and also quoting the same language (p. 64). In this case it was held that the title to the possession of mining ground was not a subject for arbitration under section 380 of the Practice Act. *Smith v. Cooley*, 65 Cal. 48, in approval, holding, however, that the grant of an undivided interest in mining ground is not an estate which can be the subject of partition; *Gillett v. Gaffney*, 3 Colo. 358, declaring that the descendibility of such titles may be maintained where statutory provisions are wanting, upon the principle that courts knowing the social and political conditions of a country are bound to apply the principles of law and of enlarged reason to the new circumstances of a people. This was a case relating to title by occupancy of land subject to entry under acts of Congress and its descendibility and also its legal character of real estate; *Mt. Rosa etc. Co. v. Palmer*, 26 Colo. 62, 77 Am. St. Rep. 250, sustaining action to quiet title by mining locator; *Ames v. Ames*, 160 Ill. 600 (quoted in *Catlin Coal Co. v. Lloyd*, 176 Ill. 283), sustaining right of court in partition to separate ownership of realty and minerals. But see *Dunsmuir v. Port Angeles*

etc. Co., 24 Wash. 115, ruling aliter as to waterworks system when owners did not own land on which system was established; *Ames v. Ames*, 160 Ill. 601, to the point that mining estates are legal estates of freehold. This case was one of partition of separate estates in the mineral itself and the surface; *Roseville Alta M. Co. v. Iowa G. M. Co.*, 15 Colo. 31; 22 Am. St. Rep. 374, in the court's argument, to the same point; *Aspen M. etc. Co. v. Rucker*, 28 Fed. Rep. 222, declaring that such mining claims are a "real estate title. Such a property passes to the heir, is subject to seizure and sale, must be conveyed by deed, and is subject to partition."

Fixtures.—Tenant's right to remove fixtures ceases with the actual termination of the tenant's right to consider himself a tenant, pp. 68, 69.

Cited, *Cromie v. Hoover*, 40 Ind. 61, to the same effect; *Sweet v. Myers*, 3 S. Dak. 329, also so declaring; extended note, 11 Am. Dec. 242; note, 42 Am. St. Rep. 795, that a derrick in a quarry is removable at the pleasure of the tenant who erected it.

Same.—Tenant's Right to remove fixtures may be regulated by agreement between the parties, p. 70.

Cited, *Cromie v. Hoover*, 40 Ind. 61, in affirmance; extended note, 11 Am. Dec. 244.

Same.—If the Lease is Renewed, the lessee's right to fixtures ceases, and this rule applies to other agreements which terminate a possession under the lease, pp. 71, 72.

Cited, *Marks v. Ryan*, 63 Cal. 110, affirming the rule in a case of several successive leases; *Carlin v. Ritter*, 68 Md. 488; 6 Am. St. Rep. 474, in affirmance; *Watriss v. First Nat. Bank of Cambridge*, 124 Mass. 578; 26 Am. Rep. 699; *Sanitary District v. Cook*, 169 Ill. 191, 192; 61 Am. St. Rep. 164, 165, 167, also following the rule. This last case is also noted, *Marks v. Ryan*, 63 Cal. 110; and *Carlin v. Ritter*, 68 Md. 488; 6 Am. St. Rep. 474. Denied, *Kerr v. Kingsbury*, 39 Mich. 154, 155, 33 Am. Rep. 365, a case of renewal of lease from a new landlord, and it was held that erections made by the lessee did not come within a subsequent mortgage of the premises, although not removed by the lessee during the term. This last case is noted in *Marks v. Ryan*, 63 Cal. 110; extended note 11 Am. Dec. 243. *Wadman v. Burke*, 147 Cal. 354, where lessee for years, who has put in trade fixtures accepts renewal under different term which is silent as to fixtures and covenants to repair and surrender premises at end of new term in good condition, may be enjoined from removing fixtures.

Fixtures.—Mortgage passes all fixtures annexed subsequently to the mortgage, and as between the mortgagor and mortgagee fixtures for trade cannot be removed by the mortgagor, p. 72.

Cited, *Cavis v. Beckford*, 82 N. H. 231, 13 Am. St. Rep. 555, to the point that as between the mortgagor and mortgagee of a mill a cer-

tain boiler and looms were fixtures; note, 38 Am. Dec. 376, that fixtures inure to the benefit of the mortgagee; *Dutro v. Kennedy*, 9 Mont. 107, applying the principle to the passing of the right to fixtures by a foreclosure of the mortgage.

Bond for Title is in effect a mortgage at common law. The legal title is retained by the vendor and an equity vests in the vendee to have the legal title on compliance with the conditions, p. 73.

Cited, *Wells v. Francis*, 7 Colo. 415, to the same point, and holding that relation of the parties is that of mortgagor and mortgagee; extended note 4 Am. St. Rep. 705.

14 Cal. 73-76. **HANNA v. FLINT.**

Partnership.—A broker who contracts for a share of the profits of wheat sold is not a partner or joint owner; there is no partnership where a share of the profits is given as compensation merely, p. 75.

Cited in *Cadenasso v. Antonelle*, 127 Cal. 388, holding partnership not created by assignment of contract rights; *Sodiker v. Applegate*, 24 W. Va. 415; 49 Am. Rep. 255, holding that an agreement that an employee shall have an interest in the profits for services does not constitute a partnership; extended note 58 Am. Rep. 101, as to participation in profits for services being a test.

14 Cal. 76-81; 73 Am. Dec. 615. **MORRIS v. MORRIS.**

Divorce.—**Extreme Cruelty** is any conduct in one of the married parties which furnishes reasonable apprehension that the continuance of the cohabitation would be attended with bodily harm to the other, p. 79.

Cited, *Powelson v. Powelson*, 22 Cal. 360, with approval and adding also the factor of being dangerous to the physical safety; *Waldron v. Waldron*, 85 Cal. 256, where the court says that the probable object of enacting section 94 of the Civil Code was to affirm the principal case and the *Powelson* case (noted under this heading), "to the effect that extreme cruelty may be effected without as well as with physical violence and thus to settle the law on the point"; also cited *Id.* 266, 267, in dissenting opinion; *Holyoke v. Holyoke*, 78 Me. 411, where the court says: "Both a sound body and a sound mind are required to constitute health. Whatever treatment is proved in each particular case to seriously impair or to seriously threaten to impair either . . . endangers 'life, limb, and health,' and constitutes cause for divorce for" extreme cruelty; *Reed v. Reed*, 4 Nev. 398, 399, quoting from the principal case (p. 79), but it is held that "the rule as enunciated by *Morris v. Morris* furnishes no redress for that more refined brutality which inflicts its violence upon the mind. In our judgment, it is the effect and probable consequence of the misconduct complained of which should control the actions of the court more than anything else."

Extended note 29 Am. Dec. 674, 675; notes 81 Am. Dec. 92; 97 Am. Dec. 185; 17 Am. St. Rep. 319, 523; 29 Am. St. Rep. 127, 196; 32 Am. St. Rep. 163; 38 Am. St. Rep. 847; 45 Am. St. Rep. 468; 49 Am. St. Rep. 640; 65 Am. St. Rep. 69, 71, 75.

14 Cal. 81-85. **DARST v. RUSH.**

Appeal.—Nonsuit granted on the grounds that the allegations of the complaint were not sustained by the evidence does not necessitate a motion for new trial, p. 83.

Cited, *Sanford v. Duluth*, 2 N. Dak. 11, holding that errors of law appearing of record will be reviewed on appeal from a judgment without a motion for a new trial, when it appears that when the rulings were made which were assigned as error no findings of fact had been made in the trial court.

Nonsuit.—No statement on appeal containing the evidence on which a nonsuit was granted is necessary. It is sufficient to refer in the statement to the evidence, taken down by the clerk with the consent of the parties, filed and retained among the papers in the case, pp. 83, 84.

Cited, *Sharon v. Sharon*, 79 Cal. 643, holding that depositions on file may be made part of the statement by calling for them by the words "here insert" at the proper place and may be afterward inserted.

Pleading—Trespass.—In an action of damages for overflow, allegations of force are surplusage, the facts being clearly set out in the complaint, p. 84.

Cited, *Jackson v. Dines*, 13 Colo. 92, where the court says: "The complaint shows an entry by defendant without permission from plaintiffs upon their mining claim in their possession and being improved and developed by them with due diligence, and the doing of damage and injury to the soil and timber thereon and the filling up of the shaft and tunnel of the mine without leave of the plaintiffs. The possession, entry, and damage were sufficiently averred." *McFeters v. Pierson*, 15 Colo. 206; 22 Am. St. Rep. 391, where actual possession was held not necessary to maintain an injury to a mining claim, and the term "actual" in the complaint was rejected as surplusage.

General Citation.—*Herbert v. King*, 1 Mont. 479, where the court says: "It is undoubtedly true that in considering the correctness of the court below in granting a nonsuit this court will consider as proven every fact which the evidence tended to prove."

14 Cal. 85-90. **HACKETT v. MANLOVE.**

Mortgage of Chattels is good as between the parties, although the possession is not delivered and is only voidable at the instance of subsequent purchasers and bona fide creditors. It vests the legal title

in the mortgagee, subject to defeat on compliance with the conditions of the statute, p. 89.

Cited, *Moore v. Murdock*, 26 Cal. 526, to the point that the mortgagee of chattels holds the legal title of the mortgaged property; *Berson v. Nunan*, 63 Cal. 551, holding that the validity of such a mortgage does not depend upon a change of possession, that the title passes subject to the conditions and can only be diverted by the preformance thereof, and that the recording of the mortgage operates as a notice to creditors and subsequent purchasers and as a delivery and change of possession; *Adlard v. Rodgers*, 105 Cal. 332, to the point that such mortgage is good between the parties and those having notice, though it does not strictly conform to the statute; *Everett v. Buchanan*, 2 Dak. Ter. 264, commented on as deciding that the legal title vests in the mortgagee before the code in a discussion as to the character and effect of mortgages of real and personal property; *Edmonson v. Hyde*, 2 Sawy. 209; 7 Bank. Reg. 4, but only generally and to the point that a change of possession must be immediate under the statute of frauds, and a mortgage void at its inception, for want of such change of possession is not rendered valid as to creditors by a subsequent delivery before said creditor acquires his lien—that, being void originally, it does not become valid from the date of possession subsequently taken; *Pyeatt v. Powell*, 51 Fed. Rep. 554. In this case a mortgage was executed in Kansas and the mortgagor resided and the property was situate in Indian Territory, there being no registry law and no register there, and it was held that the registry laws of Kansas did not apply, and the court said: "Between the mortgagor and the mortgagee the mortgage was valid and binding in Kansas and elsewhere and without delivery of possession," and was also valid as to third parties.

Distinguished in *Ruggles v. Cannedy*, 127 Cal. 295, construing Civil Code, sections 2957, 3440.

Same.—Where one has possession of chattels mortgaged and they are seized by a person as creditor, an effort to show that such person was a mere collusive creditor is not collaterally impeaching a judgment, but is merely assailing the judgment or process for fraud, which may be done by one not a party, p. 90.

Cited, *Hogg v. Link*, 90 Ind. 356, declaring that a mortgagee may collaterally impeach a judgment affecting him entered by collusion, but not a judgment recovered through fraud practiced by the judgment plaintiff upon the judgment defendant, the mortgagor.

14 Cal. 91-93. *BUSENIUS v. COFFEE*.

Pleading—Ejectment.—Where the answer in reference to the allegation of entry and ouster denies that the defendants wrongfully and unlawfully entered and dispossessed the plaintiffs, it admits entry

and ouster, since in the absence of a denial in positive and unequivocal terms they are to be taken as true, p. 93.

Cited, *Bassett v. Enwright*, 19 Cal. 639, an action to recover street assessments, where, on the strength of the principal case, it was claimed that a material allegation as to the space formed by the junction of two streets was not denied in the answer, but it was held that the denial met the allegation and that if no material issue was formed it was because no material fact was directly alleged; *Woodworth v. Knowlton*, 22 Cal. 168, an action to recover personal property where the pleadings were verified and the complaint averred ownership and that the defendants "unlawfully and wrongfully seized and took said property into their possession from said plaintiff," etc. The answer denied "that he wrongfully and unlawfully seized, took, or carried away said property," etc., and the court said this was "no denial of the fact that he seized and took the property from the plaintiff; it is a mere denial that it was wrongfully or unlawfully done" and that the pleadings admitted the taking; *Landers v. Bolton*, 26 Cal. 418, where the pleadings were declared not to put in issue the material fact of the conveyance but only of a conveyance for money; *Richardson v. Smith*, 29 Cal. 532, where the court said: "The taking and detention of the property by the defendants were material and issuable facts which the plaintiff alleged were wrongful and done without his consent. The answer to this allegation is that they were not wrongful; but nothing is averred by the defendants in justification of the acts with which they are directly charged in the complaint and which for want of a traverse stand confessed; *Fish v. Redington*, 31 Cal. 195, holding that if several material facts are stated conjunctively in a verified complaint, an answer which undertakes to deny these averments as a whole as conjunctively stated is evasive and an admission of the allegation thus attempted to be denied; *Scovill v. Barney*, 4 Oreg. 290, holding that the answer must specifically deny each allegation of the complaint controverted or a denial thereof according to information and belief; *Salmon v. Olds*, 9 Oreg. 489, holding that a nonsuit will not be granted where a prima facie case has been made upon the pleadings and evidence.

Instructions.—Court will not undertake to determine to what extent the party excepting was prejudiced or whether prejudiced at all by refusal to give an instruction. The grossest injustice might be done if the court refused to interfere on the ground that the jury was not influenced by the error, and judgment will be reversed, p. 93

Cited, *Territory v. Keyes*, 5 Dak. Ter. 258, in dissenting opinion, quoting from the principal case (p. 93). In this case the court charged the jury: "Should this court make errors, it will not only be ready thus to correct, but there stands a higher court above that will protect the rights of the defendant," and this instruction was sustained.

14 Cal. 94-100. ROBINSON v. SMITH.

Note taken before maturity as collateral security for a pre-existing debt is not subject to equities, pp. 98, 99.

Cited, *Naglee v. Lyman*, 14 Cal. 454, in approval; *Frey v. Clifford*, 44 Cal. 342, noting the conflict of decisions and the rule in California, and applying it to a mortgagee who takes a mortgage as security for pre-existing debt; *Davis v. Russell*, 52 Cal. 616; 28 Am. Rep. 650, applying the rule to the transfer of a warehouse receipt; *Sackett v. Johnson*, 54 Cal. 109, in affirmance, the question being declared not to be an open one; *Straughan v. Fairchild*, 80 Ind. 600, affirming the rule; *Maitland v. Citizens' Nat. Bank*, 40 Md. 564; 17 Am. Rep. 628, where the question is fully discussed and the rule of the principal case adopted; *Fair v. Harvard*, 6 Nev. 310, citing numerous cases and examining the question at length, and holding that a note and mortgage for a pre-existing debt were valid; notes 9 Am. Dec. 273; 12 Am. Dec. 137; 68 Am. Dec. 321; extended note 14 Am. St. Rep. 583.

14 Cal. 101-102; 73 Am. Dec. 631. THE PEOPLE v. BALL.

Indictment for Larceny must set forth the particular denomination or species of coin and pieces, p. 102.

Cited, *People v. Green*, 15 Cal. 513, but held not applicable as in the citing case the indictment was held sufficient, although it did not allege the value of each particular coin of the United States alleged to have been stolen but the aggregate value was stated; *Barton v. State*, 29 Ark. 72, in approval, holding that the particular kind of money be specified; *Arnold v. The State*, 52 Ind. 283; 21 Am. Rep. 176, considering numerous cases and holding bad an indictment for robbery of bank bills which alleged the value of the bills but not their denomination; *State v. Tilney*, 38 Kan. 716, to the same effect as the principal case; *State v. Segermond*, 40 Kan. 109; 10 Am. St. Rep. 171, holding that an indictment for robbery was fatally defective which failed to allege any value of the property (money) taken nor give any excuse for want of a more particular description; *Williams v. State*, 5 Tex. App. 118, to the same effect as the principal case; *Wade v. State*, 35 Tex. Cr. 173, following substantially the same rule where the money was foreign money and the indictment for robbery; *Leftwich's case*, 20 Gratt. 721, following the same rule in an indictment for obtaining money under false pretenses; extended note, 51 Am. Dec. 235; notes 3 Am. St. Rep. 215; 10 Am. St. Rep. 174.

14 Cal. 103-106. ABILA v. PADILLA.

Probate Court.—Jurisdiction is obtained as to heirs who appear and move to dismiss and answer after motion overruled, even though no citation ever issued, p. 106.

Cited, *Curtis v. Underwood*, 101 Cal. 669, as being in line with the

doctrine that proof of service is necessary as to parties who appear (sec. 1306, Code Civ. Proc.); extended note, 60 Am. Dec. 358, fully reviewing the authorities.

14 Cal. 106-107. **JOHNSON v. ALAMEDA CO.**

Eminent Domain.—Compensation should precede or accompany the taking for public use, p. 107.

Cited, San Francisco etc. R. R. Co. v. Mahoney, 29 Cal. 117, declaring that the payment or tender of the money awarded is a condition precedent for entry for construction by a railroad company, but also holding that the time when the land is "taken" is not when the plat or survey is filed with the secretary of state, nor when the company enters for construction, so far as the assessed value of the land is concerned; Fox v. Western Pac. R. R. Co., 31 Cal. 548, holding that companies may enter land and proceed with the construction of their roads while proceedings for condemnation are pending and before compensation is paid upon security being given, and that the word "taken" has reference to the performance of the last act required to subject the title to the servitude; Martin v. Tyler, 4 N. Dak. 293, to the point that the principal case so decides under the old constitution, but the same rule is also followed under the constitution of North Dakota; note, 73 Am. Dec. 584, as citing Bensley v. Mountain Lake Water Co., 13 Cal. 306; 73 Am. Dec. 575; see Tyler v. Tehama Co., 109 Cal. 618; and Callahan v. Dunn, 78 Cal. 370.

14 Cal. 108-112. **SPARKS v. DE LA GUERRA.**

Sales under Will.—Construction.—An oral direction of a testator to executors to sell has effect under no law, pp. 110-112.

Affirmed in same case, 18 Cal. 678.

14 Cal. 112. **KINNEY v. OSBORNE.**

Quaere, Whether Defendant can Set Up fraudulent representations in bar of recovery of purchase price and still retain title, p. 114.

Approved in Cowen v. Harrington, 5 Idaho, 332, defendant cannot avoid payment of note given for property without first surrendering or offering to surrender property.

14 Cal. 117-120; 73 Am. Dec. 632. **CURTIS v. HERRICK.**

Presumption.—If the sheriff's return states that the officer served defendants with a certified copy of the complaint, it will be presumed that the copy was certified by the clerk, pp. 119, 120.

Cited, Brown v. Lawson, 51 Cal. 618, in affirmance.

14 Cal. 120-125. **PACHECO v. HUNSACKER.**

Jury.—Elisor may summon in action against sheriff, where no coroner appointed, p. 123.

Distinguished in *People v. Fellows*, 122 Cal. 238, holding appointment of elisor erroneous under Political Code, section 4192, unless sheriff and coroner both disqualified.

Sale of Growing Crops.—Where grain is cut and stacked on the premises and sold and possession thereof delivered, the vendee assuming possession, he is not bound to abandon the premises or carry the grain beyond them to protect it against the vendor's creditors, p. 124.

Cited, *Chaffin v. Doub*, 14 Cal. 386, where there was a mortgage of growing crops, and the mortgagees proceeded to gather and stack the hay, and it was not decided that a removal was necessary, but it was held that if it was, a reasonable time therefor should be allowed; *Lay v. Neville*, 25 Cal. 553, where it was held that the acts required to prevent such sale from being declared fraudulent for want of an immediate delivery and actual and continued change of possession depended upon the character and quantity of the property sold; *Davis v. McFarlane*, 37 Cal. 638; 99 Am. Dec. 343, holding that growing crops are not chattels requiring an immediate delivery and change of possession to validate the sale thereof; extended note, 97 Am. Dec. 348.

14 Cal. 125-126. **SHAFTER v. RICHARDS.**

Evidence.—An express admission in pleadings under oath is admissible in a subsequent action where the party is one of the parties to such record, p. 126.

Cited, *Gale v. Shillock*, 4 Dak. 189, where there was offered in evidence so much of the verified answer as admitted the execution of certain papers, and it was held clearly admissible and sufficient proof of their execution, although the answer was superseded by a supplemental answer; *Smith v. Gale*, 144 U. S. 525, to the point that if the answer admits the execution of an instrument set up in the declaration and claims its invalidity, such instrument is admissible in evidence.

14 Cal. 127-129. **MARS v. McKAY.**

Intervention in a suit already commenced is equivalent to the commencement of a suit within the Mechanics' Lien Act, and a suit to enforce a particular lien in a proceeding to enforce all the liens, p. 129.

Cited, *Sheldon v. Gunn*, 56 Cal. 587, holding that an intervenor against whom no relief is prayed may dismiss his complaint, though one of the plaintiffs has died and his successor is not substituted; *Elliott v. Ivers*, 6 Nev. 290, holding that the statute contemplates a disposition of the entire matter of such liens in one proceeding, and certain lien claimants having intervened in a suit to foreclose a mechanics' lien, the dismissal of the suit could not affect the right of the intervenors to an adjudication; *Skyrne v. Occidental M. & M. Co.*, 8 Nev. 231,

declaring that the plaintiff need not have brought a suit to foreclose any but his own lien, and then by pursuing the provisions of the statute he would have had the right to exhibit proofs as to the others: *Hunter v. Truckee Lodge*, 14 Nev. 30, where it is said: "It was intimated without being decided" in the principal case "that a lienholder would be barred of his right of action if he failed to file an intervention before the lapse of six months after filing his lien for record; but we fail to see any good reason for so holding; Title etc. *Co. v. Wrenn*, 35 Or. 69, 76 Am. St. Rep. 458, holding filing of answer by lien claimant equivalent to commencement of suit by him.

14 Cal. 129-130. ESTATE OF COOK.

Probate Law.—Decree ordering a claim to be paid on petition of an administrator is conclusive and cannot be collaterally attacked. p. 130.

Cited, *Irwin v. Scriber*, 18 Cal. 505; *Magraw v. McGlynn*, 26 Cal. 431, both cases to the same effect as the principal case; extended note, 65 Am. Dec. 122.

14 Cal. 131-134. LACHMAN v. CLARK.

Tax Deed will convey no title unless the law has been strictly complied with as to description, especially of lands outside the city, pp. 133, 134.

Cited, *High v. Shoemaker*, 22 Cal. 371, 372, 373, in approval as to outside lands, although in that case the description was held sufficient; *Young v. Joslin*, 13 R. I. 678, that the statute is mandatory in regard to a separate description and valuation, where there are no circumstances to excuse its nonobservance or to render it impracticable; *Tilton v. Oregon etc. R. Co.*, 3 Sawy. 24; *Van Cise v. Carter*, 9 S. Dak. 239, to the point that the statute must be substantially complied with as to designation, description, and valuation.

14 Cal. 134-138; 73 Am. Dec. 634. RYER v. STOCKWELL.

Agreement to Pay a Reward for the arrest or conviction of a criminal may be enforced by the party performing the service. The performance is a good consideration but the promise is conditional and may be revoked before performance, p. 137.

Cited, *McLeod v. Meade*, 77 Cal. 88, holding that a contract arises in such case upon compliance with the conditions; *Wilson v. Stump*, 103 Cal. 257; 42 Am. St. Rep. 113, holding that performance before the offer was revoked constitutes a valid contract, but that the complaint need not aver that such offer of reward had not been revoked; *Ingram v. Colgan*, 106 Cal. 125, 46 Am. St. Rep. 230, in a case of a bounty for killing coyotes, as sustaining the point that there was a consideration under the offer of the statute, therefore the money was not a gift and

not obnoxious to the constitution. In this case the distinction between a bounty and a reward is noted, and it is also held that the right to a bounty becomes vested when it has been earned by a full compliance with the statute; *Campbell v. Mercer*, 108 Ga. 107, 108, holding reward earned under facts stated; *County v. Gage*, 139 Cal. 407, holding principle applicable to claim of county against state for maintenance of orphans. Notes, 37 Am. Dec. 147; 85 Am. Dec. 749; 97 Am. Dec. 795; 7 Am. St. Rep. 53; 10 Am. St. Rep. 800; 41 Am. St. Rep. 560.

14 Cal. 138-144; 73 Am. Dec. 639. **GREGORY v. FORD.**

Equity Will Not Enjoin a Judgment by default on the mere ground that defendant was not actually served with process, and that the return of the sheriff is false, where the defendant has no defense, pp. 141-143, 144.

Cited, *Bell v. Thompson*, 147 Cal. 693, holding insufficient complaint for relief against judgment for fraud in procurement which does not show facts constituting defense on merits nor constituting ability of plaintiff to present those facts to court; *Burbridge v. Rauer*, 146 Cal. 25, refusing to set aside justice's court in injunction suit where at time of injunction suit original cause of action barred, and no showing of defense on merits shown; *Gibbons v. Scott*, 15 Cal. 286, where the principal case is followed so far as applicable; *Logan v. Hillegas*, 16 Cal. 202, holding that a complaint to enjoin an irregular judgment should aver that plaintiff has paid the claim on which the judgment is based or that he has a valid defense thereto; *People v. Rains*, 23 Cal. 129, holding that in such case plaintiff must show that he had a good defense on the merits; *Ketchum v. Crippen*, 37 Cal. 228, applying the principle to the refusal to grant relief in equity where the party has a remedy by motion; *Peterson v. Weissbein*, 65 Cal. 45, where the principle was applied to a case where the judgment was claimed to be void because the complaint in the action was filed on a day that had been declared a legal holiday, but the defendant neglected to avail himself at the time of such point, nor did he deny the debt; *Harnish v. Bramer*, 71 Cal. 159, holding also that it must appear that a like judgment would not again be rendered; *Collins v. Scott*, 100 Cal. 452, declaring that to entitle to relief against a judgment or decree on the ground of fraud it must appear that there was a good defense on the merits lost without fault on the defendant's part; *Eldred v. White*, 102 Cal. 604, holding the same as the last citing case herein; *State v. Hill*, 50 Ark. 461, 462, 463, 464, quoting from the principal case (pp. 141, 142) and holding that in such case defendant must aver and prove that if relief is granted a different result will be attained, but also declaring that an officer's false return of service will not preclude defendant from showing the truth in an equity proceeding to be released from the burden of the judgment; *San Juan etc. Co. v. Finch*, 6 Colo. 220, holding that jurisdiction does not attach where there is a

want of summons and that equity will enjoin the execution on a judgment based thereon; *Stewart v. Brooks*, 62 Miss. 493, holding that to warrant restraining a judgment for want of service a valid defense to the demand on which the judgment is based must be shown. The following cases also hold that equity will not enjoin a judgment at law for want of service unless it be shown that a different result would be attained; *Colson v. Lertch*, 110 Ill. 508, 509, quoting from the principal case (pp. 141, 142); *Williams v. Hetzie*, 83 Ind. 309; *Hanswirth v. Sullivan*, 6 Mont. 214, quoting from the principal case (pp. 141, 142); *Gifford v. Morrison*, 37 Ohio St. 507; 41 Am. Rep. 540; *Masterson v. Ashcon*, 54 Tex. 327, 329 (although in this case no opinion was expressed as to whether equity would enjoin, but, assuming that it would, the court approved the rule); *Schleicher v. Markward*, 61 Tex. 103; extended note, 19 Am. Dec. 139, notes, 32 Am. Dec. 177, that equity will not lightly interfere with courts of law; 70 Am. Dec. 740, that complainant's equity must appear from his bill; 73 Am. Dec. 693, 88 Am. Dec. 705, as to when equity will and will not interfere; 93 Am. Dec. 473; 95 Am. Dec. 446; 3 Am. St. Rep. 755; 8 Am. St. Rep. 306; 27 Am. St. Rep. 386; 30 Am. St. Rep. 598, that he who seeks equity must do equity; extended note, 54 Am. St. Rep. 223, 259, in exhaustive consideration of the principle.

Distinguished in *Marks v. Willis*, 36 Or. 3, 78 Am. St. Rep. 752, enjoining execution in replevin where judgment improper in form; *Parsons v. Weis*, 144 Cal. 417, sustaining equitable action to set aside judgment as having been procured by fraud; but see *McClung v. McWhorter*, 47 W. Va. 151, denying writ when asked for false return of service of process; *Marks v. Stephens*, 38 Or. 67, where individual personal property of survivor who was administrator of partnership estate is levied on under judgment against firm, injunction does not lie because execution issued in name of creditor who was dead.

14 Cal. 146-148. BUCKINGHAM v. WATERS.

Goodwill.—One cannot sue to recover back purchase money paid on the ground that the goodwill is not vendible, p. 147.

Cited, *Smock v. Pierson*, 68 Ind. 408; 34 Am. Rep. 272, as sustaining the principle that the sale of the goodwill of a business is a valid consideration for a note.

Pleading.—Although the Use of Common Counts is permitted, yet such practice does not justify a jumble of all the causes of action in one count, p. 147.

Cited, *Watson v. San Francisco etc. R. R. Co.*, 41 Cal. 19, where the complaint was declared to be a jumble of several causes of action in one count and directly within the objection noted in the principal case; *Clay v. Carroll*, 67 Cal. 20; *Leeke v. Hancock*, 76 Cal. 131, both cases upholding the right to rely upon the common counts; *Clafin v. Simon*, 18 Utah, 161, holding complaint insufficient as against demurrer.

14 Cal. 148-156. **HART v. PLUM.**

Uniformity of Taxation is required by the constitution and all property is to be taxed in proportion to its value, p. 153.

Cited, *Cross v. City of Milwaukee*, 19 Wis. 516, but only generally to the point that objections taken to similar provisions were examined in the principal case, and that uniformity of taxation is required under the California constitution, and their courts disaffirm the view that it requires annual assessments.

Tax rightly assessed in fact as to value, etc., is not invalidated because a particular mode of arriving at the right result is not adopted. If the required statement be procured of taxable property and the assessment is properly made, especially if the party taxed has notice thereof, the directory provisions of the statute are complied with, p. 154.

Cited, *Guy v. Washburn*, 23 Cal. 116, holding that a failure to complete the "alphabetical index" in time would not vitiate the assessment roll.

Time of Making Assessment is directory. When a time is fixed by statute within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered directory merely, unless the nature of the act to be performed or the language of the legislature shows that the designation of time was a limitation of the officer's powers, p. 155.

Cited, *Guy v. Washburn*, 23 Cal. 116, to the effect that such provision is directory merely; *People v. Eureka etc. Co.*, 48 Cal. 146, holding that the provision of the statute requiring the assessor to return his roll to the clerk prior to a certain date was directory; *Porphyry Paving Co. v. Aucker*, 104 Cal. 343, upon the point as to whether delay in the notice by the street superintendent was so unreasonable as to vitiate the assessment; *Buswell v. Supervisors*, 116 Cal. 354, approving the rule as to public officers; *State v. Northern Belle M. Co.*, 15 Nev. 388, to the point that time of making an assessment roll is merely directory; *State ex rel. v. Buchanan*, 24 W. Va. 386, holding that the statute is merely directory which requires the assessor to deliver to the county clerk a copy of the personal property book on or before a specified time.

14 Cal. 156-157. **ROWLAND v. LEIBY.**

Decree of Foreclosure may follow the old chancery system, p. 157.

Cited, *Chapin v. Broder*, 16 Cal. 422, where the court, referring to section 246 of the Practice Act says: "We have held . . . that in actions of foreclosure its effect was to authorize a personal judgment against the mortgagor in addition to the relief usually granted"; *Cormerais v. Genella*, 22 Cal. 127, where the court says: "There are many good reasons why no change should be made in the practice of

rendering personal judgments in the decree of foreclosure unless imperatively required by the statute. . . . That practice was well known to the legislature, and had been settled by numerous decisions of this court." *Hobbs v. Duff*, 23 Cal. 623, following the preceding cases herein; so, also, is *Englund v. Lewis*, 25 Cal. 349.

14 Cal. 157-159. **CHIPMAN v. BOWMAN.**

Jurisdiction of Superior Court of San Francisco was inferior and limited. Its character depended upon the subjects of its jurisdiction and its relation to other tribunals, and not upon the form of its process or the counties to which it might be issued, and the legislature could authorize it to send summons outside the city limits for service, p. 158.

Cited, *McCauley v. Fulton*, 44 Cal. 360, to the same point; *Grand Rapids etc. R. R. Co. v. Gray*, 38 Mich. 467, where the court says the principal case "went to the whole length, however, of holding that a summons might be served upon a person beyond the limits of the city"; See *Gear's Index Dig. Cal.*, p. 487, "municipal courts."

Judgment.—Equity will not interfere where a judgment by default is void because entered by the clerk without authority. The district court could arrest at any time all process issued by its clerk on void judgments, pp. 158, 159.

Cited, *Logan v. Hillegass*, 16 Cal. 202, in affirmance of the last point, also to the point that as to merely irregular judgments which could be reached by motion before judgment or on appeal a petition in equity to enjoin such judgment should aver payment of the original claim or that defendant has a valid defense thereto; *Bell v. Thompson*, 19 Cal. 708, to the point that the district court can arrest process issued by the clerk on void judgments; *Sanchez v. Carriaga*, 31 Cal. 172, to the same point as the last citing case; *Murdock v. De Vries*, 37 Cal. 529, as to when the collection of a judgment by default will not be enjoined; *California Pac. R. R. Co. v. Central Pac. R. R. Co. etc.*, 47 Cal. 531, holding that when a trespass is about to be committed through a void order of court, such void order will not authorize an injunction. In this case there was a writ of certiorari; *Ross v. Heathcock*, 57 Wis. 97, to the point that where costs and disbursements have been inserted in a judgment without authority the court may stay proceedings on an execution issued for collection of the judgment; *Extended notes*, 49 Am. Dec. 514; 54 Am. St. Rep. 250.

General Citation.—*Scamman v. Bonslett*, 118 Cal. 99, as sustaining the point that an amendment to a judgment or decree being void is sufficient reason for quashing the execution.

14 Cal. 159-160. **PEOPLE v. MURRAY.**

Criminal Law.—Evidence, in cases where an attempt is a material

factor, must show something more than mere intention to prove the offense. Preparation for the attempt may indicate the intention, but the attempt is the direct movement toward commission after the preparations are made. The attempt must be manifested by acts which would end in consummation except for the intervention of circumstances independent of the party's will, pp. 159-160.

Cited, *Patrick v. People*, 132 Ill. 534, but only generally to the point that an attempt must be carried beyond mere preparation but falling short of execution—a cause as distinguished from a condition; *Territory v. Reuss*, 5 Mont. 614, in dissenting opinion to the same effect as the principal case and quoting therefrom (p. 159), but a conviction of an attempt to murder was sustained upon the evidence; *Gandy v. State*, 13 Neb. 449, declaring that intent is gathered from what is done, as there must be an act as well as an intent to constitute an offense; *Johnson v. State*, 27 Neb. 690, to the same effect as the principal case, quoting therefrom (pp. 159, 160); and a like doctrine is stated in *State v. Lung*, 21 Nev. 214; 37 Am. St. Rep. 507 (also quoting from the principal case as to the distinction between preparation and an attempt); *Cornwell v. Fraternal etc. Assn.*, 6 N. Dak. 203, 66 Am. St. Rep. 603, holding attempt to kill not shown by evidence; *Commonwealth v. Peaslee*, 177 Mass. 272, 273 (where criticised), and *State v. Fraker*, 148 Mo. 161, holding indictments for attempts respectively at arson, and at attaining money under false pretenses insufficient; *People v. Youngs*, 122 Mich. 292, 293, holding evidence insufficient to justify conviction of burglary (but cf. dissenting opinion, p. 298, when main case criticised); *Bryant v. State*, 7 Wyo. 319, holding evidence sufficient to sustain conviction for assault with intent to kill; *Hicks v. Commonwealth*, 86 Va. 227; 19 Am. St. Rep. 894, also quoting from the principal case at length (pp. 159-160); *United States v. Stephens*, 8 Sawy. 119, 120; 12 Fed. Rep. 55, also quoting from the principal case (pp. 159, 160); extended note, 20 Am. St. Rep. 742, that preparatory act is not an attempt.

14 Cal. 160-164. THOMPSON v. WILLIAMS.

Negotiable Paper.—In notice to indorser no particular form of words is necessary; if he is informed of presentment and dishonor and that he will be held, it is sufficient if he knows what note is referred to. When demand, in case of indorsement after maturity, is made in a reasonable time, omission to state time of demand will not vitiate notice, pp. 162-164.

Cited, *Stanley v. McElrath*, 86 Cal. 456, a case of notice sent by the notary in due time and actually delivered at the residence of the indorser on the next day to a person of discretion apparently acting for him and it was held sufficient; *Beer v. Clifton*, 98 Cal. 326; 35 Am. St. Rep. 174, that if note is indorsed after maturity notice must be given indorser, in the event of refusal of prayer, in a reasonable time.

14 Cal. 164-165. HOCKER v. KELLY.

Intervention.—When unduly delayed, the right to intervene will not be granted, as where the application was made just as plaintiff was taking judgment, the suit having been pending for some time, p. 165.

Cited, *Rockwell v. Coffey*, 20 Colo. 400, holding that intervention will not be allowed between the trial and rendition of judgment, but that the petition should be filed before trial; *Gale v. Frazier*, 4 Dak. 206; *Smith v. Gale*, 144 U. S. 520, both cases holding that the right must be exercised in a reasonable time, which is a question of sound discretion with the court; *People v. Green*, 1 Idaho, 238, holding that the petitioner did not intervene in time according to the rule laid down in the principal case; extended note to 16 Am. Dec. 180.

14 Cal. 165-167. WHITE v. LESZYNSKY.

Attachment—Fraud.—The fact that a solvent debtor, able to pay his debt, threatens to dispose of his property justifies the inference of his intended fraudulent disposition of his property, pp. 166-167.

Cited, *Hanks v. Andrews*, 53 Ark. 329, to exactly the same effect.

14 Cal. 167-171. ALGIER v. STEAMER MARIA.

A Jury or Individual Jurors may try successive cases of a similar kind against the same defendant, pp. 169, 170.

Cited, *Charlton Plow Co. v. Deush*, 16 Neb. 385, quoting from the principal case (pp. 169, 170), and *Dew v. McDivett*, 31 Ohio St. 143, both to the same effect; extended note, 36 Am. Dec. 529.

Form of Special Verdict must be objected to at the time of its rendition or the objection is waived, p. 170.

Cited, *Parke v. Hinds*, 14 Cal. 418, a case where an analogous principle was decided, the case holding that an objection that the finding was qualified by certain words should have been made in the court below; *Water Co. v. Richardson*, 72 Cal. 609, in affirmance of the principal case; *Pacific Coast Ry. Co. v. Porter*, 74 Cal. 262, a case of condemnation of land for a railroad and compensation and damages under section 1249 of the Code of Civil Procedure, where the court says the claim seemed "to verge close to those criticisms upon the form of the verdict which are to be made in time to admit of correction," but the case was decided without reference to the rule; *Taylor v. Parenteau*, 23 Colo. 371, where counsel, a verdict being in his own favor, assisted in preparing the form of a verdict and neglected to point out the alleged defect before it was given to the jury or to ask for a modification or correction when returned into court, and it was held that objection was waived on appeal.

Appeal.—Verdict will not be reviewed on appeal where there is some proof to warrant it, p. 171.

Cited, *Wilson v. Southern Pac. R. R. Co.*, 62 Cal. 171, to exactly the same point.

14 Cal. 171-173; 73 Am. Dec. 645. **AGUIRRE v. PACKARD.**

Interest follows the contract according to the law of the time and place of performance, and a subsequent change in the legal rate does not affect the contract, p. 172.

Approved in *Graham v. Merchant*, 43 Or. 312, in action for money had and received where statutory rate changed after money received and before judgment, interest is computed to date of change at old rate and thereafter at new rate. Notes 98 Am. Dec. 400; 33 Am. St. Rep. 634.

Probate Claims.—Interest is not recoverable when not claimed nor resulting from claim as made, p. 172.

Cited in *Etchas v. Orena*, 127 Cal. 593, on point that recovery can be had only on claim as presented.

General Citation.—Note 78 Am. Dec. 561, as to presentation of claim against estate of decedent.

14 Cal. 173-178. **IMLAY v. CARPENTIER.**

Insolvency.—Discharge of debt discharges judgment rendered and costs after filing petition and schedule. The judgment is simply the original debt in a new form, pp. 174-176.

Cited, *Brewster v. Ludekins*, 19 Cal. 170. In this case the schedule described the debt itself which had passed into judgment before filing the insolvency petition, and it was claimed that the record was fatally defective, but the court refused to sustain the claim, on the ground that the indebtedness was so described as to enable the holder to identify it; *Carit v. Williams*, 74 Cal. 185, quoting from the principal case (pp. 176,177), as having clearly intimated the law, although the precise question of the citing case was not involved, since in that case the judgment debtor had been discharged in insolvency, but the court examined the record of the judgment to determine whether it was based on fraud of the judgment debtor; *Smith v. Broderick*, 107 Cal. 650; 48 Am. St. Rep. 172, to the point that the court may look behind the judgment to see on what it is founded, it being the old debt in a new form. In this case a claim against the city had been reduced to judgment. but the original liability was within the prohibition of section 18, article XI, of the constitution with regard to incurring indebtedness exceeding the revenue for that year; *Wells v. Edmison*, 4 Dak. 56, to the point that a discharge in insolvency discharges the judgment, but that case holds contra under the facts; *Young v. Grau*, 14 R. I. 341. applying the principle that a judgment is simply the original debt in a new form to the point that if the latter was created by fraud of the bankrupt the former was also so created; *In re Stansfield*, 4 Sawy.

337, to the point that although the cause of action is merged in the judgment and can never be the basis of another suit between the same parties, yet the limitation is recognized that the judgment pending the question of discharge is discharged when the cause of action would have been; Extended note exhaustively reviewing the cases, 53 Am. Dec. 298.

Relief against judgment against bankrupt after discharge may be by motion to discharge it, or the court may grant a perpetual stay of execution, and the remedy at law being adequate equity will not interfere, pp. 177, 178.

Cited, *Chipman v. Bowman*, 14 Cal. 159, to the point that the court can arrest at any time on motion all process issued by its clerk on void judgments; *Green v. Thomas*, 17 Cal. 86, to the point that equity will not grant relief in such cases where the remedy is by motion; *Ketchum v. Crippen*, 37 Cal. 228, to the point that where relief can be had by motion in a foreclosure suit a separate equity suit cannot be sustained; *Moulton v. Knapp*, 85 Cal. 389, quoting from the principal case (p. 177) to the points noted in the heading hereto and holding that where there is an adequate and speedy remedy at law equity will not interfere; *Paterson v. Smith*, 72 Vt. 292, permitting similar relief under local statutes; *Baer v. Higson*, 26 Utah, 84, where in foreclosure summons served by publication and property sold on default and no motion to set aside made within one year, equity cannot set aside proceedings; *Cowley v. Northern Pac. R. Co.*, 46 Fed. Rep. 331, in affirmance of the rule that, the remedy at law being ample, equity will not interpose.

General citation: In re *Anson*, 101 Fed. 699.

14 Cal. 180-188. **WESTBROOK v. ROSBOROUGH.**

Office.—County judge resigning before expiration of term, governor may fill vacancy and appointee will hold until next general election or at the most until qualification of the person duly elected, p. 187.

Cited, *Weeks v. Gamble*, 13 Fla. 18, 19, holding in substance that the power to fill a vacancy, under the constitution of that state, for the unexpired term only extends to the next election, and also that it was the duty of the authorities to see that such election was not indefinitely postponed.

Office.—Election to fill a vacancy is special and a proclamation by the governor is essential to its validity, pp. 187, 188.

Kenfield v. Irwin, 52 Cal. 169, to the same effect; *People v. Hoge*, 55 Cal. 620, in dissenting opinion, but the case holds that the power is vested in the board of election commissioners to fix a day for holding an election in the matter of a board of freeholders, and also that if there has been an election the voice of the people is not to be rejected for a defect or want of notice; *State v. Potter*, 16 Kan. 80, as to the necessity of giving notice in special elections; *Morgan v.*

Gloucester City, 44 N. J. L. 143, to the point that notice and proclamation are necessary in special elections, the time and place of which are not fixed by law; note, 70 Am. Dec. 769; extended note, 83 Am. Dec. 750.

Acts of Judicial Officers in office under color of authority are as binding and effectual as to third persons as those of officers entitled to hold office by strict law, p. 188.

Cited, *Ex parte Ah You*, 82 Cal. 347, in affirmance.

General Citations.—*Halsey v. Gaines*, 2 Lea (Tenn.), 350, in dissenting opinion in support of certain general propositions bearing upon the question of the power of the legislature to abolish courts and so terminate the office of a judge and his salary, which the case decided could be done. *State v. Martin*, 83 Mo. App. 58.

14 Cal. 194-200. VAN PELT v. LITTLER.

Statement on Appeal is insufficient where the judge certifies that it is correct according to his recollection, p. 196.

Cited, *Overman M. Co. v. American M. Co.*, 7 Nev. 323, in dissenting opinion, but the following certificate, though not a strict compliance with the statute, was held sufficient: "The foregoing is the settled and engrossed statement on motion for new trial of the above-entitled cause."

Official Bond.—Officer and sureties are liable on this official bond for breach of its conditions whether the cause of action result from the officer's misfeasance or nonfeasance. The obligation of the contract is in all cases primary and absolute, p. 196.

Cited in *Doeg v. Cook*, 126 Cal. 218, sustaining joinder of principal and sureties on marshal's bond in action for negligence; *Felwicher v. Stingley*, 142 Cal. 632, as to liability of sureties on constable's bond for trespass; *Sam Yuen v. McMann*, 99 Cal. 499, a case of replevin for property taken under execution and of damages for its detention, and holding that certain allegations in an action against the sureties were sufficient, and also that they were liable for any wrongful act or default of their principal in his official capacity, to the sum mentioned in the bond; *Kane v. Union Pac. R. R.*, 5 Neb. 107, to the point that the liability on an official bond is both original and primary, and that the action may be brought against both principal and sureties without first suing the officer (a county treasurer) for his tort; *Fox v. Meacham*, 6 Neb. 535, following the last citing case.

Official Bond.—Sheriff or constable seizing property of one man under execution against another is liable on his official bond, pp. 197-200.

Cited, *Kane v. Desmond*, 63 Cal. 465, to the point that the seizure of a wife's property under execution against her husband was wrongful; *Best v. Johnson*, 78 Cal. 218, 219; 12 Am. St. Rep. 42, 43, as so deciding, but distinguished, and that case held that the bond of an

assignee in insolvency is for the benefit of the creditors of the insolvent only, and if purporting to act as such an assignee takes property from third persons and converts it to his own use they cannot recover therefor upon such bond; *Bell v. Peck*, 104 Cal. 36, holding that under such facts as in the principal case, the action was properly brought against the constable and sureties on the bond; *Sangster v. Commonwealth*, 17 Gratt. 131, in approval, and holding the sureties liable; *Bishop v. McGillis*, 80 Wis. 580; 27 Am. St. Rep. 65, holding that a sheriff levying on the property of a third person under a writ of attachment does the act and incurs the liability in his official capacity; *Lammon v. Feusier*, 111 U. S. 21, holding that the sureties are liable in such case; notes, 12 Am. Dec. 394; 21 Am. Dec. 208; extended notes, 46 Am. Dec. 515; 6 Am. St. Rep. 132.

Appeal.—Where damages are excessive the error can only be availed of on motion for new trial, p. 201.

Cited, *Campbell v. Jones*, 41 Cal. 519, in affirmance.

14 Cal. 201-202. **SMITH v. YREKA WATER CO.**

Demurrer.—Judgment on sustaining of, will be affirmed where plaintiff does not offer to amend, p. 201.

Cited in *Williamson v. Joyce*, 140 Cal. 671, noted under *Gallagher v. Delaney*, 10 Cal. 410.

Amendments should be liberally allowed by inferior courts, p. 202.

Cited in *Martin v. Luger*, 8 N. Dak. 223, holding denial of amendment prejudicial error under circumstances; *Lord v. Hopkins*, 30 Cal. 78, holding that a complaint may be amended after demurrer sustained, except it is so defective that it cannot be made good by amendment.

14 Cal. 202-207; 73 Am. Dec. 647. **PICO v. WEBSTER.**

Principal and Surety.—Judgment against a principal is conclusive against a surety, where the surety undertakes that the principal shall do a specific act to be ascertained in a given way, as that he will pay a judgment; but in the case of official bonds the rule is otherwise where the sureties were not parties to the suit, pp. 204-207.

Cited, *Shenandoah Natl. Bank v. Read*, 86 Iowa, 142, to the same effect; a decree dismissing an injunction being held binding on the surety; *Graves v. Bulkley*, 25 Kan. 257; 37 Am. Rep. 252, holding that in an action under a statute to make the sureties of a sheriff parties to and bound by a judgment of amercement against their principal such judgment is not conclusive but only prima facie evidence of the sureties' liability; *Beauchaine v. McKinnon*, 55 Minn. 321; 43 Am. St. Rep. 506, also holding that a judgment on an official bond is only prima facie evidence against the sureties; *Rodini v. Lytle*, 17 Mont. 450, 453, quoting at length from the principal case (pp. 203, 204) deciding that such a judgment against a constable has no effect as evidence in a

subsequent action against the sureties; *McNabb v. Wixom*, 7 Nev. 173, where the main question does not seem to be decided, but as applied to the point whether an administrator's sureties are bound by a decree of settlement the case turned upon the point that the statute of that state differed from that of other states; extended note, 83 Am. Dec. 380, 382; note 85 Am. Dec. 131; extended note, 33 Am. Rep. 803; note 6 Am. St. Rep. 310; extended note, 22 Am. St. Rep. 204; notes 23 Am. St. Rep. 499; 41 Am. St. Rep. 733.

Action—Parties.—Sureties on an official bond must have had the legal notice required by statute or make voluntary appearance; they cannot be made parties in an action of trespass by mere notice, p. 207.

Cited, extended note, 50 Am. St. Rep. 739, 740, as to new parties and necessity of process.

14 Cal. 210-212. **ABBE v. MARR.**

Pleading—Turpitude.—When plaintiff alleges facts showing his own turpitude he pleads himself out of court, p. 211.

Cited, *Valentine v. Stewart*, 15 Cal. 405, in affirmance; applying the principle to the case of an attempt to enforce an agreement against public policy; *Davis v. Mitchell*, 34 Cal. 90, holding that the payee of a promissory note could neither aver nor prove a fraudulent transaction as a defense to an action on said note; *Greer v. Payne*, 4 Kan. App. 163, to substantially the same effect; *Gaston v. Drake*, 14 Nev. 183; 33 Am. Rep. 553, holding that an agreement before an election to share the salary and fees of an office in consideration of the plaintiff's using his influence to elect defendant to such office is void; *Watson v. Murray*, 23 N. J. Eq. 263, applying the principle to the point that equity will not lend its aid in the case of a bill of discovery and sale of property of a lottery firm, one of the partners being the petitioner; extended note 3 Am. St. Rep. 737.

Distinguished in *Wright v. Stewart*, 130 Fed. 926, when plaintiff deposited money with stakeholder of fake footrace and demanded return thereof before race run, action lies for its recovery.

Judgment by Default can no more be taken when the complaint shows no legal cause of action than it can over a general demurrer, pp. 211, 212.

Cited, *Choynski v. Cohen*, 39 Cal. 502; 2 Am. Rep. 476, declaring that if the complaint shows no cause of action a judgment by default will be reversed on appeal; *Harmon v. Ashmead*, 60 Cal. 441, 442, in affirmance in a case of foreclosure of a mechanic's lien; *Arkansas etc. Co. v. Nelson*, 4 Colo. App. 440, to the same effect; *Old v. Mohler*, 122 Ind. 598, quoting from the principal case (pp. 211, 212) and deciding that any defect in a complaint which would have been available as a ground of demurrer before judgment may be taken advantage of on appeal

after judgment by default; *Territory v. Virginia Road Co.*, 2 Mont. 101, asserting the right after judgment to inquire into the sufficiency of a complaint; *Scottish etc. Co. v. Reeve*, 7 N. Dak. 100, but holding practice not one to be encouraged; *Schwab & Co. v. Tucker*, 10 Utah, 135, following the rule in a case where it was held that frauds as the foundation of a suit would have been specifically alleged even though the facts were set up in the affidavit of attachment.

14 Cal. 212. **TYLER v. YREKA WATER CO.**

Mortgage Securing Several Debts is enforceable as to any of them, p. 218.

Cited in *Stockton etc. Soc. v. Harrold*, 127 Cal. 620, further discussing form of decree on cross-complaint of another creditor.

14 Cal. 219-223. **RANDALL v. YUBA COUNTY.**

A Contract by the Tax Collector for printing the delinquent list of taxpayers is valid and binds the county. He is in this respect the agent of the county, and not of the board of supervisors, p. 222.

Cited, *Keller v. Hyde*, 20 Cal. 595, in approval and holding that a demand for such printing under a contract with the supervisors is not legally chargeable to the county; *Fisk v. Cuthbert*, 2 Mont. 597, where the general recorder was held authorized to contract at the "public expense" a certain list of "marks and brands."

14 Cal. 223-230. **COLLINS v. BUTLER.**

Injunction—Judgment.—Chancery will not grant relief by way of appeal from the law side of the lower court upon the same facts when a party moves for a new trial and fails, p. 226.

Cited, *In re Griffith*, 84 Cal. 112, where the court says: "It is entirely clear that a separate suit cannot be maintained by reason of mere errors of law or fact in a matter which was examined in the first suit"; *Telford v. Brinkerhoff*, 163 Ill. 443, in affirmance; *Gray v. Barton*, 62 Mich. 195, where the same issue was directly raised by counsel and it was held that equity would not grant a new trial for misconduct of a juror; extended note 54 Am. St. Rep. 251.

Equity will not Set Off the claim of an individual creditor of a partner against a judgment in favor of a partnership. An individual creditor cannot claim any part of the judgment, though partnership assets, until adjustment of the firm accounts, pp. 227, 230.

Cited, note 11 Am. Dec. 737; extended note 43 Am. St. Rep. 371, as to preferences in favor of partnership creditors.

General Citation.—*Lamott v. Butler*, 18 Cal. 35, where the court says: "It seems to us that the matters involved in this controversy have heretofore been determined. It is scarcely necessary to repeat

here all the facts which appear in the cases of *Butler v. Collins*, 12 Cal. 457, and *Collins v. Butler*, 14 Cal. 223."

14 Cal. 230-232. **PURCELL v. McKUNE.**

Mandamus will not lie to compel a judge to pass upon a motion for judgment on the pleadings and verdict in a chancery case where the attorney on being requested to furnish a statement does not object and fails to furnish it, pp. 231, 232.

Cited, *Flagley v. Hubbard*, 22 Cal. 38, as holding the same principle applied in that case, where a justice's court had refused a change of venue and mandamus was refused.

14 Cal. 232-242. **McMILLAN v. VISCHER.**

A Redemptioner Who Pays Under Protest, as to the excess, a sum of money to the sheriff, such payment is not compulsory, pp. 240, 241.

Cited, extended note 45 Am. Dec. 166, as to money illegally exacted for redemption; note 70 Am. Dec. 676, as citing to the point *McMillan v. Richards*, 9 Cal. 365; 70 Am. Dec. 655.

14 Cal. 242-247. **SMITH v. QUARTZ M. CO.**

A Transfer of Stock as Security for a Loan, if shown to have been intended as a mortgage, is none the less so because of an agreement for foreclosure on nonpayment or that the mortgagee may take the stock for the debt, pp. 246, 247.

Cited, *Turpie v. Lowe*, 114 Ind. 48, to the point that an absolute deed may be shown to be a mortgage and a deed to secure advancements with a power of sale to sell the land to raise money to repay the lender made him not a trustee but a mortgagee.

Same.—Even if Such Transfer is Fraudulent as to creditors, it is good between the parties, p. 247.

Cited, *Halloran v. Halloran*, 137 Ill. 111, holding that if the fraudulent transfer of a debtor consists of a mortgage as security for an honest debt, the debtor may file a bill to redeem the property from its operation; so, in *Over v. Carolus*, 171 Ill. 554; *Livingston v. Ives*, 35 Minn. 60, holding that it is no defense to an action for redemption of an absolute deed intended as a mortgage that it was given to hinder and delay creditors, the transaction being valid as between the parties, as the statute against fraudulent conveyances is solely for the benefit of creditors.

14 Cal. 247-250. **SOULE v. DAWES.** S. C. 7 Cal. 575.

Judgment is Conclusive in a chancery case where all the proofs are in and the case fully before the lower and the appellate court, where the latter passes upon the merits, and upon reversal the court below

can take only such proceedings as are necessary to give effect to the latter's judgment, unless authorized by said appellate court, p. 249.

Cited, *Crowell v. Gilmore*, 17 Cal. 195, in affirmance; *Stockton etc. Works v. Glens etc. Co.*, 121 Cal. 178, discussing evidence introduced since prior decision; *McLaughlin v. Kelly*, 22 Cal. 222, holding that where there has been a fair trial of an issue of fact courts give the verdict and judgment a conclusive effect and will not permit the matter to be relitigated in another suit; *Argenti v. City of San Francisco*, 30 Cal. 463, to the point that the appellate court may reverse and direct a trial de novo or that a particular issue be tried leaving all the other facts to stand as found; *Duff v. Duff*, 101 Cal. 4, to the same effect as the last citing case; *Wadhams v. Gay*, 83 Ill. 253, holding that when a cause is remanded with directions, the lower court is bound thereby and must not go beyond said mandate; *Lynn v. Lynn*, 160 Ill. 318, quoting from and following the last citing case herein; *Lake v. Bender*, 18 Nev. 373, to the point that the appellate court may order a new trial of particular issues alone.

Mechanic's Lien.—Extra work done with the knowledge of the mortgagor and without objection would in equity be a lien as against the mortgage, p. 250.

Cited, *Capron v. Strout*, 11 Nev. 313, but only generally, where a similar point was similarly decided; *Haxtun Steam Heating Co. v. Gordon*, 2 N. Dak. 251; 33 Am. St. Rep. 779, where the principal case is considered but the facts held to be entirely different, although such lien was decided to have priority under the facts of this citing case; see next heading herein.

General Citation.—In *re Coulter*, 2 Sawy. 49, holding that the commencement of bankruptcy proceedings before filing notice does not affect the lien or the right to file notice, and that such lien is not opposed to the policy of the bankrupt law; (perhaps this may fall within the principle of notice implied in the last heading herein).

14 Cal. 250-253. **BECKMAN v. McKAY.**

Administrator—Trover and Conversion.—An action by an administrator for embezzling, alienating, or converting the property of the estate is in the nature of an action for trover and conversion, p. 252.

Cited, *Jahns v. Nolting*, 29 Cal. 512; *Levy v. Superior Court*, 105 Cal. 606, both cases to the same point.

14 Cal. 254. **ROBINSON v. SMITH.**

Pleading—Statute of Limitation.—Where defendants file a joint plea of the statute, which is bad as to one, it is not error or gross abuse of discretion to permit the other defendant to file a separate plea, p. 254.

Cited, *Kraft v. Greathouse*, 1 Idaho, 258, as so deciding and applied

to the point of not pleading the statute in the court below and then asking in the appellate court to have a demurrer understood as being interposed to the complaint, on the ground that it did not state a cause of action, which claim the court refused.

14 Cal. 256-264; 73 Am. Dec. 651. **KOCH v. BRIGGS.**

Deed of Trust is not a Mortgage requiring foreclosure when given to secure a debt of the grantor with power of the grantee to sell. Such a deed passes the legal title in trust subject to the agreement, and the contract is that the trustee shall sell upon the happening of the event, pp. 261-264.

Cited in *Sacramento Bank v. Copsey*, 133 Cal. 664, as not sustaining proposition that grantee must look to the property alone for his debt; *Banta v. Wise*, 135 Cal. 279, but holding instrument to be a mortgage; *Kraft Co. v. Bryan*, 140 Cal. 80, discussing distinction between trust deed and mortgage; *Southern etc. Assn. v. McCants*, 120 Ala. 621, 622, holding such deed not to be embraced by term "mortgage" in local statute; *Etna Coal etc. Co. v. Martinez Iron etc. Co.*, 127 Fed. 36, upholding provision of corporate trust deed that in case of default instrument might be foreclosed without resort to judicial proceeding. Distinguished in *Brown v. Bryan*, 6 Idaho, 16-19, trust deed to secure given debt payable at specified time can only be foreclosed by judicial proceedings and not by notice and sale under power in deed; *Cormerais v. Genella*, 22 Cal. 124, but distinguished from that case, where, there being a power of sale in the mortgage, it was held that the mortgagee might sell under a foreclosure or under the power; *Grant v. Burr*, 54 Cal. 300, in affirmance; *Bateman v. Burr*, 57 Cal. 482, 483, to the same effect, also in this connection to the point that section 260 of the Practice Act (sec. 744 Code Civ. Proc.) had no application to a deed of trust; *Savings and Loan Society v. Deering*, 66 Cal. 286, to the point that such trust deed conveyed the legal title; *Partridge v. Shepard*, 71 Cal. 478, holding the deed there to be one of trust conveying the legal title; *More v. Calkins*, 95 Cal. 437; 29 Am. St. Rep. 129, holding the same as the last citing case herein; *Savings & L. Soc. v. Burnett*, 106 Cal. 528, to the point that such a deed is a trust deed; *Shepard v. Richardson*, 145 Mass. 36, to the point that the right to foreclose means the right to cut off a right to redeem given by equity, when by the condition of the mortgage the mortgagee's estate has become absolute at law. This case was one of a refusal by the court to consider the provisions of a certain indenture as consistent with the right of trustees to treat the instrument merely as a mortgage and to foreclose by entry and lapse of time. *First Nat. Bank v. Bell etc. Mining Co.*, 8 Mont. 44, but the instrument there was held a mortgage with a power of sale; *National Bank v. Kreig*, 21 Nev. 408, where the transaction was held quite different from a deed of trust, and it was declared as to the principal case that the weight of authority was the other

way; *Merrill v. Hurley*, 6 S. Dak. 602, 603, 55 Am. St. Rep. 867, holding that a conveyance of real property is a mortgage when given in trust to a third person as security for a debt, the trustee having no power in relation to the property, but the trust to be executed by the creditor; *Dupee v. Rose*, 10 Utah, 311, where a trust deed to secure a debt and containing a power of sale was held a mortgage which might be foreclosed; *Bell Mining Co. v. Butte Bank*, 156 U. S. 475, 476, quoting from the principal case (p. 262) and holding that a trust deed in the nature of a mortgage, and conferring a power of sale on the trustees in case of a default in payment of the debt and a sale thereunder, would pass the granted premises on conveyance; notes 81 Am. Dec. 336; 93 Am. Dec. 116; extended note 19 Am. St. Rep. 275; note 29 Am. St. Rep. 133.

Right to Foreclose Mortgage and right to redeem are reciprocal and mutual; when one cannot be enforced the other is denied, p. 262.

Cited, *Cunningham v. Hawkins*, 24 Cal. 410, 85 Am. Dec. 77, in affirmance, also holding that if one right is barred by the statute of limitations the other is also; *Brenner v. Quick*, 88 Ind. 556, to the same effect, where a decree of foreclosure being void the sheriff's sale and deed were held void; *Green v. Turner*, 38 Iowa, 117, where the rule is admitted but held to have no application in that case, which decided that a mortgagee in possession, who has received payment of the debt, will not be protected by the statute of limitations, except he has held adversely for the requisite period of time; *King v. Meigher*, 20 Minn. 267, in affirmance; *Parsons v. Nogle*, 23 Minn. 331, to the same point under a claim that when the statute of limitations makes an exception to its operation in favor of a mortgagee's right of action to foreclose it shall operate in favor of the mortgagor's right of action to redeem; *Bradley v. Norris*, 63 Minn. 166, declaring that the point is wholly obiter, and "that no such doctrine is now held by the supreme court of that state will be seen by reference to *Raynor v. Drew*, 72 Cal. 307, and *Spect v. Spect*, 88 Cal. 437"; *Parsons v. Noggle*, 23 Minn. 328, is entirely inconsistent with any such doctrine; note 85 Am. Dec. 78.

A Mortgage is a conveyance in form but the contract is one only of security and the equity is enforced to effectuate the intention of the parties, p. 263.

Cited, *Goodenow v. Ewer*, 16 Cal. 468; 76 Am. Dec. 544; *Dutton v. Warschauer*, 21 Cal. 621; 82 Am. Dec. 768, in affirmance; notes, 76 Am. Dec. 550, 566.

14 Cal. 265-268. **MOKELEUMNE ETC. MINING CO. v. WOODBURY.**
S. C. 10 Cal. 185, 187, 188, but on questions relating to appeal.

Corporations.—Each stockholder is personally liable for his proportion of the corporate debts and liabilities, p. 266.

Cited, *Hodgson v. Cheever*, 8 Mo. App. 321, holding that a bank

stockholder's individual responsibility, where its charter provides therefor, arises out of contract, the contingency being the failure of the corporation to pay its legal debts; *White v. Blum*, 4 Neb. 560, applying the doctrine of individual liability to stockholders of railroad companies; extended note, 43 Am. Dec. 700.

Stockholders are not Sureties of Corporations but principal debtors, and stand in the same position in relation to the creditors of the corporation as if they were a common partnership, p. 266.

Cited, *Robinson v. Bidwell*, 22 Cal. 388; *Davidson v. Rankin*, 34 Cal. 505; *Young v. Rosenbaum*, 39 Cal. 654; *Sonoma Valley Bank v. Hill*, 59 Cal. 110; *Faymonville v. McCollough*, 59 Cal. 286; *Mitchell v. Beckman*, 64 Cal. 122; *Hyman v. Coleman*, 82 Cal. 653; 16 Am. St. Rep. 180, all following and affirming the doctrine; *Winona Wagon Co. v. Bull*, 108 Cal. 6, in affirmance, but holding that the defendant there, though a principal debtor as to debts created while he was stockholder, was not a party to the notes executed by the corporation and was not liable thereon; *Hill v. Graham*, 11 Colo. App. 544, discussing stockholders' statutory liability generally; *Nebraska etc. Bank v. Walsh*, 68 Ark. 440, on point that such statutes are not penal (and see *Continental etc. Bank v. Buford*, 114 Fed. 292, construing same Arkansas statute as to limitation of action thereon); *Lanigan v. North*, 69 Ark. 65, holding nonresident stockholders of California corporations liable under California rule in actions in their own courts; *Trippe v. Huncheson*, 82 Ind. 314, holding to substantially the same effect as the principal case; *Hanson v. Donkersley*, 37 Mich. 194, dissenting opinion, quoting from the principal case (p. 266), but the case itself holds that under the statute of that state individual stockholders are not primarily liable for corporate debts; *Aldrich v. Anchor Coal etc. Co.*, 24 Oreg. 37; 41 Am. St. Rep. 835, to the same point as the principal case and the court adds that such liability is "in no way dependent or contingent upon a recovery against the corporation, and that proceedings in behalf of a creditor to enforce such liability may be had in an ordinary action at law." This case was one relating to enforcing in another state the personal liability of stockholders; *Coleman v. White*, 14 Wis. 701; 80 Am. Dec. 798, applying the doctrine to bank stockholders; extended note, 3 Am. St. Rep. 949, as to liability of stockholders as partners.

Construction.—Constitutional and statutory provisions as to stockholders' liability should receive a just and reasonable construction, p. 266.

Cited, extended notes, 43 Am. Dec. 696, as to whether statutes are to be literally or strictly construed; 3 Am. St. Rep. 836, to the same point.

Witness.—A Stockholder who was a member at the commencement of a suit is not a competent witness, nor does he become a witness by selling out thereafter his shares of stock, pp. 266, 268.

Cited, *Blen v. Water and Mining Co.*, 20 Cal. 615; 81 Am. Dec. 136, in affirmance of the general rule; so, also, in *Contra Costa R. R. Co. v. Moss*, 23 Cal. 329. For the present law, however, see secs. 1879-1881, Cal. Code Civ. Proc.

14 Cal. 279-380. **BOGGS v. MERCED M. CO.**

Admitting Testimony of Absent Witness to Avoid a Continuance operates to place such testimony, for all the purposes of the case, actually before the court, p. 358.

Cited, *Alden v. Carpenter*, 7 Colo. 89, to the same point and also that the truth of such testimony is not thereby admitted, nor is the party precluded from rebutting the same on trial; *Territory v. Guthrie*, 2 Idaho, 403, to the same point. This was a criminal case.

Patent is Conclusive when not void upon its face and is not subject to collateral attack by a third party or one claiming no higher title, nor even can such party in an action of ejectment collaterally attack it for fraud or misrepresentation in procuring it. For these matters the right of interference rests only in the government. Individuals can resist the conclusiveness of the patent only by showing that it conflicts with prior rights vested in them, pp. 361-363.

Cited, *Yount v. Howell*, 14 Cal. 469, to the point that unless a patent is issued without authority, or is prohibited by statute, or is void upon its face, its operation upon the government and those claiming by title subsequent cannot be questioned in any collateral suit; *Fremont v. Seals*, 18 Cal. 435, to the point that fraud and misrepresentation are inadmissible against such patent in an action of ejectment; *Pioche v. Paul*, 22 Cal. 111, to the point that a patent cannot be so attacked in a collateral proceeding; *Byrne v. Alas*, 74 Cal. 639, holding that in ejectment by the grantee of a patentee to recover lands of Indians the latter could show that the plaintiff holds the legal title burdened with their right of occupancy; *Omaha etc. R. Co. v. Tabor*, 13 Colo. 53; 16 Am. St. Rep. 193, to the point that a patent title cannot be attacked collaterally. "Individuals can resist the conclusiveness of the patent only by showing that in conflicts with prior rights vested in them" (p. 362 of principal case); *Horsky v. Moran*, 21 Mont. 365, quoting *Smelting Co. v. Kemp*, 104 U. S. 647; *Power v. Sla*, 24 Mont. 250, denying right of third person to enforce forfeiture; *Peabody etc. Co. v. Gold Hill etc. Co.*, 106 Fed. 242, denying right of private individual to annul patent; *Small v. Rakestraw*, 28 Mont. 421, that holder of legal title under patent may be adjudged to hold as trustee because of erroneous ruling of land department, it is necessary to show defendant not entitled to patent and plaintiff's right; *South End M. Co. v. Tinney*, 22 Nev. 54, in dissenting opinion, to the point that fraud cannot be set up in ejectment against a patent or a patent be collaterally attacked, but resort must be had to equity, with certain limitations even then, but the case, however, decided that the patent

in question was fraudulently obtained; *Bohall v. Dilla*, 114 U. S. 51, where the court says: "To charge the holder of the legal title to land under a patent of the United States as trustee of another and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the government, and that in consequence of erroneous rulings of the officers of the land department, upon the law applicable to the facts found, it was refused him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the claimant"; *Smelting Co. v. Kemp*, 104 U. S. 647, to the point that an aggrieved party cannot set up errors of law, or imperfect views from corrupt motives, of officers of the department to defeat a patent, but resort must be had to equity also. that a stranger to the title cannot complain against the government in relation thereto (pp. 641, 647 of this case are quoted from in *South End M. Co. v. Tinney*, 22 Nev. 53, 54, above noted); *St. Louis etc. Co. v. Green*, 4 McCrary, 235; 13 Fed. Rep. 210, where the citation of the principal case is in a quotation from the last citing case (104 U. S. 647) to the same point; *Wight v. Dubois*, 21 Fed. Rep. 694, quoting from 104 U. S. 647 (above noted), and holding substantially that a stranger cannot complain as to whether conditions of a sale of mineral land have or have not been complied with; *Hartman v. Warren*, 76 Fed. Rep. 164, where the citation of the principal case is in a quotation from 104 U. S. 647 (above noted, and to the same points. Extended note, 12 Am. Dec. 565, to the point that a patent perfect on its face cannot be impeached collaterally.

Same.—"Third Persons," under act of Congress of 1851, were those whose titles were at the time such as to enable them to resist successfully any action of the government respecting it, p. 362.

Cited, *Minturn v. Brower*, 24 Cal. 669, where it is said: "Third persons must be regarded to be all persons who were not parties to the proceedings before the land commissioners or standing in any such relation, with those who were parties thereto, as to become affected and bound as privies; and the interest of third persons that remain unaffected by the final confirmation and patent are those subsisting in perfect titles derived from a source of paramount proprietorship which could be used in resisting successfully any action of the government respecting them"; *De Arguello v. Greer*, 26 Cal. 627, affirming the rule of the principal case; *Bissel v. Henshaw*, 1 Sawy. 569, upon the same point.

Quieting Title—Patent.—A bill in equity to set aside a patent or control its operation is in the nature of a bill to quiet title, to determine an adversely held estate, or to remove what would otherwise be a cloud on title, or is in the nature of a bill to enforce a transfer of the patentee's interest which he should hold in equity for com-

plainant's benefit. The individual complainant's title must therefore be superior to that of his adversary, as well also as to that of the government, or he must possess equities which will control the title in his adversary's name, pp. 364, 365.

Cited, *Pierce v. Sparks*, 4 Dak. 3, to the point that if one seeks to have the holder of a patent declared trustee of the legal title to recover the same it must appear affirmatively that his equity is superior to that of the holder of the legal title, and that his adversary's patent is all that stands between him and the legal title; *Silver v. Ladd*, 7 Wall. 228, to the point that where a claim is that a patent was issued to one while the right was in another the relief granted does not proceed upon the ground of annulling or setting aside the patent wrongfully issued, but is founded upon the theory that the title which has passed from the United States to the defendant inured in equity to the benefit of the plaintiff; and a court of chancery gives effect to this equity in several ways as by a decree of conveyance to the plaintiff or a conveyance in his name by a commissioner or by giving possession of the land, etc.; *Fulkerson v. Chisna Min. etc. Co.*, 122 Fed. 786, under Alaska Code, section 475, one in possession of mining claim under valid location has sufficient title to support action to quiet title against adverse claimant. Note, 2 Am. Dec. 570; extended note, 12 Am. Dec. 566, as to what proceeding is necessary in equity to annul a patent.

Estoppel in pais.—To the application of this principle with respect to the title of property it must appear: 1. That the party making the admission by his declarations or conduct was appraised of the true state of his own title; 2. That he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; 3. That the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge, and 4. That he relied directly upon such admission and will be injured by allowing its truth to be disproved. These are qualifications of the doctrine that a party is estopped where his declarations or conduct have influenced another party to his injury. There must also be some degree of turpitude in the conduct of the party to estop him, pp. 367, 368.

Cited in *Bashore v. Parker*, 146 Cal. 528, applying rule where claim and delivery was by husband for alleged community property, and was defended by wife's execution creditor who pleaded estoppel in pais; *United Ld. Assn. v. Pac. Imp. Co.*, 139 Cal. 376, *Lackmann v. Kearney*, 142 Cal. 115, holding no estoppel shown; *Van Allen v. Francis*, 123 Cal. 482, *Ditch Co. v. Canal Co.*, 27 Colo. 274, *Gjerstadengen v. Hartzell*, 9 N. Dak. 276, and *Smyth v. Neal*, 31 Or. 112, holding party not estopped by representations or conduct when not calculated to deceive or mislead; *Bloch v. Sammons*, 37 Or. 604, holding main case opposed to general current of authority as to estoppel by fraudulent

concealment; *Murray v. Brigg*, 29 Wash. 259, fact that judgment debtor was present at void execution sale of land which was bid in by creditor for amount of debt at request of debtor, and that debtor afterward collected rents as creditor's agent, does not estop debtor or successors in interest where sale was absolutely void and debtor was ignorant of invalidity; *McCracken v. City of San Francisco*, 16 Cal. 626, affirming rule in a case where the city was held not estopped from asserting title to property sold, where the party did not appear, with the exception of a certain ordinance to have been influenced in his purchase, and said ordinance was not shown to have been brought to his notice, nor was there any fraud or intention to deceive; *Green v. Prettyman*, 17 Cal. 402, where a certain instruction as to silence operating as an estoppel was held error as tested by the doctrine of the principal case; *Kelly v. Taylor*, 23 Cal. 15, where the same rules as to estoppel in pais were held to apply to mining ground, and holding also that an instruction that knowingly standing by and permitting working of the claim which was not visibly marked by boundaries operated as an estoppel, was error; *Maye v. Yappen*, 23 Cal. 308, stating the same rules as in the principal case, and holding that there was no estoppel where the plaintiff told defendant that he did not know where the line of a mining claim ran, that he need not be uneasy for he was not near the line and had full fifty feet to run before he reached it; *Carpenter v. Thirston*, 24 Cal. 281, 283, 284, also stating the same rules and holding that a disclaimer of title to land made to a person who has no claim or right thereto cannot operate as an estoppel unless the person to whom it was made was so directly influenced to and did so act upon it that it would be a fraud to permit the disclaimer to be retracted; *Davis v. Davis*, 26 Cal. 40; 85 Am. Dec. 166, also stating the same rules in affirmance and applied to the declarations of one made in ignorance of his title, his ignorance not being due to culpable negligence, and there being no intention to deceive, even though a party is thereby induced to purchase the land; *Bowman v. Cudworth*, 31 Cal. 153, as stating fully the doctrine of estoppel and the case holds that there must be some act or admission or neglect on which another has relied or acted to his injury, to constitute an estoppel; *Love v. Shartzler*, 31 Cal. 494, where it was held that there was no estoppel against the grantee under a Mexican grant such as to permit his recovering possession according to the boundaries established by final survey by the United States, by reason of the grantee's statements to the occupant before the survey that the land was public land and not within the limits of the grant, even though the occupant thereupon put valuable improvements thereon; *Maine Boy's T. Co. v. Boston T. Co.*, 37 Cal. 50, in an action for trespass to mining ground, where improvements made thereon with the knowledge of defendants and without their objection were held not to create an estoppel within the doctrine of the principal case; *Martin v. Zellerbach*, 38 Cal. 315; 99 Am. Dec. 379, stating the above rules of the

principal case, and it was held that a judgment creditor is not estopped to deny the debtor's title to property sold under execution in satisfaction of his judgment; *Davenport v. Turpin*, 43 Cal. 602, where the withdrawal from possession of land under a misbelief as to his title did not estop the party from afterward asserting his title within the period fixed by the statute of limitations; *Smith v. Penny*, 44 Cal. 166, holding that the fact that A, as attorney in fact for B, executes to C a deed of land does not constitute an equitable estoppel so as to prevent A from afterward setting up a title to the property acquired by him from B before he executed the deed; *Flège v. Garvey*, 47 Cal. 377, where a wife was held not estopped from recovering a homestead from the purchaser at a guardian's sale, although said guardian, having been appointed for the insane husband, had by order of court sold said homestead to pay the expenses of the wife and children, and she had received a part of the proceeds of said sale and had also consented that an attorney be appointed to represent her in the probate proceedings; *Stockman v. Riverside L. & I. Co.*, 64 Cal. 59, holding that the facts that a ditch was constructed at a heavy cost and used for more than five years with the knowledge of the true owner and without his objection did not operate as an estoppel in pais, and that there must be some degree of turpitude to estop one from the assertion of his title; *Anaheim W. Co. v. Semi-Tropic W. Co.*, 64 Cal. 196, also declaring the rule as to turpitude and holding that no estoppel arises from a riparian owner's neglect to object to the use of water in his stream during a time of abundant supply; *Lux v. Haggin*, 69 Cal. 266, where the laches and delay of plaintiffs were held not to create an estoppel, also stating the rule that the party claiming the benefit of an estoppel must be destitute of knowledge of his own legal rights and of the means of acquiring such knowledge, and in substance, also, the doctrine of the principal case, and applying the doctrine to the point that no estoppel is created against a riparian proprietor from objecting to the unlawful diversion of a stream flowing through his land, because he had knowledge that the diverting ditches were being constructed at great expense and did not object; *Breeze v. Brooks*, 71 Cal. 182, also in dissenting opinion, *Id.* 175, where A obtained credit on the strength of his apparent ownership in land, although the owner never stated that A owned the land, nor did it appear that he had any knowledge thereof, nor did he induce the creditors to believe that he owned said land, and it was held that there was no such carelessness or negligence as amounted to turpitude and an estoppel; *Raynor v. Drew*, 72 Cal. 313, where it was declared to be essential that one should act in ignorance of his real position to enable him to sustain the claim of estoppel; also holding that a mortgagor is not estopped from denying his liability for improvements on the mortgaged premises made by the mortgagee, by reason of the former's knowledge thereof and failure to object; *Bell v. Hudson*, 73 Cal. 288; 2 Am. St. Rep. 793, where a claim for relief founded

on certain partnership transactions was refused because the claim was stale, and the court said: "It is not the same thing as equitable estoppel, although it has been termed a quasi estoppel," and therefore the rules as to equitable estoppel did not apply; *Montgomery v. Keppel*, 75 Cal. 133, 134, 7 Am. St. Rep. 128, where it was urged that a corporation was by the conduct of one of its officers estopped from the setting up of the priority of its mortgage to that of the plaintiff, but it was held that it did not appear that such officer had authority to bind or affect the corporation by his statements and conceding that he did, his statements were of law and not of facts. It was also declared that statements to create an estoppel must be made with the express intention to deceive or with such carelessness or culpable negligence as to amount to constructive fraud, also that the plaintiff was not without the means of acquiring the knowledge; *Griffith v. Brown*, 76 Cal. 262, where the court said: "It is quite evident that these instructions were erroneous. They lack the most important element of estoppel; namely, that the party against whom it is invoked made the declaration or did the act upon which the estoppel is sought to be based either with the express intention to deceive or with such careless and culpable negligence as to amount to constructive fraud." The case was one of claimed estoppel, where certain advances were made on a mortgage taken on wheat; *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 429, 432; 9 Am. St. Rep. 226, 228, where it was held that no estoppel against resisting an action to recover under an insurance policy arose from a request to make proof of loss and furnish vouchers; *Morgan v. Lones*, 78 Cal. 61, where the declaration in an application for a homestead made by the husband that his wife was the "owner" did not estop him from thereafter asserting that it was not his wife's separate property; such declaration not having been made to deceive her or to induce her to take action thereon; *McCormick v. Orient Ins. Co.*, 86 Cal. 263, where an insurance company was held not estopped to set up a valid defense against a claim on a policy by reason of a request to the insured to produce books and undamaged property, even though the insured, at much expense and trouble, complied with said request, it not being found that the insured's acts were induced by said request; *Dean v. Parker*, 88 Cal. 288, restating the rules of the principal case in affirmance, where the husband's grantee was held not estopped from showing certain property was community property although the husband had filed a petition for letters of administration on his deceased wife's estate, setting forth therein that said land was his wife's separate estate; *Leonard v. Flynn*, 89 Cal. 543; 23 Am. St. Rep. 504, where in ejectment the holder of the title was held not estopped by knowledge of the fact that valuable improvements were put upon the land, even though he made no objection thereto nor any claim of interest in the land; *Ions v. Harrison*, 112 Cal. 271, holding that an administrator, the actual owner of the land, who in probate proceeding represented the title in his

deceased wife and procured a sale thereof, was estopped to question the purchaser's title by retention of the purchase money, even though the sale was void for want of jurisdiction; *Murphy v. Clayton*, 113 Cal. 160, holding that the fact that the equitable owner of real property permits the legal title to stand in the name of another does not estop him from asserting his equity and enforcing the trust against the administrator and creditor of the deceased trustee, where no act of such person induced the creditor to give credit to the decedent; *Blood v. La Serena L. & W. Co.*, 113 Cal. 227, where the court says the elements of an estoppel in pais have so long been settled that it is superfluous to refer to the cases. The decision distinguishes such estoppel from ratification and also holds that such an estoppel may be shown, without pleading, by way of equitable rebuttal; *Gull River L. Co. v. Keefe*, 6 Dak. Ter. 160, where certain statements of a subcontractor, made to the owner of certain premises without any design to mislead and without any facts showing gross negligence of said agent, and also made away from the office and without access to the books were held not to constitute an equitable estoppel in an action to foreclose a mechanic's lien; *City of Aurora v. West*, 22 Ind. 95; 85 Am. Dec. 418, but only generally to the point as to how far holders of negotiable paper irregularly issued are charged with notice; *Dohms v. Mann*, 76 Iowa, 728, where a minor owned land subject to a mortgage which was foreclosed and the land sold. The foreclosure was void for want of jurisdiction over plaintiff. Defendants occupied and improved the land for six or eight years after the sale; they did not, however, rely upon the plaintiff's representations or conduct in purchasing the land, nor did it appear that he was better informed as to the real condition of the title than defendants. These facts were held to create no estoppel; *Turner v. Baker*, 64 Mo. 242; 27 Am. Rep. 237, where the court says the principal case has been qualified somewhat by more recent decisions, and that the case before it did not involve the doctrine of estoppel, it being held that a jury could infer a practical location of a disputed boundary line by agreement, from long acquiescence, and by acts and declarations of the parties; *Acton v. Dooley*, 74 Mo. 69, to the point that there is no such thing as an estoppel in pais for neglecting to speak or act when without knowledge of the facts, and that agreements between coterminous proprietors as to a dividing line made in ignorance of the true line do not involve questions strictly of estoppel, so also that facts establishing an adverse possession should not be confounded with those creating an estoppel; *Burke v. Adams*, 80 Mo. 514, to the point that neglecting to speak or act without knowledge of the facts does not estop, and it was also held that estoppel in pais could not be urged against a minor; *Meyendorf v. Frohner*, 3 Mont. 321, holding that to set up a complete defense of estoppel in pais the answer should aver that the representations relied on were made with intent that they should be acted upon; *South End M. Co. v. Tinney*, 22 Nev. 64, in dissenting

opinion, to the point that under the facts there was no estoppel. In this case the action was ejectment for mining ground, and appellants contended that respondents were estopped to maintain the action by reason of their acts in suffering and encouraging them to locate the property and expend money and labor in discovering and developing the ledge; *Page v. Arnim*, 29 Tex. 72, stating the rules of the principal case in affirmance, but with the qualification that "a party may be estopped by acts and declarations which were designed to influence another who has acted upon them, although both parties were ignorant that what is thereby represented is not true, for if one of two innocent parties must suffer, he through whose agency the loss was occasioned must sustain it"; *Grigsby v. Caruth*, 57 Tex. 271, stating said rules of the principal case, also the qualification noted under the last case (29 Tex. 72) and holding that an heir was not estopped as to certain recitals in a deed of a part of partitioned land received through the probate court out of his father's community interest, where the grantee of the heir equally knew the true state of the title, and no fraud or concealment were shown; *Shoufe v. Griffith*, 4 Wash. 166; 31 Am. St. Rep. 914. In this case a syndicate made a declaration of trust representing the ownership of an interest in lands to be in parties who had made false representations to it. The respondent was ignorant of its rights in the premises, and such ignorance was not chargeable to its neglect. The parties making the false representations had mortgaged the land to another, who had no knowledge of the declaration of trust, although it was recorded prior to the execution of the mortgage, nor did the assignees of the mortgagee or the appellants actually know of the existence of said declaration. It was held that the actual owner of the land was not estopped from asserting his rights thereto. *Davenport v. Lamb*, 13 Wall. 432, holding that certain declarations, but at the best expressions of opinion in relation to title, as to which the other party was equally well informed or possessed equal means of information, were declared inadmissible years after the death of the party making them to create an estoppel in pais and to control a title descended to the heirs; *Henshaw v. Bissell*, 1 Sawy. 563, 569; 18 Wall. 272, in the matter of a claimed estoppel in locating certain patented land and declarations made in connection therewith, and it was held that there must be some intended deception or gross negligence amounting to fraud to create an equitable estoppel; *Brant v. Virginia etc. Co.*, 93 U. S. 336, to the point that there must be some intended deception or gross negligence amounting to fraud by which another has been misled to his injury, to constitute an equitable estoppel; also holding that the party urging the estoppel must have had no actual knowledge and no means convenient or available of obtaining such knowledge, and that if both parties knew the true state of title there is no estoppel; *Wythe v. Smith*, 4 Sawy. 25, where certain statements as to the true state of title by a feme covert was held not to create an estoppel,

it appearing that there was no intent to deceive and also that the other party could not have been misled; *Farmers' etc. Bank v. Farwell*, 58 Fed. Rep. 639, to the point that negligence that does not amount to a breach of duty does not constitute constructive fraud nor raise an estoppel. This case was one of a failure to give notice to a bank of an assignment of certain policies. Note 51 Am. Dec. 505, as to requisites of such estoppel; note, 23 Am. St. Rep. 150.

Mining Law—Proprietary Interest of Government.—The United States holds with reference to the public property in the minerals only the position of a private proprietor, and cannot, in derogation of the state's rights, enter upon or authorize the entry upon private lands to extract minerals, which could only be done by lessening or destroying the value of the inheritance, pp. 373, 375-380.

Cited, *Henshaw v. Clark*, 14 Cal. 464, to the point that miners have no right of entry on private lands to mine; *Hunt v. Steese*, 75 Cal. 626, to this same point of entry of miners on private land; *Burbank v. Fay*, 65 N. Y. 62, to the point that when one state owns lands within another state it acquires its estate subject to all the incidents of ordinary ownership and assumes merely the position of a private proprietor; *Mining Debris Case*, 9 Sawy. 492, to the same point as the principal case; *Woodruff v. North Bloomfield etc. Co.*, 18 Fed. Rep. 772, also to the same point; extended note, 63 Am. Dec. 93, 95; note 91 Am. Dec. 694; extended note, 30 Am. St. Rep. 556.

Jurisdiction—Pleadings.—Consent of parties will not enable the court to pass upon questions not raised by the written allegations of the pleadings, p. 380.

Cited, *Marshall v. Golden Fleece M. Co.*, 16 Nev. 177, to exactly the same point.

General Citations.—*Pralus v. Pacific etc. Co.*, 35 Cal. 34, to the point that a possessory title in or upon the public lands of the United States is sufficient to authorize an action by a party in possession under the same to determine the adverse title or claim of a party out of possession; *Murray v. Montana Lumber etc. Co.*, 25 Mont. 18; extended notes 11 Am. Dec. 501, as to trespasses destructive of estate; 63 Am. Dec. 93, 95, "cases supporting Justice Field's propositions of law" and "rights of settlers upon public lands"; note 68 Am. Dec. 274, as to the vested title of an owner of a mining claim.

14 Cal. 380-383. **BURDGE v. SMITH.**

Mining Law.—The presumption raised by the statute is that all lands in this state are public lands until legal title is shown to have passed from the government to private parties, p. 383.

Cited, *Smith v. Doe*, 15 Cal. 105, to the same point; *City of Santa Cruz v. Enright*, 95 Cal. 113, but the case is in effect distinguished as having been decided under a statute for the protection of settlers and

to quiet land titles, and it was held no such presumption could arise in favor of a riparian proprietor by appropriation, but that the burden of proving such fact was on him.

Same.—This presumption is constantly indulged in in favor of the possessor against a trespasser, p. 383.

Cited, *Smith v. Doe*, 15 Cal. 105, to the same point.

Same.—Right of Prior Appropriation by agricultural settlers does not apply as against subsequent miners, p. 383.

Cited, *Rupley v. Welch*, 23 Cal. 456, to the same effect; note 91 Am. Dec. 694, as to the respective rights of miners and others on public lands.

14 Cal. 384-387. **CHAFFIN v. DAUB.**

Sale.—What constitutes delivery depends in some measure upon the character of the article sold and the peculiar circumstances of the case, p. 386.

Cited, *Lay v. Neville*, 25 Cal. 553; *Williams v. Lerch*, 56 Cal. 334; *O'Gara v. Lowry*, 5 Mont. 434, all in affirmance; *Tognini v. Kyle*, 17 Nev. 213; 45 Am. Rep. 444, where the principal case is fully considered. This case was that of a sale of charcoal in pits on vendor's land, the change of possession being held sufficient.

14 Cal. 387-390; 73 Am. Dec. 656. **HULL v. SACRAMENTO VALLEY R. R. CO.**

Negligence is Shown Prima Facie by communication of fire by sparks from a locomotive engine with proof that such result was not probable from ordinary working of engine, pp. 388, 389.

Cited, *Henry v. Southern Pac. R. R. Co.*, 50 Cal. 182, in affirmance; *Butcher v. Vaca Valley etc. R. R. Co.*, 67 Cal. 524, where the evidence was held to have prima facie established negligence in a case of damages caused by fire from such engine, but in that case, however, an expert testified that a perfect engine, properly equipped and properly run, would not ordinarily throw out sparks sufficient to start a fire; *Judson v. Giant Powder Co.*, 107 Cal. 560; 48 Am. St. Rep. 154, where an explosion in a dynamite factory was held to raise a presumption of negligence, which, unexplained, made a prima facie case, and where expert evidence similar to that in the last citing case was decided to have strengthened the case; *Jacksonville etc. R. R. Co. v. Peninsular etc. Co.*, 27 Fla. 81, holding that the mere emission of sparks from a locomotive or the single setting out of fires thereby is not per se evidence of negligence and will not throw the burden of proof on defendant of removing such presumption. But that where the circumstances of the emission are such as common experience, or the known efficacy of approved spark arresters in general use, tells us would not exist if such instruments are properly used, negligence is suggested;

Illinois Cent. R. R. Co. v. Phillips, 55 Ill. 202, where the explosion of a steam boiler was held prima facie evidence of negligence, throwing the burden of proof on the defendant company; Evansville etc. Co. v. Keith, 8 Ind. App. 71, on point that fact that fire originated from escaping sparks raises no presumption of negligence; but cf. Louisville etc. Co. v. Marbury etc. Co., 125 Ala. 258, holding presumption rebutted by facts stated; Gandy v. Chicago etc. R. R. Co., 30 Iowa, 422; 6 Am. Rep. 684, holding that the mere fact that fire is communicated by a locomotive does not prima facie evidence negligence, but that the burden of proving it is on the plaintiff; Atchison etc. R. R. Co. v. Stanford, 12 Kan. 372; 15 Am. Rep. 365, to the same effect as the principal case; Smith v. Hannibal etc. R. R. Co., 37 Mo. 297, where the principal case is said to go to the extreme verge of the law in sustaining a verdict on the ground that there was some evidence to support it, and that the cases did not justify the proposition that negligence is ever to be presumed as a matter of law or of fact without some evidence from which actual negligence might be rationally inferred; Kelsey v. Chicago etc. R. R. Co., 1 S. Dak. 91, to the same effect as the principal case and perhaps less restricted; H. & T. C. R. R. Co. v. McDonough, 1 Tex. App. Civ. 356 (bottom paging), holding that in case of an unexplained cause of such fire negligence may be inferred; Spaulding v. Chicago etc. R. R. Co., 30 Wis. 121; 11 Am. Rep. 555, holding that in case of such fires the burden of proof is on the defendant railroad company, to overthrow the presumption of negligence; notes 81 Am. Dec. 259; 93 Am. Dec. 713; 96 Am. Dec. 650; 1 Am. St. Rep. 532; 7 Am. St. Rep. 69.

14 Cal. 390-395. CARSLEY v. LINDSAY.

Award cannot be impeached because contrary to law and evidence, p. 394.

Cited, note, 56 Am. Dec. 317, to this point as citing Muldrow v. Norris, 2 Cal. 74; 56 Am. Dec. 313.

14 Cal. 396-401. TAYLOR v. ROBINSON.

Agent to collect or secure claim has no authority to purchase to secure claims. General words must be construed with reference to the matter specially mentioned, p. 399.

Cited, Cassin v. Marshall, 18 Cal. 692, but that case was declared not within the principle, since one who held notes "to get the money" transferred them as part of the purchase price of property, and it was held that the sheriff who had attached the vendor's property, could not, in an action against him inquire whether the notes had been as against the principal improperly used; Stetson v. Briggs, 114 Cal. 514, to the point that an agent to collect rents has no power to receive anything but money; Cram v. Sickel, 51 Neb. 831, 66 Am. St. Rep. 480, on point that attorney for collection cannot receive anything but money in satisfaction of claim; Claflin v. Continental Works, 85 Ga. 43, Notes Cal. Rep.—45

to the point that general words in an agency restricts the agent in performing the act to the manner usual in the course of business, and that authority to take pay in other than money does not authorize making payments in the same way; *Scully v. Dodge*, 40 Kan. 397, holding that a naked authority to collect rents authorizes taking cash only and the agent cannot take notes in payment; *Pollock v. Cohen*, 32 Ohio St. 523, holding that a power of attorney to secure or in "any way to settle" a claim does not authorize an absolute purchase creating a debt against the principal; note 27 Am. Dec. 156, as to authority of an agent to execute a sealed instrument.

Ratification.—Agent's unauthorized acts may be ratified by principal so as to bind him from the inception of the transaction, p. 400.

Cited, *Frink v. Roe*, 70 Cal. 311, to the same point; but the doctrine was referred to in discussion merely, and not because the record in that case showed a ratification; *Los Angeles etc. Co. v. City*, 38 Fed. 743, applying rule to municipal contracts.

Ratification cannot affect intervening rights of third parties, p. 401.

Hardware Co. v. Deere M. Co., 53 Ark. 145; *Mayor v. Bernstein*, 69 Miss. 22; *Pollock v. Cohen*, 32 Ohio St. 525; *Kempner v. Rosenthal*, 81 Tex. 16; *Galloway v. Hamilton*, 68 Wis. 656; *In re Kansas City etc. Co.*, 9 Nat. Bank. Reg. 81; Fed. Cas. No. 7610, all in affirmance; *Cook v. Tullis*, 18 Wall. 339, to the same effect. Cited in *Graham v. Williams*, 114 Ga. 719, holding ratification of deed pending action not sufficient to establish right of action not theretofore existing; *Merritt v. City*, 175 Ill. 549, as to ratification of petition for street work originally invalid as against objecting owners; *Bank v. Richards*, 55 Neb. 687, as to ratification of sureties' signatures; *Farmers' etc. Co. v. Memphis etc. Co.*, 83 Fed. 875, but holding no such rights to have existed; extended note, 5 Am. St. Rep. 114, where the effect of a ratification is fully considered.

14 Cal. 402-403. **ANGULO v. SUNOL.**

Evidence.—Anything which rebuts the idea of a contract, express or implied, is proper evidence in an action upon an express or implied contract for services, the answer being the general issue, p. 403.

Cited, *Gerlach v. Terry*, 75 Cal. 292, in affirmance.

14 Cal. 403-408. **POPE v. HUTH.**

Equitable Assignment.—Order payable out of a particular fund, present or future, is an equitable assignment of the fund pro tanto, though not expressly accepted, pp. 407, 408.

Cited, *Grain v. Aldrich*, 38 Cal. 521, 99 Am. Dec. 426, where the principle is relied on to the point that an assignment of part of an entire demand is valid in equity without the consent of the debtor; *Bergson v. Builders' Ins. Co.*, 38 Cal. 545, where an assignment of an in-

insurance policy was held to constitute an equitable assignment of a contingent right to the money; *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 426, sustaining assignment of part of entire demand in equity without consent of debtor; *Curtner v. Lyndon*, 128 Cal. 36, applying rule to order for payment of share under cropping lease; *McIntyre v. Hauser*, 131 Cal. 14, discussing principles of equitable assignment; *Pullen v. Bank*, 138 Cal. 174, and *Donohoe etc. Co. v. S. P. Co.*, 138 Cal. 188, 189, noted under *Wheatley v. Strobe*, 12 Cal. 92; *Pease v. Landauer*, 63 Wis. 29; 53 Am. Rep. 250, holding that as between drawer and holder a check is an equitable assignment.

14 Cal. 410-413. GRIFFITH v. BOGARDUS.

Replevin lies for money of plaintiff mingled with other money, but claimed by him with assent of possessor at time of seizure, p. 413.

Skidmore v. Taylor, 29 Cal. 622, holding that "the authorities are very clear that replevin is a proper remedy for the recovery of a parcel of money 'sealed up in a buckskin leather bag'"; *Sharon v. Nunan*, 63 Cal. 235, in affirmance; *Eddings v. Borer*, 1 Ind. Ter. 178; extended note, 54 Am. Dec. 593.

14 Cal. 413-415. HAWKINS v. BORLAND.

Pleading.—It is not new matter, and may be shown under a general denial that money is not due under the contract, p. 415.

Cited, *Landis v. Morrissey*, 69 Cal. 86, where new matter is defined and evidence of a sale of goods on credit was held not new matter in an action for goods sold and delivered. So, also, in *Ferguson v. Rutherford*, 7 Nev. 390, new matter is defined and holding that it was not proving new matter to show that there were other terms of the contract besides those shown by plaintiff; note, 70 Am. Dec. 698.

14 Cal. 419-420. PIERCE v. PAYNE.

Affidavit for Continuance must show that there are no other witnesses by whom the same facts can be proven, p. 420.

Cited, extended note, 74 Am. Dec. 147, covering this and other points in reference to requisites of such affidavit.

Excess in Judgment may be remitted, as where damages are given for more than the amount claimed, p. 420.

Cited, *Pacific Postal T. C. Co. v. Fleischner*, 66 Fed. Rep. 910, to the same effect in a case of an allowance of an excess of interest.

14 Cal. 421-424. CITY OF SACRAMENTO v. DUNLAP.

Sureties on Joint Bond are not liable when signed by sureties only; aliter as to joint and several bonds, pp. 422, 423.

Cited in *Spokane etc. Co. v. Loy*, 21 Wash. 504, holding omission of

appellant's signature immaterial on appeal bond; *Storz v. Finkelstein*, 50 Neb. 186, holding party not liable on attachment bond not signed by him; *People v. Breyfogle*, 17 Cal. 509, as widely different as to the facts. This case was that of a joint and several bond signed and sealed by sureties and principal; *People v. Hartley*, 21 Cal. 589; 82 Am. Dec. 759, quoting from the principal case (p. 423) and affirming the rule; *People v. Love*, 25 Cal. 530, but distinguished in that the bond in that case was joint and several; also so distinguished in *City of Los Angeles v. Mellus*, 59 Cal. 449, and the sureties were held liable although the name of a cosurety was written in the body of the bond but erased after execution thereof by the other sureties. The same distinction as to a joint and several bond is also made in *Kurtz v. Forquer*, 94 Cal. 93, and the sureties were held liable even though the principal did not sign; so, also, is this distinction noted in *Weir v. Mead*, 101 Cal. 128, 129; 40 Am. St. Rep. 48, 49, quoting, also from the principal case (p. 423), but the bond was nevertheless held void, the principal not having signed. Cited, *State v. Martin*, 56 Miss. 114, in affirmation of the principal case; *Gay v. Murphy*, 134 Mo. 104, 107; 56 Am. St. Rep. 499, 501, quoting from the principal case (p. 423), noting, also, the distinction as to joint and joint and several bonds and holding the bond void where not signed by the principal, with the qualification that to hold the sureties liable the obligee must prove that they consented to be bound without such signature; *Ney v. Orr*, 2 Mont. 562, quoting from the principal case (pp. 422, 423,) and affirming the rule thereof; *State v. Hill*, 47 Neb. 498, fully discussing the point and noting the conflicting decisions, but not deciding the exact question, although it was held that an official bond was valid where the principal's name was only written in the body of the bond; *Vass v. Riddick*, 89 N. C. 8, to the same effect as the principal case with regard to joint and several bonds, although the case was one of alleged fraud of a co-obligor in inducing a party to sign a note, but this was held no defense; *Board of Education v. Sweeney*, 1 S. Dak. 646, 647; 36 Am. St. Rep. 771, quoting from the principal case (p. 423). In this citing case the bond was joint and several, but the principal did not execute it, and the sureties were held not liable; note, 34 Am. Dec. 700; 40 Am. St. Rep. 51.

14 Cal. 424-427; 73 Am. Dec. 658. **MOKELUMNE ETC. CO. v. WOOD-BURY.** S. C. 14 Cal. 285.

Existence of a Corporation must be shown by at least a substantial compliance with the statute, and the omission of the essential steps is fatal in a collateral proceeding, although mere irregularities cannot be collaterally assailed, the corporation being only responsible to the government in a direct action of forfeiture, pp. 426, 427.

Cited in *Los Angeles etc. v. Spires*, 126 Cal. 544, holding irregularities in formation of religious corporation not attackable collaterally (but cf. *Wall v. Mines*, 130 Cal. 37, 39, and *McLennan v. Hopkins*, 2 Kan.

App. 268, holding corporations not properly incorporated because of defective verification or filing of articles); *Doty v. Patterson*, 155 Ind. 66, holding de facto corporation and its stockholders liable on its contract notwithstanding defects in organization; *Jackson v. Mining Co.*, 21 Utah, 12, applying rule to amendment to articles under local statutes; *Elgin etc. Watch Co. v. Loveland*, 132 Fed. 45, under Hurd's Revised Statutes of Illinois of 1899, chapter 32, section 4, recording of certificate of Secretary of State with county clerk is condition precedent to legal existence of corporation; *Spring Valley W. W. v. San Francisco*, 22 Cal. 440, 441, noting the rule as to mere irregularities being a ground only of a direct proceeding by the state and that a failure to file a certificate was not fatal; *Harris v. McGregor*, 29 Cal. 127, holding that only such substantial compliance with the statute is necessary. So, also, in *People v. Stockton etc. R. R. Co.*, 45 Cal. 413; *McCallon v. Hibernia S. & L. Soc.*, 70 Cal. 168, where the certificate was held legally defective for want of conformity to the statutory requirements; *Fresno v. Warner*, 72 Cal. 384, but declared not in point so far as the right to question the corporate existence was concerned—since the action thereon was not based upon a contract alleged to have been made between the corporation and the adverse party in which case said party, having been sued for failure to perform, cannot deny the existence of the corporation and so annul the contract; *Humphreys v. Mooney*, 5 Colo. 284, 285, 287, where the authorities are fully considered and the case states the general rule as being against a collateral attack upon the existence of a corporation; *Bigelow v. Gregory*, 73 Ill. 201, holding that if parties seek to escape individual liability by reason of having become a corporation, a substantial compliance with the statute as to the formation of corporations must be shown; *Loverin v. McLaughlin*, 161 Ill. 426, but only generally to the point that a full and complete organization as a corporation is a prerequisite to transacting business in the corporate name; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 109; 41 Am. Rep. 86, quoting from the principal case (p. 426) as to collateral attack and the distinction between essential steps and mere irregularities in incorporating; *Granby M. Co. v. Richards*, 95 Mo. 111, where the same distinction is noted, but the case held that the failure to file a certificate of incorporation was not fatal nor an omission which could be taken advantage of collaterally; *Abbott v. Omaha Smelting Co.*, 4 Neb. 422, quoting from the principal case (pp. 426, 427) and holding that filing articles of incorporation was a condition precedent; *Kelly v. Ruble*, 11 Oreg. 86, but only generally to the point that in that case there was neither stock nor a company in existence; *Childs v. Hurd*, 32 W. Va. 99, to the point that filing a certificate of incorporation is a condition precedent to the creation of a corporation; *Greenbrier Ind. Exposition v. Rodes*, 37 W. Va. 743, quoting from the principal case (pp. 426, 427) as to the distinction there noted in a case as to the effect upon corporate existence of an acknowledgment of an agreement for incorporation, and the obligation as stockholders of the

subscribers thereto; *Hyde v. Doe*, 4 Sawy. 135, in approval of the rule that corporate existence depends upon compliance with requirements of the statute. Extended note, 19 Am. Dec. 67, as to corporations de facto; irregularities in formation of the company and collateral attack upon the existence of the corporation; notes, 78 Am. Dec. 732, as to the observance of statutory requirements; 79 Am. Dec. 437; extended notes, 29 Am. St. Rep. 601, as to the personal liability of persons acting as a corporation but without authority, where, by failure to comply with the statute, there exists no corporation; 33 Am. St. Rep. 177, as to substantial compliance with the statute being essential; notes, 33 Am. St. Rep. 369; 41 Am. St. Rep. 162.

Corporation Exists from date of filing certificate in the county clerk's office, but a failure to file a duplicate certificate can only be objected to by the state, p. 427.

Cited, *Humphreys v. Mooney*, 5 Colo. 295, in affirmance as to the failure to file a duplicate certificate; *Granby Min. Co. v. Richards*, 85 Mo. 111, to the point that the failure to file a certificate of incorporation was not fatal, nor an omission which could be taken advantage of collaterally; *Hyde v. Doe*, 4 Sawy. 135, holding that filing a duplicate certificate was not an essential act and that corporate existence was acquired by filing a certificate with the county clerk, also that the remedy for omission to file said duplicate rests alone with the state; *Spokane etc. Co. v. Loy*, 21 Wash. 512, construing similar local statute; note, 79 Am. Dec. 437. See, also, under the last heading herein, *Spring Valley W. W. v. San Francisco*, 22 Cal. 440, 441; *Abbott v. Omaha Smelting Co.*, 4 Neb. 422; *Childs v. Hurd*, 32 W. Va. 99.

General citation: *Hyman v. Coleman*, 82 Cal. 653.

14 Cal. 428-436. PEOPLE v. IRWIN.

The Statutory Lien of a Judgment upon the real estate of the judgment debtor can attach only upon property in which such debtor has a vested legal interest, p. 434.

Cited, *Riley v. Nance*, 97 Cal. 205, quoting at length from the principal case (p. 434), also cited *Id.* 206, where the court says: "A debtor cannot convey land subject to attachment so as to exempt it from the judgment lien," and that the principal case "does not affirm either in terms or in effect that he can."

14 Cal. 437-438. PEOPLE v. WOPPNER.

Oral Instructions in Criminal Cases constitute error when given without defendant's consent, pp. 437, 438.

Cited, *People v. Chares*, 26 Cal. 79; *People v. Trim*, 37 Cal. 276; *State v. Potter*, 15 Kan. 316, all in affirmance; *State v. Bennington*, 44 Kan. 585, in affirmance, and also holding that it was error to give part of the instructions orally, although taken down by the stenographer

and copied and delivered to the jury; *State v. Porter*, 35 La. Ann. 536, where the refusal upon request to instruct in writing was held error. *Boggs v. United States*, 10 Okla. 447.

Appeal.—Statute as to time for setting bill of exceptions or statement in criminal cases is directory, p. 437.

Cited, *People v. Lee*, 14 Cal. 511, in affirmance; *People v. Sprague*, 53 Cal. 424, with approval. So, also, in *State v. Salge*, 1 Nev. 460, *Che Gong v. Stearns*, 16 Oreg. 221, quoting to this point from the principal case, but holding that there was no statute in that state fixing the time for signing such bill by the circuit judge; Distinguished in *Winter v. People*, 10 Colo. App. 515, and held inapplicable under local statutes.

14 Cal. 438-440. **PEOPLE v. CARABIN.**

Larceny.—Conversion of property is not per se larceny, p. 440.

Cited in *Lee v. State*, 102 Ga. 224, applying rule to taking under claims of right.

Instructions are erroneous in a criminal case which assume that as a fact which should be left to the jury, p. 440.

Cited, *People v. Strong*, 30 Cal. 158, in affirmance, holding the same doctrine; *Davis v. State*, 50 Miss. 93, to the point substantially that instructions which leave no discretion to the jury are erroneous in a trial for larceny.

14 Cal. 440-444. **HITCHCOCK v. PAGE.**

Lease of land with privilege of purchase limits the privilege to the whole land, p. 443.

Cited, note 70 Am. Dec. 688, but only generally as distinguishing *Laffan v. Naglee*, 9 Cal. 662; 70 Am. Dec. 678.

14 Cal. 444-446. **McDANIEL v. YUBA COUNTY.**

Contracts by Supervisors with Physician for specified time as examining physician of hospital cannot be abrogated by rescinding order of appointment or by abolishing office, p. 445.

Cited in *Patton v. Board*, 127 Cal. 397, 78 Am. St. Rep. 72, holding health inspector under Political Code, section 3009, an officer within article 20, section 16 of constitution; *People v. Wheeler*, 136 Cal. 654, holding county physician not a public officer; *Webb v. Spokane Co.*, 9 Wash. 106, following rule.

14 Cal. 446-450. **HAYNES v. WAITE.**

Appropriation of Payments.—Debtor may make the appropriation at time of payment. If not then made by him, his right is gone and the creditor may make it any time before suit brought on the debt, p. 448.

Cited, *Christnot v. Montana etc. Co.*, 1 Mont. 48; *Lowerey v. Dixon*, 1 Tex. App. Civ. 246, sec. 497, both cases in substantial affirmance; note, 29 Am. Dec. 691.

14 Cal. 450-457. **NAGLEE v. LYMAN.**

Bill of Exchange may be taken as collateral security for a pre-existing debt, p. 454.

Cited, *Frey v. Clifford*, 44 Cal. 342, where a mortgagee in a mortgage given to secure a pre-existing debt was held a purchaser for a valuable consideration; *Davis v. Russell*, 52 Cal. 616; 28 Am. Rep. 650, where the same rule was applied to a warehouse receipt received by a bank; *Sackett v. Johnson*, 54 Cal. 109, affirming the rule in the case of a note; *Fair v. Howard*, 6 Nev. 318, applying the rule to a mortgage; notes, 12 Am. Dec. 137; 68 Am. Dec. 321; 33 Am. Rep. 46.

Bill of Exchange.—Acceptance may be by letter of credit agreeing to accept all bills drawn on its credit, p. 454.

Cited in *James v. Lyons Co.*, 134 Cal. 194, holding unqualified promise to accept shown by facts stated, and construing Civil Code, section 3197.

General Citation.—Note, 68 Am. Dec. 317, to the point that the doctrine of *Adams v. Woods*, 8 Cal. 152; 68 Am. Dec. 313, with respect to the invalidity of assignments not in conformity with the insolvent act is limited in the principal case, p. 456.

14 Cal. 457-459. **JEROME v. STEBBINS.**

Pleadings.—Plaintiff must aver in his complaint every fact which, if controverted, he would be compelled to prove to maintain his action, p. 458.

Cited, *O'Connor v. Dingley*, 26 Cal. 21, affirming the rule, and holding that in an action for work and labor done under a special contract the complaint must aver the execution of the contract, its terms, performance by the plaintiff, nonperformance by the other party, and the damages sustained; *Johnson v. Santa Clara Co.*, 28 Cal. 547, in affirmance; *Daley v. Russ*, 86 Cal. 117, holding that the complaint must allege either performance or a valid excuse for nonperformance; and if defendant's consent is relied on as an excuse, that excuse must be averred; *Perkins v. Barnes*, 3 Nev. 565, in dissenting opinion, but only generally as to the facts required to be pleaded; extended note 57 Am. Dec. 549.

14 Cal. 459-460. **JOHNSON v. JOHNSON.**

Divorce is not allowable for extreme cruelty caused by wife's misconduct, p. 460.

Cited in *Masterman v. Masterman*, 58 Kan. 757, holding extreme cruelty not shown by facts stated; extended note, 15 Am. Dec. 212.

where the point of misconduct of plaintiff is fully considered, as well, also, as other defenses in actions for divorce.

14 Cal. 460-465. **HENSHAW v. CLARK.**

Miners have no right of entry on private land to mine, p. 464.

Cited, extended note, 63 Am. Dec. 93, fully considering the principal cases; note, 91 Am. Dec. 694, as to the rights of miners on public and private lands.

Injunction lies to prevent mining by a trespasser and the subjection of private land to such uses as may be necessary to extract minerals, pp. 464, 465.

Cited, *Hunt v. Steese*, 75 Cal. 624, quoting from the principal case (p. 464) with approval; extended notes, 11 Am. Dec. 501, as to "trespasses destructive of estate"; 1 Am. St. Rep. 377.

General Citations.—Extended notes, 63 Am. Dec. 94, as to the rights of settlers on public lands; 63 Am. Dec. 103, "Public lands of California, sovereignty respecting." It will be observed, however, that in these notes the principal case is considered in connection with *Boggs v. Merced Mining Co.*, 14 Cal. 279, to which cross-reference is hereby made.

14 Cal. 465-469. **YOUNT v. HOWELL.**

Ejectment.—Improvements can be set off only by a defendant holding adversely in good faith under color of title, p. 466.

Cited, extended note 15 Am. Dec. 352, to this point.

Patent Proves Itself.—Judicial Notice is taken by the courts of both the signature and seal, p. 467.

Cited, *Stark v. Barrett*, 15 Cal. 366, to the effect that the patent proves itself; *United States v. Williams*, 6 Mont. 387, 389, to the same point; extended note, 89 Am. Dec. 686.

Ejectment.—Description of land by a certain name is sufficient where there is a reference to the grant by way of description and the allegations are supported by the recitals of the patent from the government, pp. 467, 468.

Cited, *People v. Lett*, 23 Cal. 163, where the description designated the tract by name and gave its general location and it was held sufficient.

Ejectment.—Pleading.—Exact time of seisin or ouster need not be alleged and is immaterial, if before suit brought, except as to mesne profits. It is sufficient if it appear that plaintiff was entitled to possession at the commencement of the action, p. 468.

Cited, *Boles v. Cohen*, 15 Cal. 151, where an averment of possession, the entry and ouster, and that plaintiff was still in possession was held

sufficient; *Moore v. Tice*, 22 Cal. 516, to the point that the plaintiff must show a title or right of possession at the commencement of the suit; *Hestres v. Brennan*, 37 Cal. 389, to the point that the issues in ejectment relate to the commencement of the action and that plaintiff must show that he was then entitled to possession; *Toland v. Mandell*, 38 Cal. 43, declaring that "to maintain ejectment a right of entry and possession is all that is required"; *Kidder v. Stevens*, 60 Cal. 420, to the same points as the principal case; *Vance v. Anderson*, 113 Cal. 536, where a similar complaint was held insufficient, it being determined that there should be an averment of seisin or right of possession at the commencement of the suit, and that it was not sufficient to aver it merely as of the date of the alleged ouster, but such defective averment was also held to be cured by the answer; *South End M. Co. v. Tinney*, 22 Nev. 226, to the same effect; *Hardy v. Johnson*, 1 Wall. 374, holding that possession or seisin must be alleged on some day stated, also defendant's entry and withholding from the plaintiff, and that a denial put in issue the plaintiff's title at the date alleged, "or at least his title at the commencement of the action."

Ejectment.—Meane Profits may be recovered in such action, but the proof must be limited to such as accrued subsequent to the alleged ouster. When they are claimed in an independent suit, whatever is necessary to their recovery must be established by evidence outside of the record in ejectment, p. 468.

Cited, *Clerk v. Boyreau*, 14 Cal. 637, to the same effect, also holding that the right to rents and profits must be asserted in a distinct proceeding based on the statute.

Judgment in Ejectment is only conclusive of the right of possession in the plaintiff and the occupation of defendant at the institution of the suit, p. 468.

Cited, *Marshall v. Shafter*, 32 Cal. 194; *Murray v. Green*, 64 Cal. 369; *Coburn v. Goodall*, 72 Cal. 506; 1 Am. St. Rep. 80; *Barrell v. Title Guarantee Co.*, 27 Oreg. 85; *McLane v. Bover*, 35 Wis. 34, all of said cases to this same point; note 48 Am. Dec. 775.

Patent takes Effect by relation to the first step in proceedings for the confirmation of the grant, p. 469.

Cited, *Stark v. Barrett*, 15 Cal. 366, to the same point; *Teschmacher v. Thompson*, 18 Cal. 26; 79 Am. Dec. 158, to the same effect in approval; *Leese v. Clark*, 18 Cal. 571, also, so holding; followed, *Touchard v. Crow*, 20 Cal. 160; 81 Am. Dec. 114; affirmed, *Kahn v. Old Telegraph M. Co.* 2 Utah, 188.

Patent is Conclusive in ejectment as to the action of officers of the government in the location of lands claimed under confirmed Mexican grants. The existence of the patent implies a compliance with every prerequisite of the law to its issuance, p. 469.

Cited, *Stark v. Barrett*, 15 Cal. 366, to the point that the patent is

conclusive against the government and all claimants therefrom by title subsequent, of the existence and validity of the grant and of the confirmation of the claim set forth in the recitals; *Knight v. United States Land Assn.*, 142 U. S. 204, in concurring opinion in affirmance.

Patent cannot be Collaterally attacked unless issued without authority, or prohibited by statute or void upon its face, p. 469.

Cited, *Pioche v. Paul*, 22 Cal. 111; *Turner v. Donnelly*, 70 Cal. 604, both cases to the same point; *Miller v. Grunsky*, 141 Cal. 457, noted under *Moore v. Wilkinson*, 13 Cal. 478; note, 2 Am. Dec. 568, as to proceedings to set aside a patent; also in extended note, 12 Am. Dec. 566.

14 Cal. 470-472. **BLACKWELL v. ATKINSON.**

Vendor is not a Competent Witness for his vendee, under a warranty of title, in any controversy concerning title, p. 471.

Cited, *Wright v. Carillo*, 22 Cal. 603, as so deciding, but in that case there was no proof or presumption that the vendor warranted the title, and he was held a competent witness as well on this as on other grounds; see Cal. Code Civ. Proc., secs. 1879-1881; 3 Deering's Cal. p. 3054, et seq.; *Gear's Cal. Index Dig.*, p. 984.

Covenant of Warranty runs with the land, p. 471.

Cited, extended note, 47 Am. Dec. 572, citing and considering numerous cases.

14 Cal. 472-478. **GEE v. MOORE.**

Covenant of Nonclaim in a Deed generally amounts to the ordinary covenant of warranty and operates as an estoppel, but is limited to the interest conveyed, pp. 473, 474.

Cited, *Morrison v. Wilson*, 30 Cal. 348, in affirmance, *Holcombe v. Richards*, 38 Minn. 44, to the same effect; *Taylor v. Holter*, 1 Mont. 708, to the point that the warranty is limited to the interest conveyed, but it is declared, however, that in that case the words used were those of bargain and sale; note, 37 Am. Dec. 130; extended note, 58 Am. Dec. 587.

Quitclaim Deed.—Covenant of Warranty of right, title, and interest does not enlarge estate or bind after-acquired title, p. 474.

Cited, *Kimball v. Semple*, 25 Cal. 452, in affirmance; so, also in *Cadiz v. Majors*, 33 Cal. 289; *McDonald v. Edmonds*, 44 Cal. 330; *McGarrahan v. New Idria M. Co.*, 49 Cal. 335; *Barrett v. Birge*, 50 Cal. 659; and *Emeric v. Alvarado*, 90 Cal. 459, is the doctrine approved and followed; *McDonough v. Martin*, 88 Ga. 679, to the same effect; *Holbrook v. Debo*, 99 Ill. 381, enunciating the same doctrine; *Young v. Clippinger*, 14 Kan. 151, but only generally as supporting a similar rule; *Taylor v. Holter*, 1 Mont. 708, where the rule is approved, but in that case the words used were declared to be those of bargain and sale;

Myers v. Reed, 9 Sawy. 139; 17 Fed. Rep. 406, in affirmance of the principal case; extended note, 58 Am. Dec. 586, "quitclaim deeds, as passing after-acquired titles under statutes."

Homestead.—Neither the constitution or the statute recognizes an estate in the wife, except as survivor. The husband alone has the legal title, pp. 474, 476, 478.

Cited, *Guiod v. Guiod*, 14 Cal. 508; 76 Am. Dec. 441, holding that the statute confers upon the wife no right to the homestead independent of her husband which she can enforce against his consent; *McQuade v. Whaley*, 31 Cal. 534, as deciding that the legal title is in the husband; *Creath v. Creath*, 86 Tenn. 661, as being to the effect that the homestead law does not vest any title in the wife to the homestead during her husband's life,—that it is, at the most, but a negative which she has in the conveyance by the husband.

Homestead.—Husband cannot alienate, without the signature of his wife. The deed, however, is not absolutely void, but creates, however, a kind of estate in reversion in the vendee, the estate being vested in him subject to the use and occupation of the homestead until another is acquired or until the character of the premises as a homestead is otherwise gone, pp. 474-476.

Cited, *Bowman v. Norton*, 16 Cal. 216, 218, quoting at length from the principal case on this point, but holding that the act of 1860 materially changed the provisions of the act of 1851 and rendered any mortgage thereafter of the homestead, except to secure or pay the purchase money, invalid for any purpose whatever; *Himmelman v. Schmidt*, 23 Cal. 121, to substantially the same effect as the principal case, but holding, however, that the act of 1860 to the point stated in the last citing case herein must be strictly construed; *McQuade v. Whaley*, 31 Cal. 534, in specially concurring opinion to the point that the vendee took an estate in reversion; *Brooks v. Hyde*, 37 Cal. 374, holding that a deed of a homestead executed by the husband alone gives no right of entry to the grantee so long as the grantor occupies the premises as a homestead; *Johnston v. Bush*, 49 Cal. 201, to the point that a joint deed was necessary under the act of 1851; *Godfrey v. Thornton*, 46 Wis. 685, to the point that the wife's signature is necessary to enable the husband to alienate the homestead; *Ferguson v. Mason*, 60 Wis. 390, holding that a conveyance by the husband alone without a reservation of the homestead right is void; *California Fruit Transp. Co. v. Anderson*, 79 Fed. Rep. 406, deciding that a homestead can be conveyed or encumbered only in the manner prescribed by law. In this case a wife's mortgage of the homestead to secure her husband's pre-existing debt was held not binding on her. Extended note 65 Am. Dec. 485, 486, 488, as to the "necessity of joinder of husband and wife in release of homestead," and "form of wife's assent to conveyance or release of homestead"; note 67 Am. Dec. 612, to the same point as the principal case; extended note 12 Am. St. Rep. 684, as to

the conveyance by the husband alone creating a reversionary interest in the grantee.

Homestead is Exempted from Forced Sale, p. 475.

Cited in *Karcher v. Gans*, 13 S. Dak. 390, 79 Am. St. Rep. 897, holding mortgage foreclosure not a "forced sale" within this rule; note 55 Am. Dec. 771, as citing *Sampson v. Williamson*, 6 Tex. 102; 55 Am. Dec. 762, to this point.

Husband may Alienate Homestead, in the absence of constitutional or statutory provisions, p. 476.

Cited, *Moran v. Clark*, 30 W. Va. 368; 8 Am. St. Rep. 74, to the same effect.

Homestead may be Established upon the common property of the husband and wife or the separate estate of the husband, pp. 474, 476.

Cited, *Bowman v. Norton*, 16 Cal. 216, to the same point; *Gimmy v. Doane*, 22 Cal. 638, in affirmance; *Riley v. Pehl*, 23 Cal. 74, where the court declared it unnecessary to determine "whether the separate estate of the wife can become the homestead, respecting which some doubts have heretofore been expressed."

Homestead is not a joint tenancy with right of survivorship; the wife did not take by right of survivorship, but as property set apart by law for her benefit and that of her children, if there be any, pp. 477, 478.

Cited, *Brennan v. Wallace*, 25 Cal. 114, restating the doctrine, but the case was one relating to abandonment of the homestead; *McQuade v. Whaley*, 31 Cal. 531, to the same point as the principal case; *Johnston v. Bush*, 49 Cal. 201, to the point that there was no joint tenancy under the act of 1851; *Levins v. Rovegno*, 71 Cal. 280, quoting from the principal case on these points, considering and construing the act of 1860 and noting the amendment of 1862; *Tyrrell v. Baldwin*, 78 Cal. 475, also quoting from the principal case upon these points; *Smith v. Shrieves*, 13 Nev. 308, 310, upon the points of joint tenancy and survivorship, and holding contrary to the rule of the principal case; extended notes 60 Am. Dec. 615; 65 Am. Dec. 483; note 68 Am. Dec. 309.

General Citation.—*Broadus v. Nelson*, 16 Cal. 81, where it is said that the principal case (with others cited) might be decisive of that case on other grounds, but it was not necessary to consider them.

14 Cal. 479-505. **WHITNEY v. BOARD OF D. OF S. F. F. D.**

Fire Department of San Francisco is a branch of the municipal government and not a mere voluntary association, pp. 496, 497.

Cited, *People v. Newman*, 96 Cal. 607, in affirmance.

Certiorari.—Decision of board of delegates of fire department upon contest of election of chief engineer is judicial and reviewable by cer-

tiorari to the extent of inquiring whether said board has exceeded its jurisdiction, pp. 496-499.

Cited, *Lowe v. Alexander*, 15 Cal. 301, but only generally to the point that a decision of an inferior court establishing a jurisdictional fact is reviewable on certiorari; *Henshaw v. Board of Supervisors*, 19 Cal. 156, to the point that a review by certiorari cannot be had of the action of the board except for excess or want of jurisdiction; *Spring Valley W. W. v. Bryant*, 52 Cal. 137, to the same point as the principal case, and holding that certiorari did not lie to review acts of the board of supervisors of a legislative character, but only such proceedings of governmental boards as are judicial; *Sweeney v. Mayhew*, 6 Idaho, 462, reviewing on certiorari sufficiency of evidence to support appointment of receiver; extended notes, 12 Am. Dec. 536, as "to what tribunals the writ may issue"; 16 Am. St. Rep. 222; 40 Am. St. Rep. 44, where the questions reviewable by the writ, as well also the point against what bodies the writ lies, are exhaustively considered.

Certiorari never extends to the merits and tries nothing but the jurisdiction. It covers however, every question of law and fact involving jurisdiction, pp. 499, 500.

Cited, *Central Pac. R. R. Co. v. Placer County*, 46 Cal. 670, declaring the doctrine well settled; *Stumpf v. Board*, 131 Cal. 368, quoting *In re Madera Irr. Dist.* 92 Cal. 335, 27 Am. St. Rep. 106; *White v. Superior Court*, 110 Cal. 64, in affirmance; *Board of Aldermen v. Darrow*, 13 Colo. 465; 16 Am. St. Rep. 217, approving the rule. In this case the writ was allowed to review the judicial action of city officers in behalf of an officer disturbed in the enjoyment of office; *More v. Bailey*, 8 Mo. App. 161, to the same effect as the principal case; *Lonsdale v. License Commrs.*, 18 R. I. 10, holding that the law and facts going to the jurisdiction will be reviewed; *State ex rel. v. Van Brocklin*, 8 Wash. 562, to the point that the facts as to the jurisdictional question will be examined.

Certiorari.—Inferior magistrates must show affirmatively their authority to act, and not only the record, but the evidence itself, when necessary to determine a jurisdictional fact, must be returned. p. 501.

Cited in *Borchard v. Supervisors*, 144 Cal. 14, but holding record otherwise not contradictable by evidence aliunde; *Blair v. Hamilton*, 32 Cal. 53, holding that the supreme court may require the inferior court to certify such necessary facts; *Central Pac. R. R. Co. v. Placer County*, 32 Cal. 585, in dissenting opinion, but the case holds that the statute does not require the board of equalization to take down nor preserve the evidence; also that it is not the clerk's duty to take down or preserve the same, and if it is not taken down and filed, it cannot be certified by the clerk in his return to the writ; *Central Pac. R. R. Co. v. Placer Co.*, 34 Cal. 362, holding that the clerk of such board can only return a transcript of such document, orders, judgments, proceedings, etc., as remain of record or on file in his office, and otherwise to the

same effect as the last citing case; *Lent v. Tillson*, 72 Cal. 434, in concurring opinion to the point that for irregularities in proceedings for widening a city street or other omissions in departing from the statute which rendered an assessment therefor invalid for want of jurisdiction, certiorari was a remedy; *In re Madera Irrigation District*, 92 Cal. 335; 27 Am. St. Rep. 134, in approval of the doctrine of the principal case. So, also, in *Schwarz v. Superior Court*, 111 Cal. 112, where the rule is affirmed; *Los Angeles v. Young*, 118 Cal. 298, holding that the lower court may be required to certify necessary facts in its return; *Hunter v. Eddy*, 11 Mont. 257, in dissenting opinion in a case holding that an entry in a justice's docket of confession of judgment is not a statement of a jurisdictional or other fact, on certiorari; *State v. Washoe County*, 5 Nev. 318, 319, to the same points as the principal case; approved in *State v. Humboldt County*, 6 Nev. 103, as to the point that the court may on certiorari consider such necessary evidence as bears upon the question of jurisdiction; *State v. Washoe County*, 7 Nev. 92, holding the same doctrine as to the evidence, but deciding also that the return cannot include matter which is neither a part of the record nor of the proceedings before the inferior tribunal; *In re Dance*, 2 N. Dak. 191; 33 Am. St. Rep. 772, as deciding the right of the court on certiorari to have the necessary evidence before it as to jurisdiction, but declaring that the California statute gave a wider range of investigation, and also that no effort was made in the principal case to contradict the facts in the record by parol, as was done in this citing case; extended note 12 Am. Dec. 537, to the point that the evidence must be returned.

Inferior Judicial Bonds must, if the legislature provides the mode of proceeding in special cases, be limited to the prescribed mode of exercising its powers, p. 503.

Cited, *Dorsey v. Barry*, 24 Cal. 452, to the same effect.

General Citations.—*Keller v. Chapman*, 34 Cal. 640, to the point that proceedings instituted to contest the election of county officers are special and summary in their character. *Maroney v. City Council*, 19 R. I. 4.

14 Cal. 506-508; 76 Am. Dec. 440. **GUIOD v. GUIOD.**

Homestead.—Wife has no Right thereto independent of her husband which she can enforce against his consent, p. 507.

Cited, *Brennan v. Wallace*, 25 Cal. 114, to the same point as bearing upon the question of abandonment; *Slavin v. Wheeler*, 61 Tex. 659, holding to the same effect; and *Cook v. Higley*, 10 Utah, 231, also to the same effect; notes 83 Am. Dec. 260; 85 Am. Dec. 277; 86 Am. Dec. 711.

Abandonment of Homestead.—Wife must accompany her husband when he changes his residence and the husband may relinquish the homestead, pp. 507, 508.

Cited, *Williams v. Moody*, 35 Minn. 281, 282, to the point that although it is necessary that the wife should join a conveyance, there may without any writing be an abandonment which will terminate the homestead right and exemption; also that the husband may fix the domicile; *Slavin v. Wheeler*, 61 Tex. 659, to the same point; note, 46 Am. St. Rep. 133.

Homestead.—The Statute Affords Protection to the husband and only through him to the wife and children, p. 507.

Cited, note, 92 Am. Dec. 116, as to the object of the homestead.

Conveyance of Homestead by Husband alone is valid subject to the homestead right until it ceases, when the deed takes full effect, p. 507.

Cited, *Bowman v. Norton*, 16 Cal. 218, to the same effect; *California F. & T. Co. v. Anderson*, 79 Fed. 406, construing section 1242 of the California Civil Code, and declaring that a homestead can only be conveyed or encumbered in the manner prescribed by law; *Farmers' etc. Assn. v. Jones*, 68 Ark. 79, holding husband estopped to deny abandonment; note 8 Am. St. Rep. 623, as to specific performance of the husband's bond to convey.

Intent to Abandon Homestead permanently is effectual, but a mere temporary removal for some specific purpose, intending to return, is not an abandonment, p. 507.

Cited, *Tipton v. Martin*, 71 Cal. 327; *Fyffe v. Beers*, 18 Iowa, 8; 85 Am. Dec. 579; *Williams v. Moody*, 35 Minn. 281, 282; all of said cases in affirmance; extended note 60 Am. Dec. 609, covering fully these points; notes 81 Am. Dec. 301; 85 Am. Dec. 582; 87 Am. Dec. 249; 9 Am. St. Rep. 518.

General Citation.—Extended note 65 Am. Dec. 483, 486, as to "Homestead right, whether estate or mere privilege," and also as to joint tenancy and right of survivorship (see reference to *Gee v. Moore*, 14 Cal. 472, at p. 508 of the principal case).

14 Cal. 508-509. **HENSLEY v. TARTAR.**

Pleading.—General denial to a verified complaint is insufficient, and raises no issue, p. 509.

Cited, *Fish v. Redington*, 31 Cal. 195, holding that a specific denial of each material allegation in a verified complaint is necessary, and also that a denial as a whole of averments of facts conjunctively stated is evasive and admits them; *Scovill v. Barney*, Oreg. 290, to the same points as the last citing case; *Hardy v. Purrington*, 6 S. Dak. 388, quoting the headnote of the principal case and stating that the code of that state differed, and a denial was held sufficient which was of "each and all the allegations in the affidavit contained, except such as are hereinafter admitted and qualified"; *Conway v. Clinton*, 1 Utah.

225, in dissenting opinion, quoting from the principal case (p. 509), as being to the point that a justification admitting the acts done was inconsistent with a denial.

Verified Answer must be consistent, p. 509.

Cited in *Hayes v. Silver Ck. etc. Co.*, 136 Cal. 241, holding pleading inconsistent.

14 Cal. 510-512. **PEOPLE v. LEE.** S. C. 17 Cal. 76.

Bill of Exceptions or Statement.—Time for settling and signing same in criminal cases is directory, but the statute is not on that account the less to be observed, p. 511.

Cited, *People v. Sprague*, 53 Cal. 424, quoting at length from the principal case in approval; *People v. Goldenson*, 76 Cal. 351, to the point that the court could delay the settlement beyond the statutory time; *Fechheimer v. Trounsteine*, 12 Colo. 283, holding that such bills must be signed and sealed by the judge whose rulings are excepted to; *State v. Salge*, 1 Nev. 460, approving the rule that the time is directory; so, also, in *State v. Baker*, 8 Nev. 145; *Che Gong v. Stearns*, 16 Ore. 221, as so deciding, but in that case there was no statute fixing the time.

Same.—Statement must be prepared and tendered within the statutory time, or time allowed by the judge, or excuse shown, pp. 511, 512.

Cited, *People v. Sprague*, 53 Cal. 424, quoting from the principal case at length in approval; *State v. Baker*, 8 Nev. 145, to the same point in affirmance.

Same.—There is no difference between a statement and bill of exceptions under the statute fixing the time for settlement and signing, p. 511.

Cited, *People v. Crane*, 60 Cal. 280, in affirmance with the exception that a statement follows a notice of motion for a new trial; *Bradbury v. I. O. Imp. Co.*, 2 Idaho, 225, to the point that in most respects a statement and bill of exceptions are similar, and that exceptions to the admission or rejection of evidence may be considered on a statement where a statement is authorized the same as in a bill of exceptions.

Same.—When the record is before the supreme court, it will not inquire into the reasons which induced the judge to delay signing such bill, but will presume they were sufficient, p. 512.

Cited, *People v. White*, 34 Cal. 188, to the same point; *People v. Sprague*, 53 Cal. 424, quoting at length from the principal case with approval; *People v. Raschke*, 73 Cal. 379, in approval.

The Proposed Statement or Bill in a criminal case may, whenever the judge is not found, be delivered to the clerk for him, p. 512.

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Cited, *Sprague v. Fawcett*, 53 Cal. 409, where the court also notes the fact that subsequently the statute and code "was altered so as to expressly authorize the practice"; *People v. Sprague*, 53 Cal. 424, where the practice is impliedly sanctioned; *Fechheimer v. Trounstiene*, 12 Colo. 284, to substantially the same effect; *Bradbury v. Alden*, 13 Colo. App. 211, holding presentation to clerk during judge's absence sufficient under local statutes.

Mandamus was issued in this case compelling the district judge to settle a bill of exceptions, p. 512.

Cited, *Sprague v. Fawcett*, 53 Cal. 409, but that case was distinguished and a mandamus refused upon the ground that such writ would not lie to compel the court in the first instance to determine in a particular manner the question of reasonable excuse for nonpresentation of the bill in time; *People v. Bitancourt*, 74 Cal. 190, as holding that mandamus will issue; *Wood v. Strother*, 76 Cal. 550; 9 Am. St. Rep. 253, also so holding; *In re Plume*, 23 Mont. 42, holding mandamus adequate remedy therefor in case of unreasonable delay in settlement; *Keane v. Murphy*, 19 Nev. 95, following rule.

General Citation.—*People v. Dickson*, 46 Cal. 54, as to what the record, on application for mandamus in such case, must show.

14 Cal. 512-519. **WAND v. WAND.**

Divorce.—In granting custody of children, their interests should be a leading if not a paramount consideration, p. 518.

Cited, extended note, 65 Am. Dec. 356, fully considering this and other points.

14 Cal. 519-531; 76 Am. Dec. 444. **PERRE v. CASTRO.**

Tender after Law Day of Mortgage and refusal do not discharge the mortgage lien, pp. 528-530.

Cited, *Hayes v. Josephi*, 26 Cal. 544, 545, where it was held that a surety on an undertaking was discharged, under the facts, by a tender and refusal of the amount due on a judgment, and the court said: "But there are substantial reasons why a tender should operate as a discharge of a mortgage or surety which do not apply to the debtor personally"; *Ketchum v. Crippen*, 37 Cal. 226, where the question was discussed but not decided; *Himmelmann v. Fitzpatrick*, 50 Cal. 651, in affirmance; *Olmstead v. Tarsney*, 69 Mo. 399, as so deciding, but it was held unnecessary to settle the rule, as the tender in that case was not made to the owner of the tax bill lien, but to the purchaser at the execution sale under the judgment enforcing the lien, and it was determined that such a tender could not divest the purchaser of his title; *McClung v. Trust Co.*, 137 Mo. 118, holding that the mortgage lien is released by a tender after default of the debt and interest, secured by a deed of trust; *Tompkins v. Batie*, 11 Neb. 151; 38 Am. Rep. 363,

holding that a tender after default of the amount due upon a chattel mortgage must be kept good to be availing; *Hyams v. Bamberger*, 10 Utah, 14, holding that a tender in writing, by pledgors, of the amount of the debt, even after sale, disaffirms the sale and it is void; *Mitchell v. Roberts*, 17 Fed. Rep. 779; 5 McCrary, 430, in affirmance as the general rule at common law, but also deciding that a tender of the debt after maturity extinguishes the lien on personal property pledged; notes 82 Am. Dec. 58; 93 Am. Dec. 112; extended note 30 Am. St. Rep. 461; note 36 Am. St. Rep. 194.

Foreclosure Decree Will not Apportion Debt among several cotenants of the mortgaged premises who acquire undivided interests therein at the same time and subsequent to the execution of the mortgage, p. 531.

Cited in *Walker v. Sarven*, 41 Fla. 218, applying rule to foreclosure of vendor's lien against joint tenants; note 83 Am. Dec. 329.

14 Cal. 531-539. GORMAN v. RUSSELL.

Voluntary Associations for mutual relief are partnerships and may be dissolved for improperly excluding a member, pp. 535-539.

This case was again before the court in 18 Cal. 688, where the action of the association in following the intimation of the court in admitting the member and removing unauthorized restrictions upon his rights was held sufficient to prevent a decree of dissolution. Cited in *Brown v. La Societe*, 138 Cal. 477, holding private hospital corporation not to be a charitable society; note to *Breaux v. Le Blanc*, 69 Am. St. Rep. 425, on partnership dissolution; *Fogg v. Supreme Lodge*, 156 Mass. 435, and distinguished as not being a partnership and so not within the principle of the principal case, but the association having exceeded its authority under the statute, a receiver was appointed and the fund ordered distributed; *Garham v. Mutual Aid Soc.*, 161 Mass. 367, but only generally to the point that if the association is not strictly a partnership the property on dissolution must be distributed among the members in much the same manner as if a partnership; *Hammerstein v. Parsons*, 38 Mo. App. 339, to the point that in case of the nonperformance, on demand, by the directors, of the duties imposed under the by-laws in regard to the payment of death losses, then the only remedy lies in equity to compel a performance of the trust; *Hornberger v. Orchard*, 39 Neb. 641, to the point that the liability of such associations is governed by the law of agency; *Industrial Trust Co. v. Green*, 17 R. I. 587, 588, considering but not deciding the question of partnership, but holding that courts will not interfere in dissensions of members for occasional breaches of agreement not interfering seriously with the carrying out of the corporate purposes; *Winona Lumber Co. v. Church*, 6 S. Dak. 502, where it was held unnecessary to decide the question of partnership, but it was determined that the acts of a voluntary unincorporated association are those of its members; note, 12

Am. Dec. 504; extended notes, 69 Am. Dec. 677; 98 Am. Dec. 265, exhaustively considering the question of dissolution; 7 Am. St. Rep. 162, 166, 170, also exhaustively treating the question relating to the nature of such associations and of dissolution, etc.

14 Cal. 542-544. MYERS v. CASEY.

Evidence.—If part of deposition be objectionable, this goes only to the rejection of that part, and the objection should be taken at the hearing, p. 544.

Approved, *First Nat. Bank v. Rush*. 85 Fed. Rep. 542.

14 Cal. 544-552. NATOMA WATER & M. CO. v. CLARKIN.

Complaint in Ejectment may also pray injunction against waste, p. 548.

Cited, *Curtis v. Sutter*, 15 Cal. 264, to the same point; *More v. Masini*, 32 Cal. 595, 596, also so deciding; *Haggin v. Kelly*, 136 Cal. 483, holding latter relief ancillary and plaintiff still entitled to jury trial; *Hughes v. Dunlap*, 91 Cal. 390, where it is said that such joinder was very common in the early history of the state, that it was frequently used to determine mining and water rights, and either party had a right to a jury trial; *Wa Ching v. Constantine*, 1 Idaho, 266; *Field v. Holzman*, 93 Ind. 210; *Catholicon Hot Springs Co. v. Ferguson*, 7 S. Dak. 508; *Jerrett v. Mahan*, 20 Nev. 100, all to the same point as the principal case.

Nonsuit does not waive exceptions when it is taken by consent with leave to move to set it aside upon exceptions taken, p. 549.

Cited, *Conner v. McPhee*, 1 Mont. 78, holding that the plaintiffs can move to set aside a nonsuit, when they have consented to it, upon its becoming apparent from the rulings of the court that he could not recover, the motion being based upon alleged error in said rulings; *Stevenson v. Matteson*, 13 Mont. 111, holding that asking for judgment against him after demurrer sustained and an election to stand on the complaint is not such a consent by plaintiff as to bar him from the right of appeal.

Objections to Evidence.—Appellate court will confine its considerations thereof to the specific point urged in the court below, p. 549.

Cited, *Sharon v. Minnock*, 6 Nev. 383, to the same point.

Evidence.—Certified copies of Mexican grant made by surveyor general are admissible if original is there on file, but is admissible only when the original itself would be, p. 550.

Cited, *Soto v. Kroder*, 19 Cal. 95, as so deciding, but holding that the nonproduction of the original must be accounted for where the party does not rely upon a certified copy, but upon proof aliunde that the copy was correct.

Patent to land cannot be collaterally attacked, p. 551.

Cited, *Pioche v. Paul*, 22 Cal. 111, in affirmance.

Mexican Grant.—Segregation is made by the decree of confirmation, p. 551.

Cited, *Mahoney v. Van Winkle*, 33 Cal. 456, as so deciding in a case where the decree of the supreme court of the United States setting aside a new survey and directing one to be made in accordance with the first was held to operate as a final location and segregation of the grant.

Injunction cannot be dissolved until final hearing, when granted upon a rule to show cause. The remedy is by appeal when the right to apply for dissolution upon filing the answer is not expressly reserved, p. 551.

Cited, *Natoma Water & M. Co. v. Parker*, 16 Cal. 85, quoting from the principal case (p. 551), in affirmance; cited in *State v. District Court*, 23 Mont. 566, denying mandamus to compel hearing on motion to dissolve or modify order.

Injunction.—Cutting and removing growing timber constitute a ground for an injunction, p. 551.

Cited, *United States v. Guglard*, 79 Fed. Rep. 23, to the same point.

Power of Corporation to hold real estate is a question only between it and the government, p. 552.

Cited, *Cal. St. Tel. Co. v. Alta Tel. Co.*, 22 Cal. 430, in affirmance with the qualification of an absence of an express prohibition of the law to purchase; *Union W. Co. v. Murphy's F. F. Co.*, 22 Cal. 630, where the rule is applied to the power of a corporation to make contracts, there being no express prohibition in its charter; *Stockton Sav. Bank v. Staples*, 98 Cal. 192; *Hough v. Cook Co. Land Co.*, 73 Ill. 28; 24 Am. Rep. 234; *The Chicago B. & Q. R. Co. v. Lewis*, 53 Iowa, 113; *Crolley v. Minneapolis etc. Ry. Co.*, 30 Minn. 543; *Jefferson Co. v. Grafton*, 74 Miss. 441; *Butte Hardware Co. v. Cobban*, 13 Mont. 361; *Missouri Valley L. Co. v. Bushnell*, 11 Neb. 195; *Gilbert v. Hole*, 2 S. Dak. 168; *Tarpey v. Salt Co.*, 5 Utah, 502, 503; *Water etc. Co. v. Tenney*, 24 Colo. 355, applying rule to purchase of water rights; *Farwell etc. Co. v. Wolf*, 96 Wis. 14, 65 Am. St. Rep. 23, as to right of corporation to acquire causes of action by assignment; *Cowell v. Springs Co.*, 100 U. S. 61, all of said cases affirming the doctrine; *Matter of McGraw*, 111 N. Y. 103, but distinguished as that case was one of a devise to a college corporation, exceeding the amount it was permitted to take under its charter, and it was held that the heirs or next of kin could raise the question of corporate capacity to take; *Hughes v. Northern Pac. Ry. Co.*, 9 Sawy. 330; 18 Fed. Rep. 118, holding that where there is a grant to a railroad corporation conditioned that the road be completed within a certain time, only the government can take advantage of a

failure to keep such condition; *Southern Pac. R. R. Co. v. Orton*, 6 Sawy. 182; 32 Fed. Rep. 470, affirming the principle in an action by a corporation against a trespasser; *Cole S. M. Co. v. Virginia etc. Co.*, 1 Sawy. 478, Fed. Cas. No. 2989, to the same point as the last citing case; extended note 94 Am. Dec. 381, 382, 383.

14 Cal. 553-558. **DORSEY v. MANLOVE.**

Damages.—In actions for taking and detaining personal property, the value of the property with interest is the rule where no express malice, fraud, or oppression is shown, and the measure of relief is a matter of law. If vindictive damages are claimed, any evidence showing want of malice is admissible, and if the trespass was willful or aggravated, the question is for the jury, and they may award punitive or exemplary damages. The rule of compensatory damages, applies to a seizure under a void writ, if there are no circumstances of aggravation, pp. 555, 556.

Cited in *Pac. etc. Co. v. Packers' Assn.*, 138 Cal. 630, holding evidence of bona fides improperly excluded; *Nightingale v. Scannell*, 18 Cal. 325, holding that the rule of vindictive damages in cases of malicious trespass applies to officers of the law acting under color of process; *Abbott v. '76 Land & W. Co.*, 103 Cal. 611, holding that compensation for the actual detriment suffered by plaintiff by reason of the conversion of wheat is the rule where taken without malice or oppression; *Lamb v. Harbaugh*, 105 Cal. 695, to the point that evidence showing want of malice and explaining the motives of the party should not be excluded from the jury where exemplary damages are claimed; *Winstead v. Hulme*, 32 Kan. 574, in substantial affirmance of the point that the rule of damages depends upon the presence or absence of fraud, malice, and oppression; *Dow v. Julien*, 32 Kan. 579, also in substantial affirmance of the same point, and holding that the actual damages would include the deterioration between the time of seizure and return, the injury to the property, and decrease in market value during such period, and, if any goods were not returned, the value thereof, with interest; *Whitfield v. Whitfield*, 40 Miss. 365, quoting from the principal case (pp. 555, 556), and substantially holding that the value of the property with interest is the rule where there is no malice or oppression shown; and that the question is for the jury in cases of malice; *Morgan v. Reynolds*, 1 Mont. 166, 167, and declaring, as to the principal case, that "in trover the rule therein declared is undoubtedly correct," but the case adheres in replevin to the rule of value of the use of the property and not the legal interest in its value; *Pegram v. Stortz*, 31 W. Va. 268; but only generally, with numerous other cases, in an exhaustive opinion as to the rule of damages for selling spirituous liquors to a husband; extended notes, 27 Am. Dec. 688; 50 Am. Dec. 768, as to exemplary damages, etc.

14 Cal. 559-566. **KIRKHAM v. DUPONT.**

Foreclosure of Mortgage—Parties.—Junior encumbrancers are not necessary though proper parties, p. 564.

Cited, *Grattan v. Wiggins*, 23 Cal. 32, and *Carpenter v. Brenham*, 40 Cal. 235, in affirmance; *Railway Co. v. James*, 54 Ark. 86, where substantially the same principle is followed as to a purchaser from the mortgagor of a portion of the premises not being a necessary party.

Redemption.—Junior mortgagee of an undivided interest in land, who is not made a party to a foreclosure suit of the whole land, may redeem the interest mortgaged but not the whole land, p. 565.

Cited, *Carpentier v. Brenham*, 40 Cal. 238, to the point that a younger mortgagee not made a party to the foreclosure may redeem; *Eldridge v. Wright*, 55 Cal. 536, holding that the principal case was not one of statutory redemption, and also that a judgment creditor of a tenant in common is a valid redemptioner of the whole premises; *Railway Co. v. James*, 54 Ark. 86, where a purchaser from the mortgagor of a portion of the premises was not made a party to a foreclosure suit and was declared to have no right of redemption.

14 Cal. 566-573. **PEOPLE v. BEATTY.**

Grand Jury may be summoned by special order of the court after commencement of the term, pp. 569, 570.

Cited, *People v. Cuintano*, 15 Cal. 329, but only generally to the point that a grand jury may be summoned while the prisoner is in custody on an offense charged before the commencement of the term.

Grand Jury.—Defendants must challenge the panel before it is made up and sworn, when they have been held to answer. If not held to answer, they may exercise this right of challenge on arraignment, pp. 570, 571.

Cited, *People v. Moice*, 15 Cal. 331, holding that challenges to the panel or to individual jurors must be made at the impaneling of the jury; *People v. Arnold*, 15 Cal. 479, and *People v. Colmere*, 23 Cal. 632, both these cases also so holding; *People v. Travers*, 88 Cal. 236, declaring that what is said in the principal case "about the right of challenge upon arraignment was evidently mere dictum"; *State v. Davis*, 12 R. I. 494; 34 Am. Rep. 705, as relied upon by the attorney general to the point that an objection to the qualification of a grand juror came too late after the jury had been impaneled and sworn, but the case held that such objection could be raised by a plea in abatement; *United States v. Clune*, 62 Fed. Rep. 799, construing the Penal Code of California, section 995, to mean that defendant shall have the privilege of challenge on arraignment when, from the nature of things, he could not have had it on the impaneling of the grand jury; extended note, 12 Am. St. Rep. 910.

Indictment in court of sessions in San Francisco may be entitled of the city and county of San Francisco, p. 571.

Cited, *People v. Connor*, 17 Cal. 361, in affirmance.

Indictment is sufficient if language of statute is substantially followed, p. 573.

Followed, *People v. Phipps*, 39 Cal. 331, a case of indictment for arson; also, *Portis v. State*, 27 Ark. 361, an indictment for exhibiting a gambling device; *Wheeler v. State*, 42 Md. 567, an indictment for gaming, etc.; *Foster v. Territory*, 1 Wash. 413, also an indictment for gaming. Cited, *State v. Carr*, 6 Oreg. 134, to the point that where the statute mentions several things disjunctively as constituting a crime, the indictment may embrace the whole in a single count, but it must use the conjunctive "and" where "or" occurs in the statute.

14 Cal. 573-576. LANDIS v. TURNER.

Party Offering Books of Account is competent witness to establish the facts which render the books admissible evidence, and it appearing that they are books of original entry and properly kept, they are admissible, p. 575.

Cited in *Stuart v. Lord*, 138 Cal. 677, 678, noted under *Bagley v. Eaton*, 10 Cal. 147; *Caulfield v. Sanders*, 17 Cal. 573, where a party was held a competent witness to prove the loss of a certain book of original entries, though one of the assignors of the book account; *Roche v. Ware*, 71 Cal. 379; 60 Am. Rep. 542, to the point that before the code a party offering his books was a competent witness as to the facts rendering the books admissible; *West Coast Lumber Co. v. Newkirk*, 80 Cal. 280, to the same points as the principal case; *White v. Whitney*, 82 Cal. 166, which holds that such books so supported by the party are receivable in evidence as prima facie proof of an account in his favor; *Ford v. Cunningham*, 87 Cal. 211, following the rule of the principal case; so, also, in *Redlich v. Bauerlee*, 98 Ill. 138; 38 Am. Rep. 88, in such book so proven held admissible.

Same.—The character of such books as ones of original entries is not affected by the fact that the charges were made first on a slate and transferred to such books, p. 575.

Cited, *Redlich v. Bauerlee*, 98 Ill. 138; 38 Am. Rep. 88, to the same point; extended note, 15 Am. Dec. 196.

General citation: *Missouri Electric Light etc. Co. v. Carmody*, 73 Mo. App. 541.

14 Cal. 576-612. NOE v. CARD.

Donations.—Restrictive conditions in a Mexican grant and a provision for cultivation and occupancy do not change it from a donation to a purchase, and the property constitutes the separate property of the grantee, pp. 596-607.

Cited, *Fuller v. Ferguson*, 26 Cal. 565, 566, but only generally as to the point of separate property; *Hood v. Hamilton*, 33 Cal. 703, also affirming the point as to separate property; *Morgan v. Lones*, 80 Cal. 319, to the point that the wife being the owner of the equitable estate as her separate property, the husband could not turn it into community property by advancing the funds necessary to obtain the legal title from the authorities; extended note, 86 Am. Dec. 630.

Same.—Onerous title by the Mexican law meant that which was created by a valuable consideration paid or rendered. A lucrative title was that created by donation, inheritance, or otherwise, p. 597.

Cited, *Fuller v. Ferguson*, 26 Cal. 566, to the same point.

Same.—Conditions are not onerous which require the expenditure of money and labor by the grantee for his own benefit, but otherwise when for the grantor's benefit or that of parties other than the grantee, pp. 598-608.

Cited, extended note, 86 Am. Dec. 630.

Same.—Fees required to be paid in such case are incidental to the grant and form no part of the consideration, and make the grant none the less a donation and separate estate, pp. 600-608.

Cited, extended note, 16 Am. Dec. 187; see, also, *Morgan v. Lones*, 80 Cal. 319, noted under the third preceding heading herein.

Community Property.—Expenditures by community upon separate property are a charge in favor of community, but do not make the property or improvements common, pp. 604-607.

Cited, *Fuller v. Ferguson*, 26 Cal. 568, to the point that a sum withdrawn from the funds of the community and used by him for his individual benefit constituted a charge in favor of the community against his separate estate; extended note 86 Am. Dec. 630, 634; see, also, *Morgan v. Lones*, 80 Cal. 319, noted under the fourth preceding heading herein; *Lake v. Bender*, 18 Nev. 390, in support of the general principle underlying the question as to what extent the profits arising from the joint labor and skill of husband and wife belong to the separate or to the community property.

Ejectment.—Disclaimer by defendant is not a proper basis for judgment for plaintiff, p. 609.

Cited, *Ellis v. Jeans*, 26 Cal. 278, to the same effect; *McAdams v. Lotton*, 118 Ind. 2, to substantially the same point.

Judgment in Ejectment cannot be entered against a party unless he was in possession actual or constructive at the commencement of the suit, p. 609.

Cited, *Crane v. Ghirardelli*, 45 Cal. 236, to the point that the possession of defendant in ejectment need not be actual as contradistinguished from constructive.

General Citations.—Yancy v. Butte, 48 Tex. 77, in dissenting opinion "to exhibit the view taken of the right of the surviving husband as regards the community estate," the laws being analogous to those of California. The case, however, considers the right of the heirs of the wife to recover pay for improvements made on and by the purchaser from the widower of what had been community property. Note 52 Am. Dec. 295, as citing Hoen v. Simmons, 1 Cal. 119; 52 Am. Dec. 291, in illustrating the difference between a tax for municipal purposes under the Mexican law and the general tax upon the transfer of land.

14 Cal. 612-634; 76 Am. Dec. 449. **CLARK v. BAKER.**

Mortgage.—As regards operation of mortgage upon subsequently acquired title, it is immaterial whether it be deemed the conveyance of a conditional estate, or as creating a mere lien or incumbrance, p. 626.

Cited, Goodenow v. Ewer, 16 Cal. 468; 76 Am. Dec. 544, as sustaining this point; also followed in Dutton v. Warschauer, 21 Cal. 621; 82 Am. Dec. 768.

Mortgage binds a subsequently acquired title of mortgagor, and such title inures to the benefit of the mortgagee, pp. 630-632.

Cited and the doctrine affirmed in the following cases: Clark v. Boyreau, 14 Cal. 636; San Francisco v. Lawton, 18 Cal. 474; 79 Am. Dec. 188; Lent v. Morrill, 25 Cal. 500; Kirkaldie v. Larrabee, 31 Cal. 457; 89 Am. Dec. 206; Green v. Clark, 31 Cal. 593; Christy v. Dana, 34 Cal. 554; 42 Cal. 179; Vallejo Land Assn. v. Viera, 48 Cal. 579; Sherman v. McCarthy, 57 Cal. 575; Camp v. Grider, 62 Cal. 25; Orr v. Stewart, 67 Cal. 277; Barnard v. Wilson, 74 Cal. 517; Dorn v. Baker, 96 Cal. 209; Stewart v. Powers, 98 Cal. 518; Green v. Green, 103 Cal. 110; Blakeslee v. Mobile L. Ins. Co., 57 Ala. 208; Kline v. Ragland, 47 Ark. 117, 118; Yerkes v. Hadley, 5 Dak. Ter. 334; Madaris v. Edwards, 31 Kan. 290, 291; Reynolds v. Cook, 83 Va. 823; 5 Am. St. Rep. 321. In Montgomery v. Whiting, 40 Cal. 299, the principle is applied and it is held that a sheriff's deed in fee simple does not bind an after-acquired pre-emption title. De Frieze v. Quint, 94 Cal. 659; 28 Am. St. Rep. 153, holding that a tax title acquired by a grantor after his deed purporting to convey an absolute title inures to his grantee's benefit; Jefferson v. Edrington, 53 Ark. 565, affirming the rule, but holding that if a married woman joins in her husband's deed she is not estopped to subsequently acquire title under the statute; McDermott M. Co. v. McDermott, 27 Mont. 149, where by deed to mining claim grantor granted the same and the habendum expressly covenanted that grantor conveyed all right, title and interest thereafter acquired by patent under proceedings previously instituted, grantor estopped to assert inconsistent after-acquired interest; Rice v. Kelso, 57 Iowa, 119, holding that a mortgage will, as between the mortgagor and mortgagee, in the absence of intervening equities, attach to land

the moment the mortgagor acquires title; *Simpson v. Greeley*, 8 Kan. 598, quoting from the principal case (p. 629) as to the general doctrine and its qualification, and holding that a quitclaim does estop to set up an after-acquired title; *Baldwin v. Root*, 90 Tex. 554, holding that a conveyance with warranty of title, or in such manner as to estop disputing the grantee's title, passes an after-acquired title to the grantee binding the warrantor, his heirs and subsequent purchasers; *Marrier v. Lee*, 2 Utah, 462, where the principle is applied to a purchaser with notice of a mortgage; notes 37 Am. Dec. 130, as to "after-acquired title, acquisition of by estoppel"; 58 Am. Dec. 588, "bargain and sale deeds as passing after-acquired title"; extended note, 76 Am. Dec. 733, as to remedies in equity and after-acquired titles; notes 79 Am. Dec. 192, 629; 89 Am. Dec. 206, 549; 91 Am. Dec. 165; 5 Am. St. Rep. 215, 323; 41 Am. St. Rep. 722.

Grantor and His Privies are estopped from denying that he was seised and possessed in accordance with the recitals and averments of the particular estate purported to be conveyed by the deed, and neither the mortgagor nor his vendee can deny his title to the mortgaged premises, pp. 629-633.

Cited, *San Francisco v. Lawton*, 18 Cal. 476; 79 Am. Dec. 191, where the principal case is fully considered, but it is held that a grantee in a quitclaim deed, or the grantee of land in fee, may deny that he received any estate by the deed or conveyance; *Kirkaldie v. Larrabee*, 31 Cal. 457; 89 Am. Dec. 206, to the point that the mortgagor of the fee in public lands is so estopped; *Orr v. Stewart*, 67 Cal. 278, to the same point as the last citing case; *Barnard v. Wilson*, 74 Cal. 517, as to estoppel against the mortgagor of the fee; *De Frieze v. Quint*, 94 Cal. 659; 28 Am. St. Rep. 153, holding that a grantor is estopped, under his deed purporting to convey an absolute title, to deny that before and at the date of the deed he had such title and had conveyed the same; *Hoppin v. Hoppin*, 96 Ill. 272, where a widow was held estopped to set up a claim to dower in lands against parties claiming under a trust deed made by her in connection with the heirs of the estate to secure debts and money borrowed to pay debts; *Dobbin's Admr. v. Cruger's Admr.*, 108 Ill. 194, where the principle of estoppel was applied to a grantor under a grant with full covenants of warranty, also to the case of a conveyance to a debtor's wife to hinder and delay creditors, the grantor being held estopped to assert that the transaction was illegal; *Shreve v. Copper Bell M. Co.*, 11 Mont. 327, where the rule of estoppel was applied to a conveyance of a mining claim; *Hagensick v. Castor*, 53 Neb. 503, applying rule to quitclaim deed containing such recitals; *Reynolds v. Cook*, 83 Va. 823; 5 Am. St. Rep. 321, applying the principle of estoppel to a case where the deed contains no covenant of warranty, but recites or affirms expressly or impliedly that the grantor is seized of a particular estate which is purported to be conveyed.

14 Cal. 634-640. CLARK v. BOYREAU.

Mortgage binds a subsequently acquired title of mortgagor, and such title inures to the benefit of the mortgagee, p. 636.

Cited, *Bull v. Shaw*, 48 Cal. 459; *Vallejo Land Assn. v. Viera*, 48 Cal. 579; both cases to this same point; *Yerkes v. Hadley*, 5 Dak. Ter. 334, also following the same rule; note, 76 Am. Dec. 458.

Plaintiff in ejectment cannot recover for use and occupation prior to execution of sheriff's deed during time for redemption, pp. 637-640.

Cited, note 1 Am. Dec. 116, citing numerous cases.

Rehearing.—Petition for modification of judgment will not be granted without rehearing, p. 638.

Cited and followed in *Argenti v. City of San Francisco*, 30 Cal. 461.

14 Cal. 640-642. COWELL v. BUCKELEW.

Probate Law.—Act providing that sale of property must be made by order of probate court does not apply to foreclosure or judicial sale in equity, p. 642.

Cited, *Fallon v. Butler*, 21 Cal. 31; 81 Am. Dec. 143, in affirmance; *Myers v. Mott*, 29 Cal. 373, in dissenting opinion as so deciding, but the case decides that an attachment lien can be enforced only by sale of the attached property under execution and that the death of defendant destroys the attachment lien.

Mandamus can only be issued by supreme court in the exercise of appellate jurisdiction, p. 642.

Cited, *Carpentier v. Loucks*, 28 Cal. 71, holding that under the constitution subsequent to the amendments of 1863 the supreme court had original jurisdiction in mandamus; *Hyatt v. Allen*, 54 Cal. 355, affirming the power to issue mandamus under article 6, section 4, of the constitution; *Id.* 364, in dissenting opinion; *State ex rel. v. Phillips*, 97 Mo. 347, as so deciding, but the case holds that the supreme court has original jurisdiction in mandamus; note, 52 Am. Dec. 302, 303.

General Citation.—*Morrison v. Lynch*, 36 La. Ann. 613, to the point that the moment an order of appeal is made and bond furnished, the power of that court over its clerk does not cease to have him perform the duties imposed upon him for the perfection of a transcript of appeal; *Havens v. Pope*, 10 Kan. App. 301.

14 Cal. 642-651. HARDING v. JASPER.

Dedication.—No particular formality is necessary; the intention governs, and this may be manifested by words or acts or by writing or by declared and clear assent to public user; and the dedication must also be accepted. Time, though material, is not an essential ingredient, and the question is one of fact, stronger proof being re-

quired in cases of country roads than in cases of town or city streets, pp. 647-651.

Cited in *Niles v. Los Angeles*, 125 Cal. 577, and *Town v. Rovelstad*, 105 Wis. 426, holding dedication not shown under facts stated; *Sears v. Tuolumne*, 132 Cal. 170, holding toll bridge dedicated; *Seattle v. Hill*, 23 Wash. 93, 97, 99, and *London etc. Bank v. Oakland*, 90 Fed. 699, 61 U. S. App. 234, holding dedication of roads established; *Schettler v. Lynch*, 23 Utah, 315, where owner inclosed land leaving street which was used by public as highway for long period, dedication inferred; *Kittle v. Pfeiffer*, 22 Cal. 490, where a mortgage, as to the mortgagees and those claiming under them, was held a dedication of certain city streets named as public highways and that a quitclaim deed to the city might be referred to, to show the width of such streets; *San Francisco v. Calderwood*, 31 Cal. 589; 91 Am. Dec. 543, holding that the public must accept a dedication to make it complete; *San Francisco v. Canavan*, 42 Cal. 554, to the point that an intention clearly indicated by words and acts and an acceptance are necessary to constitute a valid and complete dedication, also holding that the dedication must be irrevocable; *People v. Blake*, 60 Cal. 505, to the point that there must be an intention to dedicate and an acceptance, and that the acts of the public and donor must be unequivocal and satisfactory upon these questions. This was a case of a city street; *Quinn v. Anderson*, 70 Cal. 457, holding that the question is one of fact and cannot be presumed without evidence of an unequivocal intention to dedicate, also that stronger evidence is required in case of a neighborhood or timber road than of a thoroughfare, and in case of a county road than of a city or town street; *Hayward v. Manzier*, 70 Cal. 480, holding that there must be an acceptance; *Tait v. Hall*, 71 Cal. 152, where declarations of a former owner of the land as to his intention were admitted and it was also declared that the question of dedication was one of fact; *Hope v. Barnett*, 78 Cal. 14, deciding that while a formal grant was unnecessary, there must have been some act or assent to user of the road unless such user had continued for five years under section 2619 of the Political Code; *Spaulding v. Bradley*, 79 Cal. 454, affirming the rule as to intent being essential and acceptance necessary; *People v. Reed*, 81 Cal. 77, 79; 15 Am. St. Rep. 28, 30, quoting from the principal case (pp. 647, 648), also in affirmance of the points noted in the head line herein and holding that the making and filing a map designating streets in a city is only an offer to dedicate them, and acceptance must be made within a reasonable time; *Phillips v. Day*, 82 Cal. 30, to the point that the question is one of intention, to be gathered from the acts and conduct of the owner, and holding that the platting of land outside the town limits without an acceptance by the public constitutes no dedication; *Smithers v. Fritch*, 82 Cal. 158, to the point that the question is one of fact. The highway here was a county road; *City of Eureka v. Armstrong*, 83 Cal. 625, distinguishing the principal case in that in such case there

was no dedication or offer to dedicate, and therefore nothing for the supervisors to accept, and holding that there is a sufficient acceptance by a general order of the city council accepting all streets dedicated even though the particular street is not mentioned by name; *Griffiths v. Galindo*, 86 Cal. 196, approving the rule as to intention being essential, to be determined by the owner's acts; *Archer v. Salinas City*, 93 Cal. 51, 53, to the points that the question is one of fact, and that in case of an actual dedication no acceptance is required but will be presumed. In this case city land was platted by the owner and the map recorded, and there was also designated thereon a block as a park, and there were other acts evidencing an intention to dedicate. *Smith v. San Luis Obispo*, 95 Cal. 466, 470, quoting from the principal case (pp. 647, 648), in approval; *People v. Dreher*, 101 Cal. 273, to the points that an intention clearly manifested by words or acts and an acceptance are necessary to a dedication; *Helm v. McClure*, 107 Cal. 204, holding that the question is one of fact; that the intention must be unequivocally shown by words and acts of the owner, and that there must be an acceptance or public user; *Waring v. City of Little Rock*, 62 Ark. 420, to the point that it requires less proof to establish a city street, by prescription, which connects two ends of a street and make it continuous than where a road runs across vacant land in the country or where the street claimed runs diagonally across a block; *Manderschid v. City of Dubuque*, 29 Iowa, 80; 4 Am. Rep. 199, as illustrating, with other cases cited, what acts evidence a presumption of dedication. In this case there had been no acceptance other than by public user and a dedication was found; *State v. K. C. etc. R. Co.*, 45 Iowa, 144, holding that user alone of uninclosed and wild prairie and timber land will not support a prescription for a highway; *Smith v. Smith*, 34 Kan. 301, to the point that a public road cannot be established by prescription or limitation over unimproved and unoccupied prairie land over which people may travel at pleasure; *Morse v. Zeize*, 34 Minn. 36, to the point that there can be no rule as to what conduct of a landowner will make out of a dedication, but that the question is one for the jury; *Village of White Bear v. Stewart*, 40 Minn. 287, declaring that an intention, unequivocally manifested, to dedicate is essential; that time, though material, is not indispensably necessary, and if there is an acceptance and user in the manner intended the act is complete; *Cunningham v. San Saba Co.*, 1 Tex. Civ. App. 483, holding that the use of vacant uninclosed land for twenty years by the public will not give a right by prescription; *Buntin v. Danville*, 93 Va. 204, 211, to the points that an intention to dedicate, unequivocally manifested, and an acceptance are necessary, "or such long use by the public as to render a reclamation unjust and improper"; also that a dedication is not within the statute of frauds, and may as well be done by oral declarations as by deed or writing; *Hanson v. Taylor*, 23 Wis. 555, in dissenting opinion in a case where a prescriptive right was held to have been created by continuous and uninterrupted use for the statutory period; also, that it was unnecessary to show

acts of the town authorities recognizing land as a highway; extended note, 27 Am. Dec. 560, 563, 568, exhaustively considering the several points involved in the doctrines underlying dedication; notes, 33 Am. Dec. 714; 58 Am. Dec. 617; 15 Am. St. Rep. 33.

14 Cal. 654-658. **HARDENBERGH v. HARDENBERGH.**

Divorce—Refusal of wife to go with husband upon change of residence without excuse is desertion, pp. 656, 657.

Approved in *Ault v. Ault*, 29 Colo. 153, as to insufficiency of evidence to show desertion by wife who first refused to go to other state with husband but later went to him and he refused to live with her; *Strouse v. Liepf*, 101 Ala. 441, 46 Am. St. Rep. 128, where the underlying principle, that the husband may change the matrimonial domicile at his pleasure and the wife is bound to follow, is affirmed.

14 Cal. 658-661. **GEORGE v. RANSOM.**

Trust Funds.—Wife contracting with husband for purchase with her separate property may charge him as trustee and may follow money in his hands into whatever property it goes as against his creditors, p. 660.

Cited, extended note, 32 Am. St. Rep. 125, exhaustively considering the cases and principles involved.

14 Cal. 661-667. **MITCHELL v. HACKETT.**

Negotiable Note.—Fraud is no defense against a bona fide holder, p. 666.

Cited and followed in *Bedell v. Herring*, 77 Cal. 574; 11 Am. St. Rep. 309.

Upon Motion for New Trial court should not grant the new trial and immediately, without hearing or notice, render a contrary judgment, p. 667.

Cited, *Wunderlin v. Cadogan*, 75 Cal. 618, to this point.

14 Cal. 667-682; 76 Am. Dec. 459. **REYNOLDS v. HARRIS.** S. C. 18 Cal. 276, 289, deciding, except as to effect of reversal of judgment, other points.

Want of Notice cannot be objected to by a party appearing to a motion, p. 677.

Cited, *Millard v. Hathaway*, 27 Cal. 138, where there was a waiver of failure to serve notice of intention to move for a new trial, it appearing from the order denying the motion that "the motion was submitted upon the foregoing statement and affidavits by consent of the respective attorneys herein"; *Shay v. Superior court*, 57 Cal. 542, to the same point as the principal case; *Acocck v. Halsey*, 90 Cal. 220, also to the same point; *Curtis v. Walling*, 2 Idaho, 386, also so holding.

Judgment.—Proceedings for Restitution on the reversal or modification of the judgment or order below may be by motion below. The power of the supreme court is not exclusive, pp. 677, 678.

Cited, *Johnson v. Lamping*, 34 Cal. 301, in affirmance; also approved in *Heydenfeldt v. Superior Court*, 117 Cal. 350; notes 28 Am. Dec. 244; 57 Am. St. Rep. 549.

Same.—Against such motion there seems to be no statute of limitations, p. 678.

Cited, *Johnson v. Lamping*, 34 Cal. 301, but the court says it does not desire to commit itself to this proposition; *Applegarth v. Dean*, 68 Cal. 494, holding that in an action to recover the excess paid on a judgment the statute of limitations did not begin to run against the plaintiff until the modification of the judgment by the supreme court.

Decree is Valid until reversed or set aside, where the court has jurisdiction of the subject and parties, pp. 678, 682.

Cited, *Gray v. Dougherty*, 25 Cal. 273, in affirmance; *Hazard v. Cole*, 1 Idaho, 288, to the point that a judgment which is irregular is subject to modification and cannot be impeached, and that judgments can be impeached in equity only on the ground that to allow such impeachment would unsettle titles and ruin those who had reposed confidence in judicial sales; notes 79 Am. Dec. 249, 751; 80 Am. Dec. 104; 83 Am. Dec. 533; 57 Am. St. Rep. 549.

Upon Reversal of Judgment, all advantages received must be restored by the party who has obtained them by such judgment; property purchased by plaintiff therein on sale under the judgment comes within the rule, pp. 679, 680.

Cited in *Black v. Vermont etc. Co.*, 137 Cal. 684, sustaining action against administrator of purchaser; *Cowdery v. Bank*, 139 Cal. 305, applying rule in action to foreclose mortgage. And see, also, *Di Nola v. Allison*, 143 Cal. 109, 113, 114, *Dunfee v. Childs*, 45 W. Va. 166, holding that purchaser's title under confirmatory decree fails when decree reversed; notes to *Hacker v. White*, 79 Am. St. Rep. 953, on right of judgment creditor; *Reynolds v. Hosmer*, 45 Cal. 629, declaring that, if the plaintiff be the purchaser, the former owner may, at his election, either have the sale set aside and be restored to the possession or have his action for damages; *Polack v. Shafer*, 46 Cal. 276, applies the rule to the defendant in forcible entry and detainer so far as acquired rights of third parties are not interfered with; *Marks v. Cowles*, 61 Ala. 303, 308, in affirmance, quoting from the principal case (p. 679); *Martin v. Victor M. & M. Co.*, 19 Nev. 199, quoting from *Reynolds v. Hosmer*, cited under this heading, to the same points in a case as to when a court would be authorized to set aside an execution sale; *Multin v. Atherton*, 61 N. H. 21, to the point that the owner of the judgment purchases subject to the risk of losing title by reversal of his judgment; *Day v. Bach*, 87 N. Y. 61, as sustaining the point that if property has been

wrongfully taken the party against whom the writ issued is entitled to restitution, from the party who sued out the writ, of any property or money of the defendants in his hands; *Peticolas v. Carpenter*, 53 Tex. 29, following the principal case as to restoring the advantage obtained; *Adams v. Odorn*, 74 Tex. 212; 15 Am. St. Rep. 831, holding that a reversal of a judgment foreclosing a mortgage destroyed the title to lands acquired by the mortgagee at a sale before such reversal; *Wall v. Dodge*, 3 Utah, 171, following the principal case as to restoring the advantage obtained; *Galpin v. Page*, 18 Wall. 374; 3 Sawy. 127, in affirmance of the principal case and applying the principles to an attorney purchasing at a judicial sale decreed in proceedings in which he acted as attorney; *South Fork Canal Co. v. Gordon*, 2 Abb. (U. S.) 491, where the rule as to restoring the advantage obtained is qualified and the principal case is said to conflict to a certain extent; extended note 28 Am. Dec. 369; notes 82 Am. Dec. 705; 91 Am. Dec. 195.

Same.—Third party who is a bona fide purchaser is protected if he has received the legal title with which he is not clothed until he receives a sheriff's deed, p. 680.

Cited, *Marks v. Cowles*, 61 Ala. 303, 308, in affirmance; *Hunt v. Loucks*, 38 Cal. 377, holding that such third party is protected; *Roberts v. Clelland*, 82 Ill. 542, holding that an assignee of a purchaser must be clothed with legal title by sheriff's deed to be protected; *Gowen v. Conlow*, 51 Minn. 216, to the point that a sale of real estate under an execution to a stranger, a purchaser in good faith, is not avoided by a judgment afterward set aside on grounds not going to its original validity; *Wall v. Dodge*, 3 Utah, 171, to the point that if the property had come into the hands of a bona fide purchaser so that it could not be restored in specie the defendants would be left to an action for damages for compensation, under the Practice Act of that state; extended note 28 Am. Dec. 371, as to restitution from third parties; notes 81 Am. Dec. 462, as to sheriff's deed; 82 Am. Dec. 573; 83 Am. Dec. 435, as to a consideration being paid to make one a bona fide purchaser; 87 Am. Dec. 297, as to sheriff's deed; 10 Am. St. Rep. 312; 11 Am. St. Rep. 917; 15 Am. St. Rep. 144, as to effect of reversal of judgment on bona fide purchaser; 58 Am. Rep. 932.

Same.—Assignee of certificate of sale to the plaintiff must restore property, pp. 680, 681.

Cited in *Ashton v. Heydenfeldt*, 127 Cal. 449, decreeing restitution on reversal of decree of distribution; *Singly v. Warren*, 18 Wash. 443, 445, 446, 63 Am. St. Rep. 901, 903, 904, holding innocent grantee from judgment creditor not protected; notes to *Chilstrom v. Eppinger*, 78 Am. St. Rep. 51, 56, on rights of assignee of judgment; *Taylor v. Weston*, 77 Cal. 539, holding that such assignee is not protected, as he is not the purchaser of the legal title, but acquires an equity merely; *Roberts v. Clelland*, 82 Ill. 542, to the point that the assignee of a purchaser and certificate sale is not an innocent purchaser and entitled to protection

until clothed with the legal title by a sheriff's deed; *Smith v. Huntton*, 134 Ill. 31, 23 Am. St. Rep. 650, holding that such assignee stands on the same ground as the plaintiff; *Mullin v. Atherton*, 61 N. H. 21, to the point that such assignee purchases subject to the risk of losing title by reversal of the judgment; *Adams v. Odom*, 74 Tex. 214, 15 Am. St. Rep. 833, holding that the assignee of a mortgagee who was a purchaser at a foreclosure sale acquired no title to the lands; note 83 Am. Dec. 315.

Same.—Whether the assignee, after going into possession and before setting aside of the sale, is accountable for rents and profits not fully argued and not decided, p. 683.

Cited, *Conro v. Crane*, 110 U. S. 412, but declared to be wholly unlike that case, which was one of a bankruptcy sale which was revoked, but there was held to be no liability for profits to one in whose favor the order of sale was revoked.

General Citations.—*Lucas v. City of San Francisco*, 28 Cal. 596, to the point that the finding of a referee became a matter of record and as such properly came up in the record on appeal without a statement or bill of exceptions; *Imperial S. M. Co. v. Barstow*, 5 Nev. 253, 254, holding that findings are no part of the judgment roll; note, 82 Am. Dec. 573, as to "sheriff's deed, whether relates back to time of sale."

VOLUME XV.

By WILLIAM FOSTER.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

15 Cal. 9-12. BROWNER v. DAVIS.

Parties.—One of several obligees on an injunction bond may sue alone on the bond if he was solely damaged by the breach, p. 11.

Cited in *Ruble v. Coyote Co.*, 10 Oreg. 41, holding that obligees may sue separately or jointly, though the bond be joint; and *Montana Co. v. St. Louis Co.*, 19 Mont. 320, holding that in suit on an injunction bond all the obligees are necessary parties.

Nominal Damages follow as a conclusion of law from breach of a contract, p. 11.

Cited in *Hancock v. Hubbell*, 71 Cal. 540, holding that where a breach is proven, the question of nominal damages must be left to the jury, and a nonsuit is improper.

Injunction Bond.—Demand upon the party for whom the obligees in the bond are sureties is not necessary, p. 11.

Cited, in *Murdoch v. Brooks*, 38 Cal. 604, holding that issuing of execution or demand for payment are not necessary before bringing suit on an undertaking on appeal; and note to 38 Am. St. Rep. 714, on this point.

Clerical Error in entitling of a case may be corrected on motion in the lower court or on appeal, p. 11.

Cited in *Kindel v. Lithog. Co.*, 19 Colo. 312, holding that an error in amount of a judgment, whether clerical or judicial, may be corrected in the trial court after appeal taken, and the amended judgment may be certified to the supreme court; and note to 14 Am. Dec. 518, as to amendments after appeal.

Discontinuance as to some of the defendants, effected by filing an amended complaint, cannot be objected to by the remaining defendants, p. 12.

Approved in *Ware v. Walker*, 70 Cal. 593.

15 Cal. 12-20. TRAVERS v. CRANE.

Agency is terminated by death of the principal, pp. 16-19.

Approved in *Ferris v. Irving*, 28 Cal. 648, where it is said of the principal case: "We do not consider its correctness to be an open question in this state." Cited in dissenting opinion of Sharpstein, J., in *Janin v. Browne*, 59 Cal. 47, where the majority of the court hold that an administrator is bound to carry out the contract of his intestate in regard to sale of land, the contract not being of a personal nature. Cited in *Clayton v. Merritt*, 52 Miss. 359, where the court discusses the difference between the civil-law and common-law doctrine; also in notes to *Cassiday v. McKenzie*, 39 Am. Dec. 84, 85, 89.

Agent with an Interest may act in some cases after death of his principal; but such facts are not alleged in this case, p. 19.

Cited in *Cary etc. Co. v. McCarty*, 10 Colo. App. 207, on point that license coupled with interest is irrevocable; notes to 10 Am. Dec. 41; 47 Am. Dec. 345.

Appeal.—Errors assigned by appellant are all that the court can consider, p. 20.

Cited in *Jones v. St. John Co.*, 2 Idaho, 60, where the court declines to consider an error urged by respondent on appeal.

15 Cal. 21-23. BREWSTER v. LATHROP.

Parol Evidence held admissible to explain the use of the word "morning" in an assignment of shares of mining stock, p. 22.

Cited in *Darby v. Arrowhead Co.*, 97 Cal. 387, where parol evidence was allowed to explain the use of the word "advances" in a deed.

15 Cal. 23-26. SMITH v. BILLETT.

Ejectment.—Title acquired after beginning of suit may be shown by an amended complaint; and defendant cannot object to this on appeal, if he has defaulted below, p. 26.

Cited in *Tustin v. Faught*, 23 Cal. 242, holding that a defendant may show an after-acquired title; also *Russ v. Gilbert*, 19 Fla. 60, holding that plaintiff's title, as alleged in his declaration, stands confessed by defendant's default.

Discretion of the trial judge can only be reviewed in case of gross abuse, to the oppression of a party, p. 26.

Cited in *Nutter v. O'Donnell*, 6 Colo. 259, holding that allowance of rebuttal is not reviewable; and to same effect, as to amendment, in *Henderson v. Morris*, 5 Oreg. 27.

15 Cal. 27-31. MCGARVEY v. LITTLE.

Joint Verdict.—Where defendants in ejectment are in possession, and

there is no proof of the particular portion they claim, and they file a joint answer, a joint verdict is sufficient, p. 31.

Approved in *Greer v. Mezes*, 24 Howard, 277, on writ of error to the circuit court of California, where the court say: "Although the circuit court may have adopted the mode of instituting the action of ejectment by petition and summons, instead of the old fiction of lease, entry, and ouster, it is still governed by the principles of pleading and practice which have been established by courts of common law. The hybrid mixture of civil and common-law proceedings and practice introduced by state codes cannot be transplanted into the courts of the United States." Cited in *Leese v. Clark*, 28 Cal. 35, to the point that where the answer and findings are several, a joint judgment is erroneous.

15 Cal. 31-33. **RABE v. HAMILTON.**

Appeal Bond, in an action of forcible entry and detainer in justice's court, need not be executed within ten days as a condition to the appellate jurisdiction of the county court. The statute requiring it is directory merely; and where from accident or mistake its provisions are not strictly complied with, the county court may, upon a proper showing, allow a bond to be filed, p. 32.

Distinguished in *Shaw v. Randall*, 15 Cal. 386, holding that in an appeal from district to supreme court an undertaking must be filed within five days after notice of appeal, the statute to that effect being mandatory; also, *McCracken v. Superior Court*, 86 Cal. 77, holding that under section 978 of the Code of Civil Procedure, in an appeal from justice's court to superior court, the failure of sureties on the appeal bond to justify, within five days after notice of exception to them, invalidates the appeal, and the superior court cannot extend the time, the statute being peremptory. Cited in *Salt Lake Co. v. Gilman*, 2 Idaho, 183 (where there was no question of accident or mistake in the court below) as in point if there were such question; also in *Territory v. Milroy*, 7 Mont. 562, holding that a criminal appeal bond may be amended on leave in the appellate court.

15 Cal. 35-37. **BURNETT v. WHITESIDES.**

Refusal of New Trial is discretionary with the trial court, and will not be revised on appeal, unless manifestly an abuse of discretion, p. 36.

Approved in *Bates v. Howard*, 105 Cal. 178.

Water brought into a stream by a later appropriator may be taken out again by him, provided the rights of a prior appropriator are not impaired, p. 37.

Cited in *Malad Co. v. Campbell*, 2 Idaho, 383, holding that prior appropriation gives a prior right. Distinguished in *Druley v. Adams*, 102 Ill. 198, holding that one who brings water into a stream must be held to abandon it after it has entered another's land.

15 Cal. 38. PEOPLE v. MARQUIS.

Verdict on an indictment for murder must specify the degree; a verdict of "guilty as charged" is not sufficient, p. 38.

Approved in *People v. Travers*, 73 Cal. 581, as to an indictment for burglary; also in *People v. Lee Yune Chong*, 94 Cal. 386, as to murder; and in *Hall v. State*, 31 Fla. 186; *Territory v. Stears*, 2 Mont. 329; *State v. Rover*, 10 Nev. 392, 21 Am. Rep. 748.

15 Cal. 38-40. WALLING v. MILLER.

Chose in Action is assignable, and the assignment is good as against an attaching creditor of the assignor, p. 40.

Cited in *Brumback v. Oldham*, 1 Idaho, 711, holding that a book account may be assigned and the assignee may sue on it in his own name.

Garnishment does not give precedence to the creditor over prior assignees of the fund, p. 40.

Cited in *McIntyre v. Hauser*, 131 Cal. 14 (quoted in *Donohoe etc. Co. v. S. P. Co.*, 138 Cal. 189), further holding equitable assignment shown; *Coleman v. Scott*, 27 Neb. 83, holding that where the garnishee is notified of an assignment before judgment, he must bring it to the notice of the court; and to same effect in *Copeland v. Manton*, 22 Ohio St. 404; *Bellingham Co. v. Brisbois*, 14 Wash. St. 179; also in *Dorestan v. Krieg*, 66 Wis. 613, holding that garnishment of the owner of a building, as the debtor of the principal contractor for its erection, takes precedence of the mechanic's lien of a subcontractor filed thereafter. Cited in note to 13 Am. Dec. 342, on garnishee's defenses, and note to *Hardy v. Hunt*, 70 Am. Dec. 791.

15 Cal. 42-44. MAHONEY v. WILSON

New Trial.—Failure to prosecute the motion in the lower court is an abandonment thereof, and the merits of the motion cannot be brought to the appellate court, p. 43.

Affirmed in *Frank v. Doane*, 15 Cal. 303, and *Green v. Doane*, 15 Cal. 304; also in *People v. Center*, 61 Cal. 194. Distinguished in *State v. Central Pac. R. R.*, 17 Nev. 266, holding that where defendant moved for a new trial, but was not present at the argument thereof, this did not operate as an abandonment under the Practice Act of 1863 of California, which was adopted in Nevada; the principal case was decided under the act of 1851; *Carder v. Baxter*, 28 Cal. 101, holding that refusal to argue a motion is not an abandonment, is like the case at bar.

N. B.—In *Valentine v. Mahoney*, 37 Cal. 392-399, the defendant claims that the judgment on the facts of the principal case is an estoppel in the case at bar.

15 Cal. 44-46. HAWLEY v. BADER.

Receipt for payment of a debt is not a contract, and may be explained or contradicted by parol evidence, p. 46.

Cited in *Jackson v. Sacramento Co.*, 23 Cal. 274, holding that a receipt for goods is open to explanation and proof of nondelivery, affirmed in *Jenne v. Burger*, 120 Cal. 446.

15 Cal. 46-48. WRIGHT v. WHITESIDES.

Public Lands.—A mere entry does not give a right of action under the Possessory Act of 1852; the requirements of that statute must be complied with and affirmatively shown by a party relying on it, p. 47.

Distinguished in *Coryell v. Cain*, 16 Cal. 573, holding that while one claiming under the Possessory Act must show compliance with its provisions, where reliance is placed not upon the statute, but upon prior possession, actual possession must be shown; "by actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property." Cited in *Hicks v. Whiteside*, 23 Cal. 408, holding that the statute imperatively requires that one claiming rights under it shall make the improvements prescribed before he begins his action; and to the same effect in *Crowell v. Lanfranco*, 42 Cal. 656, holding that the fact that the claimant was forcibly prevented by armed men from making the improvements was no excuse for his failure to comply with the statute.

15 Cal. 48-50. ORMAN v. RILEY.

Civil Rights.—Soldiers cannot vote unless they are citizens; but the burden of proving that they are not legal citizens rests on the party who contests their right to vote, p. 49.

Cited in *Plessy v. Ferguson*, 163 U. S. 550, holding that a statute of Louisiana, requiring railway companies to have separate cars for white and colored persons, and punishing persons of one color who insist on entering cars allotted to those of the other color, is not in conflict with the thirteenth or fourteenth amendments of the federal constitution.

15 Cal. 50-52. COHN v. MULFORD.

Evidence.—Declarations of vendor after sale are not admissible to show his fraud, p. 52.

Affirmed in *Jones v. Morse*, 36 Cal. 207; *Garlick v. Bowers*, 66 Cal. 122; *Briswalter v. Palomares*, 66 Cal. 261; *Walden v. Purvis*, 73 Cal. 519. Cited in notes to 42 Am. Dec. 632, on vendor's declarations, and 90 Am. Dec. 299, 300, on creditor's bills.

15 Cal. 53-58. EDE v. JOHNSON.

Affidavit need not be signed by affiant, p. 57.

Affirmed in *Pope v. Kirchner*, 77 Cal. 156; *State v. Washoe Co.*, 5 Nev. 320; and *Lutz v. Kinney*, 23 Nev. 282, 283. Cited in *Metcalf v. Prescott*, 10 Mont. 294, holding that an affidavit without a jurat is not an affidavit.

Judicial Notice is taken of the official character of an officer taking an acknowledgment, p. 58.

Cited in *Webb v. Kelsey*, 66 Ark. 183, as to oath taken before justice of peace; note to 89 Am. Dec. 685, 686.

15 Cal. 63-66. GRIMES v. FALL.

Evidence.—Injury is presumed from the erroneous admission of evidence, and the party introducing it must show clearly that no injury accrued, p. 66.

Affirmed in *Lally v. Wise*, 28 Cal. 544. Cited in *Roberts v. Wilson*, 1 Utah, 294, holding that the admission of district mining laws without proper authentication was ground for new trial.

15 Cal. 66-69. WALKER v. WOODS.

Sheriff, sued in trespass for unlawful seizure of goods, may introduce the attachment, judgment, and execution under which he acted as sufficient proof of the debt for which they were issued, p. 69.

Denied and declared to be obiter in *Sexey v. Adkinson*, 34 Cal. 351, 91 Am. Dec. 700, holding that the introduction by the sheriff of the pleadings, attachment, and undertaking, under which he acted, was not a defense in the absence of proof of the judgment or the debt. Cited in *Roth v. Duvall*, 1 Idaho, 152, holding that a sheriff was liable on his official bond for the amount of judgment in a suit where he released goods seized under attachment, because he considered them exempt and failed to return an execution within the time prescribed.

15 Cal. 70-75. PEOPLE v. WYMAN.

Res Gestae held not to include statements of defendant made before a homicide, p. 74.

Approved in *People v. Henderson*, 28 Cal. 470.

Confession may be believed in part by the jury and disbelieved in part, p. 74.

Cited in *People v. Strong*, 30 Cal. 158, holding that this discretion on the part of the jury must not be arbitrary, and they should be instructed that it must be "conscientiously exercised upon a consideration of all the facts and circumstances of the case"; also in *Brown v. State*, 2 Tex. App. 146, holding that the jury may believe the part of the admission that charges defendant, and disbelieve the part that discharges him.

Juror cannot impeach his verdict, p. 75.

Approved in *Boyce v. California Stage Co.*, 25 Cal. 475, holding that the only exception to the rule is in regard to a chance verdict. Cited in *Ex parte Sontag*, 64 Cal. 528, holding that a grand juror cannot be compelled to testify as to how he voted on an indictment. Approved in *Griffiths v. Montandon*, 4 Idaho, 379, affidavits of jurors not admissible to impeach verdict unless verdict obtained by resort to chance; *People v. Azoff*, 105 Cal. 633, holding that the fact that the jury read newspaper reports of the trial could not be put in evidence, either by affidavits of the jurors or of other persons. Approved, also, in *Territory v. Taylor*, 1 Dak. 467, and *People v. Ritchie*, 12 Utah, 194; the latter case referring to *Mattox v. United States*, 146 U. S. 140, which holds a contrary doctrine to 105 Cal. 633. See note to *Amsby v. Dickhouse*, 4 Cal. 102, ante.

15 Cal. 75-85. **DAVIDSON v. DALLAS.** S. C. 8 Cal. 227.

Attaching Creditors.—Where the sheriff takes bonds from two creditors on attachments of the same property, one prior to the other, and suit is brought later on the second bond, the amount for which the attached property sold on execution being only enough to satisfy the judgment of the prior creditor, held that the sheriff, against whom judgment had been rendered for damages for detention of the property, could look only to the prior creditor for indemnity, p. 80.

Distinguished, on the facts, in *Lewis v. Johns*, 34 Cal. 633, 634, holding that the sheriff and the attaching creditors were joint trespassers. Distinguished, also, in *Fury v. White*, 2 Idaho, 641, where the sheriff sued a third attaching creditor on his bond, and it was held he could not recover, as no damage had accrued under the bond and the obligor had received none of the proceeds of the attached property.

"Law of the Case."—Although the court are by no means satisfied that a former decision of their predecessors in the same case on the same point was not erroneous in principle, yet that decision "fixed the rights of the parties under the law;" it was in effect, if not directly, a mandate to the court below to follow the directions of the opinion of this court, on new trial; to administer the law as laid down in the opinion. That judgment is therefore conclusive. We could not review it on motion for rehearing. It stands as the judgment of the highest court of record of the state, and it is not in our power now to retry it on appeal, for we have no appellate power over our own judgment, pp. 80-84.

Approved in *Phelan v. San Francisco*, 20 Cal. 45, where the court says: "A previous ruling by the appellate court upon a point distinctly made may be only authority in other cases, to be followed and affirmed, or to be modified or overruled, according to its intrinsic merits; but in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot

depart nor the parties relieve themselves." Affirmed in *Haynes v. Meeks*, 20 Cal. 311; Cited in *Haley v. Kilpatrick*, 104 Fed. 648, quoting *Leese v. Clark*, 20 Cal. 417, where Field, C. J., says: "Such has been the uniform doctrine of this court for years, and after repeated examinations and affirmations it cannot be considered as open to further discussion. . . . It is also the established doctrine of the supreme court of the United States, and of the supreme courts of several of the states, . . . and the reason of the doctrine is obvious. The supreme court has no appellate jurisdiction over its own judgments; it cannot review or modify them after the case has once passed, by the issuance of the remittitur, from its control. . . . The decision is no longer open for consideration; whether right or wrong, it has become the law of the case. . . . The court cannot recall the case and reverse its decision after the remittitur is issued. It has determined the principles of the law which shall govern, and having thus determined, its jurisdiction in that respect is gone."

Affirmed in *Lucas v. San Francisco*, 28 Cal. 594, where the court say: "Whatever our views might be if the case was now before the court for the first time . . . is now a matter of no moment in the case, for the decision . . . became the law of the case. . . . It is the law of the case in the most exact and restricted sense in which it can be claimed that the doctrine of *res judicata* should have application, for it is not the reasoning of the court, nor any mere legal principle announced, but the judgment itself, which is relied on as conclusive of the question in controversy." Affirmed, also, in *Reclamation District v. Goldman*, 66 Cal. 636; *Haggin v. Clark*, 71 Cal. 452. Distinguished in *Sharon v. Sharon*, 79 Cal. 653, where the court, per Works, J. (Thorton, J., dissenting, pp. 686-691), refer to the authorities on "law of the case," and say: "But we are clear that the reason of the rule does not apply here, and that where the reason does not exist the rule itself is not applicable. The law of this state permits two appeals in the same case, one from the judgment, and the other from the order denying a new trial. . . . The fact that this court has declared a rule of law in deciding the appeal first reached for decision, and upon which no action has or can be taken until the second appeal is also disposed of, cannot, by reason of the rule invoked by the respondent, prevent the court from fully investigating and deciding the second appeal, to the extent of modifying or wholly changing its former decision, if it be satisfied that an error has been committed. The case must be regarded as within the control of this court until both appeals are determined." In *People v. Hamilton*, 103 Cal. 496, the court say: "It is not doubted but that a ruling by the appellate court upon a point distinctly made upon a previous appeal is in all subsequent proceedings in the same case a final adjudication, from the consequences of which the court cannot depart nor the parties relieve themselves (20 Cal. 40; 15 Cal. 75). But this rule does not apply to points not made or passed upon on the

former appeal (64 Cal. 455), or to new points presented on a second appeal (66 Cal. 98), or to questions of fact (23 Cal. 381; 25 Cal. 629)."

The principal case has been approved on this point in other states, as follows; *Lee v. Stahl*, 13 Colo. 177, holding that the law of the case is higher authority than *stare decisis*, it is *res judicata*; *Palmer v. Utah Co.*, 2 Idaho, 352; *Adams Co. v. Burlington Co.*, 55 Iowa, 98, holding that while a decision should be overruled if adhering to it would work more mischief than overruling it, yet as between the parties it becomes the law of the case; *Davenport v. Kleinschmidt*, 8 Mont. 480; *Portland Co. v. Coulter*, 23 Oreg. 135; *Plymouth Bank v. Gilman*, 3 S. Dak. 178, 44 Am. St. Rep. 787; *Wilkes v. Davies*, 8 Wash. 117; *State v. Circuit Court*, 71 Wis. 609, in dissenting opinion, the majority of the court holding that under the statute the circuit court may grant a new trial in a criminal case after a conviction therein has been affirmed by the supreme court; and *Silva v. Pickard*, 14 Utah, 249, holding that the rule applies to a court of intermediate appeal as well as to one of final appeal. Cited in note to 27 Am. Dec. 634, on Law of the Case.

In *Hastings v. Foxworthy*, 45 Neb. 687, 688, the principal case is disapproved in an able opinion by Irvine, C., reviewing exhaustively all the authorities. He says the question for consideration is whether a former decision in the same case shall be overruled or sustained, it being manifestly wrong and opposed to the later decisions of the court; and remarks that the principal case "is noteworthy as being one of a very few cases in which the court attempted to give a reason for such a rule of law"; and he says of the reason: "We cannot see how it is applied to a mandate reversing a case and remanding it for a new trial. In the latter case the whole case is tried anew and nothing is settled by the first appeal beyond the fact that the first trial was erroneous and that all the issues must be tried again." He adds that the California cases "originated in an obiter dictum . . . and trace the doctrine to certain cases in the supreme court of the United States and elsewhere which do not support the doctrine." (The obiter doctrine referred to is in *Dewey v. Gray*, 2 Cal. 374.)

"It has never been doubted that an appellate court is not bound blindly to follow precedent. A rule of law once announced affords a guide for similar cases, and will ordinarily control their decision; but having announced a rule, when another case arises presenting the same question, if the court is satisfied that its former opinion was wrong, it may and frequently does overrule it" (p. 698). "We conclude, that the principles governing the case are these: The cause having been remanded generally, there was no adjudication of any rights between the parties; that the record presents the question upon this trial as well as upon the others, and that it is within the power of the court to re-examine its former decision and apply the law correctly. . . . It is now clearly established that the former opinions in this case were erroneous, and the court should correct the error."

15 Cal. 85-88. **CLARK v. DUVAL.**

Miners have the right "to go upon public lands in the occupancy of others for agricultural purposes, and use the land and water for the extraction of gold, such use being a reasonable use and necessary to the business of mining," p. 88.

Cited in *Rogers v. Soggs*, 22 Cal. 454, holding that miners have no right to cut the wood on lands of a settler, even though they have appropriated part of the land for mining purposes; also in *Smith v. Cooley*, 65 Cal. 47, holding that the vendee of part of a mining right became thereby a partner of the vendor, not a tenant in common; and notes to 63 Am. Dec. 95, and 91 Am. Dec. 694, on rights of miners and settlers on public lands.

15 Cal. 88-89. **ELDRIDGE v. WRIGHT.**

Injunction refused by supreme court, pending an appeal from the judgment of the lower court denying an injunction, the lower court having ordered that upon appellant perfecting his appeal, the preliminary injunction should remain in force, p. 89.

Cited in *Swift v. Shepard*, 64 Cal. 424, where the supreme court refuses to stay, pending appeal, the operation of a permanent injunction granted by the lower court.

15 Cal. 91-93. **JACKS v. DAY.**

"Special Cases," within the jurisdiction of county courts, include mandamus, p. 92.

Cited in *Ricks v. Reed*, 19 Cal. 574, holding that proceedings in the county court under statutes regarding townsites on public lands are special cases; also in *Appeal of Houghton*, 42 Cal. 62, holding that proceedings under an act to modify grades of streets in San Francisco are special cases; and *Bixler's Appeal*, 59 Cal. 555, holding that the supreme court has no jurisdiction of appeals in "special cases."

15 Cal. 93-96. **GARRISON v. SAMPSON.**

Ejectment.—Holding over by defendant, under a tenancy at will, is an ouster, and a general allegation of ouster in the complaint is sufficient, p. 95.

Cited in *McCarthy v. Brown*, 113 Cal. 18, holding that a finding that "defendant ousted the plaintiff" was sufficient; and the force of the finding, as a fact, is not impaired by its being placed under the heading of conclusions of law.

Public Lands.—Mere entry on waste and uninclosed land, building a house and corral, and cutting hay on a part of the land, does not constitute possession of the whole one hundred and sixty acres. The case would be different as to a claimant under the Possessory Act, p. 95.

Cited in *Coryell v. Cain*, 16 Cal. 573, holding that where reliance is placed not on the Possessory Act, but on prior possession, the possession must be actual. "By actual possession is meant a subjection to the will and dominion of the claimant, and (it) is usually evidenced by occupation, by a substantial inclosure, by cultivation or by appropriate use, according to the particular locality and quality of the property." Cited also in *Polack v. McGrath*, 32 Cal. 20, 22, holding that prior possession must be actual, and there must be a substantial inclosure, "of such strength as a prudent farmer erects to protect his growing crops"; and *Forbes v. Driscoll*, 4 Dak. 344, holding that possession must be actual; *Staininger v. Andrews*, 4 Nev. 69, holding that a settler must be allowed a reasonable time to inclose or improve his land; and *Robinson v. Imperial Co.*, 5 Nev. 67, holding that digging of a ditch for water did not give possession of the land through which it was dug.

15 Cal. 100-107. **SMITH v. DOE.**

Public Lands include all lands in the state, "until the legal title is shown to have passed from the government to private parties," p. 105.

Distinguished in *Santa Cruz v. Enright*, 95 Cal. 113, holding that as to defendant's claim of appropriation of water from a stream, there was no presumption that the lands were public lands.

Mining.—Rights of property in a mining district are not at the mercy of the miners; houses, orchards, crops, etc., are private property and entitled to protection of the courts. "It is the duty of the courts to protect private rights of property, but it is no less their duty to secure, as far as possible, the entire freedom of the mines," p. 106.

Approved in *Gillan v. Hutchinson*, 16 Cal. 155, where miners were enjoined from entering on land used for raising fruits and vegetables; also in *Rogers v. Soggs*, 22 Cal. 453, holding that a settler on public lands was entitled to the timber thereon as against subsequent locators of mines. Cited in notes to 63 Am. Dec. 95, 96, 97, 103, and 91 Am. Dec. 694, 695, on rights of settlers and miners.

15 Cal. 107-117. **HICKS v. MICHAEL.**

Restraining Order held to have expired by its own limitation upon refusal of the court, after hearing, to grant an injunction, p. 109.

Cited in *Cohen v. Gray*, 70 Cal. 86, holding that upon the granting of an injunction pendente lite, a previous restraining order "spent its force"; also in *Porter v. Jennings*, 89 Cal. 442, to the point that setting aside a restraining order was in effect a refusal to grant an injunction, holding this an abuse of discretion and ordering that an injunction issue. Cited, also, in *San Diego W. Co. v. Pacific C. S. Co.*, 101 Cal. 218, holding that a restraining order made pending a motion falls with the motion; and *Curtiss v. Bachman*, 110 Cal. 440, 52 Am. St. Rep. 115, holding that if defendant waits until trial before seeking the dissolu-

tion of a preliminary injunction, he waives the right to damages for its issuance; *Wetzstein v. Mining Co.*, 25 Mont. 137, holding right to appeal from injunction not applicable to such order; *Miles v. Sheep Rock etc. Co.*, 15 Utah, 439, applying rule to nonappearance of counsel on return day where no formal continuance had. Distinguished in *Miles v. Edwards*, 6 Mont. 183, holding that the life of a restraining order is not necessarily limited by the date named in it.

Stay of Proceedings cannot result from an appeal from the refusal of an injunction. "A stay can only be sought of that which has an existence, and by its operation is supposed to work injury to the appellant," p. 109.

Cited in *Bliss v. Superior Court*, 62 Cal. 544, where an application was denied for a writ of prohibition against the refusal of the lower court to dissolve an injunction; *Heinlen v. Cross*, 63 Cal. 47, holding that an injunction is not suspended by an appeal from a judgment making it perpetual, and the lower court is not deprived of the power to punish for contempt one who disregards the injunction; *Swift v. Shepard*, 64 Cal. 424, holding that the supreme court has no jurisdiction, pending appeal, to stay an injunction awarded by the lower court; also in *Stewart v. Superior Court*, 100 Cal. 545, holding that an injunction is not suspended by an appeal unless the judgment orders some act to be done, in which case a stay of proceedings may be had, the purpose of an injunction being to hold the subject of litigation in statu quo until final determination; and in *State v. Wakeley*, 28 Neb. 436, holding that a supersedeas bond cannot be required, under the statute, from a party whose prayer for a temporary injunction has been refused.

Injunction against Waste.—Application for this is listened to more readily by a court of equity than one on the ground of trespass, p. 116.

Cited, as to injunction against waste, in *More v. Massini*, 32 Cal. 594, holding that an injunction lies against the quarrying of asphalt on land of another; also, in *Richards v. Dower*, 64 Cal. 64, where an injunction issued against the construction of a tunnel through another's land; *Silva v. Garcia*, 65 Cal. 592, holding that the digging up of trees on land of another was waste and liable to injunction; and *United States v. Guglard*, 79 Fed. Rep. 23, where injunction was granted against the cutting of growing timber.

Injunctions.—Granting and continuing of them "rest very much in the sound discretion of the court, to be governed by the nature of the case," p. 117.

Cited in *Godey v. Godey*, 39 Cal. 167, holding that an injunction will not be dissolved on appeal unless there was an abuse of discretion in the lower court; also, in *Washington Co. v. Coeur d'Alene Co.*, 2 Idaho, 407, holding that the refusal to grant a temporary injunction was not an abuse of discretion; and as to the power of being discretionary, in

Lockwood v. Lunsford, 56 Mo. 75, and Blue Bird Co. v. Murray, 9 Mont. 475.

15 Cal. 117-123. **SEARCY v. GROW.**

Election Contest.—Judgment by default cannot be rendered; the court must hear the proofs; if none are offered by either side, the proceedings should be dismissed. The public is interested in a contest of this character; it is not a matter solely between the parties to the record, and the popular will is not to be set aside upon a mere failure of a party to respond to charges made against his right, p. 119.

Cited in *Dorsey v. Barry*, 24 Cal. 452, holding that if the contestant offers no proofs, the proceeding must be dismissed, and that after pronouncing judgment the lower court has no power to grant a new trial; also in *Budd v. Holden*, 28 Cal. 139, holding that the action is brought to enforce the will of the people, not to redress the wrongs or enforce the rights of the relator; and to the same effect in *Norwood v. Kenfield*, 30 Cal. 400; *Keller v. Chapman*, 34 Cal. 640, holding that contestant cannot take judgment by default, but must prove his allegations; *Coglan v. Beard*, 67 Cal. 307, holding that certain ballots were evidence, in spite of their having been in the official custody of defendant; *Lord v. Dunster*, 79 Cal. 488, holding it was an abuse of discretion for the lower court to refuse a continuance; and *Lay v. Parsons*, 104 Cal. 663, holding that the supreme court will not rule on any points not excepted to, saying: "We see no good reason why the rule as to preserving exceptions to adverse rulings is not in its nature as applicable here as in any other proceeding; any other rule would but lead to confusion and uncertainty, and subserve no good purpose." Cited, also, in *Crisler v. Morrison*, 57 Miss. 798, holding that a writ of prohibition was properly issued against a justice of the peace hearing a contested election case; and in dissenting opinion in *Bull v. Southwick*, 2 N. Mex. 388, where a majority of the court hold that the proceedings to contest an election are exclusively between the rival candidates, and the people are in no sense parties.

Eligible means capable of being chosen. The people might select any man they chose, subject only to this exception, that the man they selected was capable of taking what they had the power to give. If he was not eligible at the time the votes were cast for him the election failed, p. 121.

Cited in *Sheehan v. Scott*, 145 Cal. 686, upholding provision of San Francisco charter requiring tax collector must be elector of city and county at time of his election and for five years previous thereto; *State v. Moores*, 52 Neb. 786, 795, construing local statutes; *Ward v. Crowell*, 142 Cal. 589, noted under *Palmer v. Woodbury*, 14 Cal. 43; *Walther v. Rabolt*, 30 Cal. 189, holding that an alien is not eligible. Doubted, in *People v. Leonard*, 73 Cal. 233, where the court say that the principal case, "which is cited to us as declarative of the proposition

that 'eligibility,' as used in our constitution, does not mean incapacity to hold, but incapacity to be elected to a civil office of profit under the state while holding a lucrative federal office, does not, as we understand it, go to the extent claimed, for there the question involved was whether or not the holder of a lucrative federal office was eligible for election to a state office, and therefore the language used in that case, in so far as it does not directly apply to the point actually submitted for decision, is but *obiter dictum*"; and holds that by article 4, section 20, of the state constitution it was "clearly intended that one holding a lucrative office under the United States should not hold a civil office of profit under the state. . . . In nearly all, if not all, of the cases where 'eligible' was said to mean capacity to be elected to an office, and not capacity to hold it, the party seeking to hold the office was declared not to be eligible because of the want of capacity to be elected; and there is nothing said in any of them which, by fair construction and interpretation, in the light of the facts of the case, shows that the mind of the court was directed to and intended to decide, where unlimited and unexplained by other language, that eligibility to office did not mean the qualification to hold as well as to be elected to an office."

Denied in *State v. Fowler*, 66 Conn. 299, where the court say: "It is not a disability to be elected; it is sufficient of the disability be removed before the holding begins"; denied also in *Smith v. Moore*, 90 Ind. 301, holding that eligible means legally qualified; and to same effect in *Demaree v. Scates*, 50 Kan. 282; 34 Am. St. Rep. 117; but approved in the dissenting opinion, 50 Kan. 286; 34 Am. St. Rep. 119. Cited in *McCarthy v. Froelke*, 63 Ind. 511, holding that a voter, though not a citizen, is eligible to the office of town trustee; *State v. Bemberderfer*, 96 Ind. 376, holding that eligible means capable of being chosen. Distinguished in *Foltz v. Kerlin*, 105 Ind. 226, holding that a postmaster elected town trustee cannot accept the office if he insists on continuing as postmaster. Cited in *Carroll v. Green*, 148 Ind. 364, to the point that eligible means capable of being chosen, "also implying competency to hold the office if chosen." Cited in dissenting opinion in *State v. Van Beek*, 87 Iowa, 587, 43 Am. St. Rep. 408, the majority of the court holding that if an alien elected sheriff is naturalized before he qualifies, he is entitled to the office; *State v. Plymell*, 46 Kan. 297, holding that one person cannot be at the same time city clerk and county commissioner; dissenting opinion in *In re Gunn*, 50 Kan. 268, the majority of the court refusing to release on habeas corpus a person in the custody of the sergeant at arms of one of two rival legislatures; in the dissenting opinion in *Bonner v. Lynch*, 25 La. Ann. 277, the majority of the court holding that an occupant of the office of justice of the peace was not an intruder under the statute; *State v. Cheevers*, 32 La. Ann. 946, holding that in proceedings under a statute for removal of an incompetent judge, the court cannot consider the question of his ineligibility; *State v. Judge*, 33 La. Ann. 1388, hold-

ing that resistance and continuance in tenure make an occupant of an office an intruder; *Taylor v. Sullivan*, 45 Minn. 312, 22 Am. St. Rep. 732, holding that eligible means "electable," and one who was disqualified when elected cannot become qualified later; *State v. McAllister*, 38 W. Va. 513, holding that a section of the code requiring members of the town council to be freeholders is constitutional.

Costs are taxable against the party instituting the proceeding, if he fails, p. 122.

Cited in *Garrard v. Gallagher*, 11 Nev. 386, refusing to allow costs and fees in an election contest, the statute making no provision for them. Cited in *Satterlee v. San Francisco*, 23 Cal. 320, as being a direct proceeding, while the latter case was for recovery of money paid a city under a void ordinance, where the question of validity of election of an alderman could not be raised collaterally. Also in *People v. Rodgers*, 118 Cal. 396, holding that where a chief of police, on election of his successor surrendered the office, and the election was later declared void, there was a vacancy to be filled by appointment, and the former incumbent had no right to resume the office.

15 Cal. 127-134. *PIXLEY v. HUGGINS*.

Community Property may be sold by the husband without the wife's consent, and her signature adds nothing to the validity of the transfer. Property deeded to the wife is presumed to be community property, and in the absence of proof that it was purchased with the separate funds of the wife, the presumption is absolute and conclusive, p. 131.

Cited in *McDonald v. Badger*, 23 Cal. 398, 83 Am. Dec. 126, holding that property which the wife had failed to prove was hers was liable for the husband's debts; also in *Landers v. Bolton*, 26 Cal. 420, holding that where property was deeded to the wife and later deeded by her to another, her deed could be contradicted by a prior deed of the same property made by the husband; *Tibbetts v. Fore*, 70 Cal. 246, where an injunction was granted against the sale, on execution against the husband, of land bought by the wife with her own money; *Schuyler v. Broughton*, 70 Cal. 283, holding that where land deeded to the wife was bought partly with the wife's own money and partly with money borrowed by her, she and the husband became tenants in common, and his interest could be sold on execution for his debts. Cited, also, in *Charauleau v. Woffenden*, 1 Ariz. 273, in dissenting opinion, where a majority of the court hold certain property to be separate property of the wife's; and in *Yesler v. Hochstettler*, 4 Wash. St. 353, holding that the presumption in favor of community property is not overcome by the fact that land deeded to the wife was partly paid for with her money; *Hearfield v. Bridges*, 75 Fed. Rep. 49, holding that a sale of community property by the husband was good as against all parties claiming under husband or wife after the husband's death;

also in notes on community property, in 73 Am. Dec. 537, 543; 86 Am. Dec. 637; 96 Am. Dec. 423.

Cloud on Title.—The jurisdiction of the court to enjoin a sale of real estate is coextensive with its jurisdiction to set aside and order to be canceled a deed of such property. It is not necessary for its assertion in the latter case that the deed should be operative, if suffered to remain uncanceled, to pass the title, or that the defense to the deed should rest in extrinsic evidence, liable to loss, or be available only in equity. The true test, as we conceive, by which the question whether a deed would cast a cloud upon the title of the plaintiff may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party founded on the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed, pp. 132, 133.

Cited in *Moskey v. Lockmann*, 146 Cal. 780, where apparent validity of sheriff's sale against plaintiff depended on continuance of attachment levied prior to plaintiff's deed and complaint shows acceptance by sheriff of bond to release attachment, and release thereof, sheriff's deed casts no cloud on title; *Chase v. Treasurer*, 122 Cal. 542, and *Gill v. Oakland*, 124 Cal. 341, applying rule to threatened sale for street assessment; *Einstein v. Bank*, 137 Cal. 49, 50, as to execution sale; *Gilman v. Gilman*, 171 Mass. 47, holding no cloud shown under facts stated; cases holding a cloud on title to exist, viz., *Englund v. Lewis*, 25 Cal. 357, where an execution sale was enjoined; *Marriner v. Smith*, 27 Cal. 653, holding that an execution sale might be a cloud on title if the premises were a homestead under five thousand dollars, but plaintiff having failed to aver this, judgment in his favor, for an injunction, is reversed, with leave to amend; *Ramsdell v. Fuller*, 28 Cal. 42, 87 Am. Dec. 105, holding that where the husband sold the wife's separate property, and it was mortgaged by the vendee, the mortgage was a cloud on the wife's title; *Culver v. Rogers*, 28 Cal. 527, enjoining the sale of a homestead for balance due on a mortgage, where the homestead was recorded prior to docketing of the judgment; *Arrington v. Liscom*, 34 Cal. 389, 94 Am. Dec. 740, where a mortgagee sold mortgaged premises to plaintiff, and after the right to redeem had been barred by limitation the mortgagor made a deed to defendant, the deed was held to be a cloud on plaintiff's title; *Porter v. Pico*, 55 Cal. 176, where a sheriff's sale was enjoined; and to same effect in *Grigsby v. Shwarz*, 82 Cal. 280; *Roth v. Insley*, 86 Cal. 140, enjoining the sale of a homestead on execution; *Wilhoit v. Cunningham*, 87 Cal. 457, where a debtor had assigned for benefit of creditors, and a sale on execution by another creditor was held to be a cloud on the assignee's title; *Woodruff v. Perry*, 103 Cal. 613, where an injunction issued to

prevent the collection of an illegal irrigation assessment by sale of the land.

Cited, also in *Talieferro v. Barnett*, 37 Ark. 515, 516, enjoining a sheriff's sale; *Stoddard v. Prescott*, 58 Mich. 546, holding a certificate of tax purchase to be a cloud; *Johnson v. Hahn*, 4 Neb. 150, enjoining the sale of land for taxes; *Byerly v. Humphrey*, 95 N. C. 155, holding a forged mortgage to be a cloud. In *Coolidge v. Forward*, 11 Oreg. 122, 126, the court held that a sheriff's deed would be a cloud, but refused to enjoin it because plaintiff had failed to allege he was in possession of the land; and said that the doctrine of the principal case not only appears to be entirely sound, but to be very generally recognized as correct. . . . We think the rule laid down . . . is the correct one on principle, and that it is fairly sustained by the weight of judicial authority." Cited in *Linnell v. Battey*, 17 R. I. 243, enjoining an execution sale; *Roe v. Dailey*, 1 Posey (Texas), 252, holding that a sale of the wife's separate property on execution for a debt of the husband was a cloud on the wife's title; *Van Wyck v. Knevals*, 106 U. S. 370, holding that the issue of a patent on public lands was a cloud on the title of a railway claiming them; *Rich v. Braxton*, 158 U. S. 407, holding an illegal tax deed to be a cloud that equity will remove when by statute it is made prima facie evidence of the regularity of the proceedings; *Tilton v. Oregon Co.*, 3 Sawy. 26, holding a tax deed under an illegal assessment to be a cloud; *West Portland Assn. v. Lownsdale*, 9 Sawy. 117, 118, 17 Fed. Rep. 618, enjoining a sale by an assignee in bankruptcy; *Southern Pacific Co. v. Wiggs*, 14 Sawy. 577, 43 Fed. Rep. 339, holding that issuance of a patent to a pre-emptor was a cloud on a railway's title to public lands. In *Northern Pacific Co. v. Cannon*, 46 Fed. Rep. 230, the court hold that it must appear that plaintiff is in actual possession of premises from which he seeks to remove a cloud, and that a bill in equity to cancel an invalid patent is demurrable on the ground that equity cannot interfere where plaintiff has a remedy by ejectment; the court saying of the principal case: "It does not appear whether plaintiff claimed under an equitable or legal title. I do not think this case can be considered in opposition to numerous cases in the California supreme court that hold that in such cases if plaintiff has a legal title in the premises he must have possession." Cited in *Southern Pacific Co. v. Stanley*, 49 Fed. Rep. 265, holding a state patent to be a cloud on title, derived from a United States patent; *Huntington v. Central Pacific Co.*, 2 Sawy. 514, enjoining a tax sale; and in notes to 28 Am. Dec. 441, 442, 62 Am. Dec. 524, 68 Am. Dec. 310, on this subject.

Cited in cases holding that no cloud on title existed, viz., *Curtis v. Sutter*, 15 Cal. 264, holding that a deed incapable of passing title was not a cloud; *San Francisco v. Beidman*, 17 Cal. 461, holding that a bill was not for quieting of title, because under its allegations no cloud could be created; *Fulton v. Hanlow*, 20 Cal. 484, holding that where

in any suit brought on a sheriff's deed it must appear that the sale was void, the sale could not be enjoined; *Thompson v. Lynch*, 29 Cal. 190, refusing an injunction against a sale by administrator of a vendor of land, the vendee failing to prove his title; *Cohen v. Sharp*, 44 Cal. 30, holding that where a bill to cancel a deed alleged that the deed was void, a demurrer was properly sustained; *Schuyler v. Broughton*, 65 Cal. 253, holding that the complaint must show that plaintiff would be compelled to offer extrinsic evidence in a suit of ejectment against him; *People v. Center*, 66 Cal. 566, holding a void patent to swamp lands to be no cloud; *Archbishop v. Shipman*, 69 Cal. 591, 592, refusing to enjoin a sale on foreclosure; *Eshleman v. Henrietta Co.*, 97 Cal. 674, holding an illegal levy of attachment was no cloud; *Ruas v. Crichton*, 117 Cal. 703, holding a tax deed, void on its face, created no cloud.

Cited, also, in *Rea v. Longstreet*, 54 Alabama, 293, 294, refusing to enjoin an attachment because a sale under it would do no injury; *Murphy v. Wilmington*, 6 Houst. (Del.) 137, 22 Am. St. Rep. 354, holding that an illegal assessment for city improvements did not create a cloud; *Davidson v. Seegar*, 15 Fla. 679, refusing to enjoin sheriff's sale under a void execution; and to same effect in *Barnes v. Mayo*, 19 Fla. 544, 545, and *Benner v. Kendall*, 21 Fla. 588; *Sloan v. Sloan*, 25 Fla. 67, 68, holding that an administrator's deed under decree of a court having no jurisdiction was not a cloud. In *Thompson v. Etowah Iron Co.*, 91 Ga. 540, 543, the court say that to Field, C. J. in the principal case, is "probably due the credit of first defining accurately and precisely the correct test which should govern in all cases"; and hold that deeds by strangers are no cloud, saying: "If any cloud at all exists, it is but the translucent mist which adorns a summer sky, not one which wears upon its face the menace of a threatened storm." Cited in *Haeussler v. Thomas*, 4 Mo. App. 469, holding an unenforceable mechanic's lien not to be a cloud, and the court cannot enjoin its foreclosure on the supposition that an incorrect legal view might be taken of it; *Vaughn v. Schmalsle*, 10 Mont. 197, holding an unrecorded mortgage not to be void against a judgment lien; *Minto v. Delaney*, 7 Oreg. 344, holding a deed of swamp land to be no cloud on the title of a riparian owner; *Rosenbaum v. Foss*, 4 S. Dak. 195, holding a mortgage not to be a cloud; *San Francisco Co. v. Dinwiddie*, 8 Sawy. 315, 316, 13 Fed. Rep. 792, holding a void tax deed to be no cloud; *Spring Valley Co. v. Bartlett*, 8 Sawy. 569, 16 Fed. Rep. 625, refusing to enjoin the passage of an unconstitutional ordinance by a board of supervisors.

Injunction against proceedings in another court, p. 134.

The principal case is distinguished in *Crowley v. Davis*, 37 Cal. 270, 271, where it was held that the fifteenth district court could not enjoin the sale of specific real estate under an order of the fourth district court, the courts being of co-ordinate jurisdiction; and the court say

of the principal case, and the execution therein: "The suit was not for the purpose of enjoining such execution, but to enjoin the sale of certain property upon which it had been wrongfully levied. . . . There is a marked distinction between a proceeding to stay the acts of an officer not authorized by the process under which he assumes to act, and a proceeding to stay or suspend the vital force and direct commands of such process."

15 Cal. 137-143. ESMOND v. CHEW.

Mining.—Owner of a claim in the bed of a stream cannot construct a flume and deposit tailings on an adjoining claim, p. 142.

Approved in *Carson v. Hayes*, 39 Or. 106, following rule; *Logan v. Driscoll*, 19 Cal. 626, 81 Am. Dec. 91, where the owner of a claim on a hill was enjoined from allowing tailings to wash into another claim in the bed of a creek; and in *Lincoln v. Rodgers*, 1 Mont. 221, holding that a prior locator cannot let tailings run free in a gulch and destroy the value of mining claims below, but if he works with reasonable care, injury caused to later locators is *damnum absque injuria*. Also in *Fitzpatrick v. Montgomery*, 20 Mont. 188, holding it no defense that it was necessary to damage the land of another in order to carry on the mining.

15 Cal. 144. BOLES v. WEIFENBACK.

Complaint of Ejectment, alleging prior possession of plaintiff, and ouster and continued occupancy by defendant, is sufficient, p. 144.

Affirmed in *Boles v. Cohen*, 15 Cal. 151; cited in *McCarthy v. Brown*, 113 Cal. 18, holding ouster to be sufficiently expressed in a finding, and its force not impaired by its being placed under conclusions of law.

15 Cal. 145-149. McDONALD v. BEAR RIVER CO. S. C. 13 Cal. 220.

Estoppel by Judgment.—A general verdict does not operate as an estoppel except as to matters necessarily considered and determined by the jury, p. 148.

Cited in *Chapman v. Hughes*, 134 Cal. 655, holding finding not conclusive when judgment not dependent thereon; *McLaughlin v. Kelly*, 22 Cal. 222, to the point that after a fair trial the verdict and judgment are usually held to be final, holding that under the code the facts put in issue by the pleadings, not the form of the action, are to be considered on the question of what was determined by the verdict or findings; also in *Hamm v. Arnold*, 23 Cal. 375, holding that a former suit in equity was not an estoppel in a later action of ejectment; *Caperton v. Schmidt*, 26 Cal. 494, 85 Am. Dec. 191, holding that: "The estoppel of a verdict and judgment is necessarily limited to the rights of the parties as they exist at the time when such verdict and judgment are rendered, and cannot preclude either party from showing that

their rights have been varied or extinguished at a subsequent period"; and in *Lillis v. Emigrant Co.*, 95 Cal. 559, 563, holding that a former judgment was not conclusive against the right to divert a certain amount of water from a stream. Cited, also, in *Holladay v. Elliott*, 3 Oreg. 346, holding that facts, not evidence, should be pleaded; *Glenn v. Savage*, 14 Oreg. 574, holding that matter pleaded in bar must have been directly in issue; *Union Co. v. Dangberg*, 81 Fed. Rep. 116, holding that former decrees are only conclusive as to matters that were decided within the pleadings; and in note to 26 Am. Dec. 610, on this point.

15 Cal. 149-150. **EARLY v. MANNIX.**

Mandamus cannot issue where there is an adequate remedy by appeal, p. 150.

Affirmed in *Clark v. Crane*, 57 Cal. 634, where mandamus was refused to compel a superior court to settle a motion for new trial where notice of motion was made too late; and in note to 89 Am. Dec. 730, on mandamus.

15 Cal. 150-152. **BOLES v. COHEN.**

Complaint in Ejectment, alleging prior possession by plaintiff, and ouster and continued occupancy by defendant, is sufficient, p. 152.

Approved in *McCarthy v. Brown*, 113 Cal. 18.

Causes of Action may be joined in the same complaint, but must be separately stated, p. 152.

Cited in *Smith v. Smith*, 80 Cal. 324, holding that the court may order actions consolidated.

15 Cal. 152-161; 76 Am. Dec. 468. **BROWN v. FORTY-NINE CO.**

Mining.—Prior locator is entitled not only to the bedrock but to the loose and decomposed quartz on his claim, pp. 158, 161.

Affirmed in *Patchen v. Keeley*, 19 Nev. 414. Cited in notes to 83 Am. Dec. 277, and 90 Am. Dec. 497, on miners' customs.

15 Cal. 161-182; 76 Am. Dec. 472. **KIDD v. LAIRD.**

Running Water, so long as it continues to flow in its natural course, is not and cannot be made the subject of private ownership. A right may be acquired to the use, which will be regarded and protected as property, p. 180.

Cited in *McDonald v. Askew*, 29 Cal. 206, holding that a prior appropriator of water, who sold his interest in it to the owner of a ditch above him, did not lose his right as against a later appropriator below him; also in *Nevada Co. v. Kidd*, 37 Cal. 311, where one who was building a dam and canal, but had not yet appropriated water, was held

not entitled to an injunction against appropriation of the water by others; *Alhambra Co. v. Mayberry*, 88 Cal. 77, holding that the riparian owners on a stream that runs from their land into public lands may agree among themselves as to the use of water, and a later proprietor takes subject to their rights. Approved in *Strickler v. Colorado Springs*, 16 Colo. 68, 70, 25 Am. St. Rep. 248, 249. Cited in *Alder Gulch Co. v. Hayes*, 6 Mont. 38, holding a lower claimant entitled to water subject to the prior use of an upper claimant; also in *Meagher v. Hardenbrook*, 11 Mont. 390, holding that water may be turned into a stream and recaptured later; *Trambley v. Luterman*, 6 N. Mex. 25, to the point that "common law, as to rights of riparian owners, is not in force in this territory, nor in California, Nevada, and other Pacific states"; *Union Co. v. Ferris*, 2 Sawy. 184, holding that a riparian owner may divert water for irrigation; *Fisher v. City*, 21 Utah, 34, discussing right of municipality to condemn water rights; *Salt Lake City v. Water etc. Co.*, 24 Utah, 266, a prior appropriator of water in a river acquires no right to the corpus of the water until such appropriator has conducted it into his canal for use; *Frank v. Hicks*, 4 Wyo. 532, to the point that "the water right is separable from the land to which it is appurtenant, and may be sold separate from the land"; and in notes, on property in the use of water, in 43 Am. Dec. 279; 82 Am. Dec. 188; 93 Am. Dec. 739; 45 Am. St. Rep. 780. Note to the principal case on this point, 76 Am. Dec. 472, is cited in notes to 79 Am. Dec. 645, and 90 Am. Dec. 541.

Point of Diversion of water may be changed. In all cases the effect of the change upon the rights of others is the controlling consideration; in the absence of injurious consequences to others, any change which the party chooses to make is legal and proper, p. 181.

Approved in *Butte Co. v. Morgan*, 19 Cal. 616. Cited in *Southern Cal. etc. Co. v. Wilshire*, 144 Cal. 72, denying unconditional right of change to owner of prescriptive right; *Bradley v. Warner*, 21 R. I. 40, holding easement of flowing land by dammed water not extinguished by change of location of dam when flooded area not increased; *Hague v. Nephi etc. Co.*, 16 Utah, 433, 67 Am. St. Rep. 641, holding diversion not permissible under facts stated; *Junkans v. Bergin*, 67 Cal. 270, holding that the change cannot be made when the rights of others are injured; also in *Ramelli v. Irish*, 96 Cal. 217, holding that a prior appropriator had the right to change his point of diversion; and in *Smith v. Corbit*, 116 Cal. 592, holding that by making the change the appropriator does not increase or diminish the amount he is entitled to divert. Approved in *Fuller v. Swan River Co.*, 12 Colo. 17, 18, 19, where the court say that the principal case furnishes "the only rule under which the rights of the prior appropriator can be fully exercised, and his rights and the rights of all other persons fully protected. The right to change, so limited, includes the point of diversion and place and character of use." Cited in *Curtis v. La Grande Co.*, 20 Oreg. 49, where change of point of

diversion was allowed: *Cole v. Logan*, 24 Oreg. 313, where the change was not allowed on account of being injurious to others. Approved in *Union Co. v. Dangberg*, 81 Fed. Rep. 95, 115, and *Frank v. Hicks*, 4 Wyo. 532. The note to the principal case, 76 Am. Dec. 472, on this point, is cited in notes to 85 Am. Dec. 151, and 25 Am. St. Rep. 254. See, also, note to 32 Am. Dec. 387. Cited in extended note on this point in 60 Am. St. Rep. 814.

Estoppel by Judgment.—"A verdict found on any fact or title distinctly put in issue is conclusive in another action between the same parties or their privies, in respect of the same fact or title. . . . It is not sufficient that the particular fact or title is put in issue. It must be tried by the jury and constitute the basis and foundation of the verdict. It must be relevant and material, and unless specially found must have been necessarily passed upon by the jury," p. 182.

Affirmed in *McDonald v. Bear River Co.*, 15 Cal. 148. Cited in *McLaughlin v. Kelly*, 22 Cal. 222, holding that when the trial has been fair, courts generally give a final and conclusive effect to the verdict and judgment; also in *Bell v. Brown*, 22 Cal. 681, holding that several inconsistent defenses may be set up in the answer; *Hamm v. Arnold*, 23 Cal. 375, holding a judgment in equity to be no estoppel in a later action of ejectment; *People v. Frank*, 28 Cal. 516, holding that in a trial for forging and uttering a draft, other drafts, for forging of which the defendant had been acquitted, were admissible on some points, the only point on which they were an estoppel being the question of whether defendant forged them. Cited, also, in *Humpfner v. Osborne*, 2 S. Dak. 322, holding that evidence was admissible to show that a former judgment was an estoppel; *Union Co. v. Dangberg*, 81 Fed. Rep. 117, holding that former decrees were binding upon the points decided therein. The note to the principal case, 76 Am. Dec. 472, on this point, is cited in notes to 81 Am. Dec. 456, 84 Am. Dec. 595, and 44 Am. St. Rep. 564.

15 Cal. 183-186. COLLIER v. CORBETT.

Lost Instrument may be proved by parol evidence, p. 186.

Cited in *Kenniff v. Caulfield*, 140 Cal. 44, noted under *Posten v. Rassette*, 5 Cal. 470; *Estate of Warfield*, 22 Cal. 68, 83 Am. Dec. 55, where evidence was received of a lost petition for probate.

Exceptions to instructions must be taken at the time the instructions are given or refused, p. 186.

Cited in *Garoutte v. Williamson*, 108 Cal. 141, holding that exceptions to instructions must be taken before the jury retire; and to same effect in *Coker v. Hayes*, 16 Fla. 379.

One **Cotenant** can sue and recover in ejectment, for the benefit of all, p. 186.

Cited in *King v. Hyatt*, 51 Kan. 512, 37 Am. St. Rep. 308, holding that the owner of an undivided fourth in certain premises could recover only his share from an intruder, as he had no community of interest with his cotenants; *Mullone v. Klein*, 55 N. J. L. 483, holding that one cotenant can collect rents; *Mather v. Dunn*, 11 S. Dak. 200, 74 Am. St. Rep. 789, sustaining such action as against stranger to title; *Crook v. Vandevoort*, 13 Neb. 507, holding that one cotenant can recover possession for the benefit of all; to same effect in *Cushing v. Miller*, 62 N. H. 526, *Le Franc v. Richmond*, 5 Sawy. 604; *Brady v. Kreuger*, 8 S. Dak. 471; 59 Am. St. Rep. 777, and in note to 50 Am. St. Rep. 842, on this point.

15 Cal. 186-198. **SPARKS v. HESS.**

Vendor's Lien for unpaid purchase money is not specific and absolute charge upon the property, but a mere equitable right to resort to it upon failure of payment by the vendee. It can be enforced without previous recourse to proceedings at law, p. 193.

Cited in *Bank v. Brander*, 124 Cal. 257, discussing form of decree of foreclosure; *Taylor v. McKinney*, 20 Cal. 620, holding that where the vendor assigned the contract to convey and executed to the assignee a conveyance of the property, "the effect was to vest in the latter all the rights and equities pertaining to the former"; also in *Baum v. Grigsby*, 21 Cal. 177, 81 Am. Dec. 156, where Field, C. J., says: "There is a marked distinction between the lien of a vendor after absolute conveyance and the lien of a vendor where the contract of sale is unexecuted. In the latter case the vendor holds the legal estate as security for the purchase money. He can assign his contract with the conveyance of the title, and in such case his assignee will acquire the same rights and be subject to the same liabilities as himself. . . . In the former case, the vendor retains a mere equity, which to become of any force or effect must be established by the decree of the court." Cited in *Burt v. Wilson*, 28 Cal. 638, 87 Am. Dec. 145, holding that a vendor's lien is good after the vendee's death, as the trust descends to the heirs and representatives of the vendee; also in *Hill v. Grigsby*, 32 Cal. 58, where Rhodes, J., says: "Although it may be a matter of regret that the court had not adhered to the easy and plain rules of the statute of frauds, the doctrine may now be regarded as firmly settled in this state, so far as it depends on the action of the courts." In *Porter v. Brooks*, 35 Cal. 206, Sawyer, C. J., concurring specially, cites the principal case, and says, on page 207, of a vendor's lien: "It is not too much to say that it cannot in any just sense be regarded, before complaint filed to enforce it, as a present lien or as a security for the debt." *Crockett, J.*, for the court, held that after conveyance of the land, the vendor only had an equitable right to resort to the land for payment, and if the vendee sold to a third party, the original vendor could attach the interest of his vendee in the property, without

first exhausting his remedy on the vendor's lien. Sanderson and Rhodes, JJ., dissented, on the ground that a vendor's lien stood on the same footing as other liens.

Cited in *Fitzell v. Leaky*, 72 Cal. 484, where McKinstry, J., says that a vendor's lien, after an actual conveyance, is a mere equitable right and "in its nature a personal privilege, unassignable, which the vendor can assert only in a suit brought for the purpose of having it decreed and enforced"; and holds that a vendor waives his lien "by taking a general judgment, which if docketed was a lien on all the real property of the plaintiff." Cited also in *Tripp v. Duane*, 74 Cal. 91, to the point that a vendor's lien exists after execution of a conveyance, unless he has taken security for his payment; and holds that the same doctrine applies to a resulting trust in favor of one who advances money to buy land where the deed is put in another's name; if he takes a deed of trust to secure himself, he loses the equitable lien. Cited in *Burgess v. Fairbanks*, 83 Cal. 216, holding that remedies at law need not be first exhausted, before bringing suit to enforce the lien, and that the lien was not waived by taking the note of a third party as security; also in *Gessner v. Palmateer*, 89 Cal. 92, where Paterson, J., says of a vendor's lien: "The various definitions given and principles applied to it by the courts are hopelessly irreconcilable; and if we take the expressions found in decisions and text-books, without observing the distinction between the lien implied by law in favor of a vendor who has parted with the legal title and taken no security for the purchase money, and the security which the vendor has while he holds the legal title under an unexecuted contract for the conveyance of lands upon payment of the purchase money, there will appear to be great confusion and inconsistency. The former, the implied lien, is properly known as a vendor's lien. . . . The latter is improperly designated as a vendor's lien." Held, by a majority of the court, that where the vendee gave a note in part payment for the land, the vendor assigned it, and the assignee procured the attachment of the land, the attachment must be dissolved, because the assignee had a vendor's lien. McFarland, J., dissenting, quotes the principal case, on pages 95-97, saying of it: "Throughout the whole case the right of the plaintiff is treated as and called a vendor's lien, and there is no doctrine better established than that a vendor's lien is not assignable. . . . In the case at bar, the lien certainly did not pass by the mere assignment of the promissory note. . . . We have been referred to no case in this state where a vendor's lien has been held to be of any value in the hands of any person other than the vendor himself." Cited also in *Robinson v. Appleton*, 124 Ill. 283, holding that in a contract for sale of land the vendor has the legal title and needs no lien; a lien need not be expressly reserved, for the law implies it, and it is not waived by a clause of forfeiture in a bond for a deed; also in *Fuller v. Bradley*, 160 Ill. 55, holding that the vendee is trustee for the vendor as to the purchase money, and the vendor is trustee of the land for the

vendee; *Stephens v. Chadwick*, 10 Kan. 412, 15 Am. Rep. 351, holding that a vendor who has executed a bond to convey has a lien and it is transferred by indorsement of a note for the purchase price; *Smith v. Rowland*, 13 Kan. 251, holding that the vendor is not bound to show that the vendee has no personal property subject to execution, also that a lien may be created by express contract; *Willard v. Reas*, 26 Wis. 543, holding that the lien may be waived by agreement, express or implied, and acceptance of a warranty deed of other lands as part of the purchase price is a waiver of the lien as to that part; and in notes to 12 Am. Dec. 264, and 4 Am. St. Rep. 704, 705, on vendor's liens. Approved in *Hendrix v. Barker*, 49 Neb. 372, 373.

Deed of a bridge and its appurtenances includes the land on which the bridge rests. Everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing to the grantee, pp. 195, 196.

Distinguished in *Wood v. Truckee Co.*, 24 Cal. 487, holding that under a sheriff's deed of a turnpike road the franchises of the corporation, being incorporeal hereditaments, do not pass. Cited in *Cross v. Kitts*, 69 Cal. 221, 58 Am. Rep. 561, holding that the right to the use of percolating water passed with a deed of the land; also in *Mitchell v. Amador Canal Co.*, 75 Cal. 493, held that by foreclosure sale of a ditch, title to another new ditch does not pass, it not being an appurtenance of the other; and in *McShane v. Carter*, 80 Cal. 315, where a ditch was held to be an appurtenance of mining ground. Cited also in *Scott v. Michael*, 129 Ind. 254, holding that a deed of a mill includes the right to maintain a dam at the same height as when it was conveyed, and the mere recital in the deed of a mortgage, in which the right of flowage was restricted, is no limitation of the rights granted by the deed; and in *Branson v. Studebaker*, 133 Ind. 165, holding that a deed included a millsite, millrace, and right to use the water; *Indianapolis Co. v. First Nat. Bank*, 134 Ind. 131, holding that a building is *prima facie* part of the land on which it stands; *Jackson v. Trullinger*, 9 Oreg. 399, holding that a dam and privileges of flowing go with a mill; *Sheets v. Selden*, 2 Wall. 188, holding that the grant of a canal includes the land adjacent; *Scheel v. Alhambra Co.*, 79 Fed. Rep. 825, holding that a grant of a tunnel includes the right to dump waste rock at its mouth; and in notes to 26 Am. Dec. 539, 31 Am. Dec. 202, and 45 Am. Dec. 699, on appurtenances.

15 Cal. 198. **BURDGE v. GOLD HILL CO.**

Appeal is on the judgment-roll only, where there is no statement on appeal, but only the statement used on motion for new trial, p. 198.

Cited in *Williams v. Rice*, 13 Nev. 236, holding that the statement on motion for new trial cannot be the statement on appeal.

15 Cal. 199-200. LISMAN v. EARLY.

Evidence.—It is discretionary with the trial court to allow a party to reopen his case after resting; and where the ends of justice require, it is better to let the testimony in, p. 200.

Affirmed in *Foote v. Richmond*, 42 Cal. 442, and *McLeod v. Lee*, 17 Nev. 119.

Payment.—**Burden of Proof** is on defendant, p. 200.

Cited in *Melone v. Ruffino*, 129 Cal. 519, applying rule, although complaint affirmatively alleged nonpayment.

15 Cal. 202-204. HARPER v. FORBES.

Homestead.—Occupancy is presumptive evidence of appropriation, and removal is presumptive evidence of abandonment, p. 203.

Cited in *Broadus v. Nelson*, 16 Cal. 81, where an instruction to the jury that if they found there was no dedication they need proceed no further was held proper; also in *Cohen v. Davis*, 20 Cal. 194, holding that where no declaration of homestead had been recorded under the act of 1860, a declaration of abandonment, under the same act, had no effect, but the rights of the parties were determined by the act of 1851; *Brennan v. Wallace*, 25 Cal. 111, holding an abandonment proven; *Tipton v. Martin*, 71 Cal. 327, holding that an abandonment can be proved only as provided in the statute; *McGee v. Board of Comr's Hennepin Co.*, 84 Minn. 471; and in notes to 60 Am. Dec. 609, 614, on homestead.

15 Cal. 204-206. MORE v. ORD.

Injunction to stay an execution sale refused, the injury not being irreparable, p. 206.

Cited in *Marshall v. Luiz*, 115 Cal. 625, holding that an injunction did not lie to restrain the sale on foreclosure of a crop of hay, contrary to the covenants of a lease, the lessor having other adequate remedies; and in *Ladd v. Ramsby*, 10 Oreg. 211, holding that averments in a bill for injunction must be positive, not in the alternative.

15 Cal. 206-208. ADAMS v. WOODS.

Receiver allowed to retain the expense of prosecuting suits authorized by the court, although the expenditures had not been approved by the court before they were made, p. 207.

Cited in *Dennery v. Superior Court*, 84 Cal. 11, holding that the receiver of an insolvent could maintain necessary actions to recover the insolvent's property; also in *Estate of Moore*, 88 Cal. 3, holding that the duties of a special administrator are similar to those of a receiver, and approving expenses incurred by such administrator in excess of the amount previously ordered by the court. Distinguished

in *Tibbets v. Cohn*, 116 Cal. 369, where it was held that the receiver of an insolvent had no right to bring suit to recover property transferred by the insolvent, his functions being limited to preservation of the estate until an assignee is appointed. Cited in note to 18 Am. St. Rep. 268, on receivers.

15 Cal. 208-212. **GAVEN v. HAGEN.**

Vendee of land, under a contract silent as to possession, has no right to possession until he performs the conditions of the contract as to payment of the purchase money, p. 212.

Doubted in *Willis v. Wozencraft*, 22 Cal. 615, where the court say of the principal case: "There are very strong grounds for doubting the correctness of that decision on these points, especially as the rules of equity upon the question seem to have been entirely overlooked"; and on page 619, it is said of the principal case that it "differs very essentially from the present in this, that there was no stipulation that the vendee was to have the possession, as in the present case, and it is not therefore in point." Cited in *Central Pac. Co. v. Mudd*, 59 Cal. 588, as not being in point in the case at bar, where there was a stipulation in the contract of sale that upon default of the vendee, the vendor should have the right to enter, and the court held that the vendor could maintain ejectment upon default of the vendee; also in *Gates v. McLean*, 70 Cal. 49, holding that if the vendee is dissatisfied with the vendor's title, but elects to retain possession of the land, he must pay the purchase money according to contract; *Stratton v. California Land Co.*, 86 Cal. 364, holding that if the contract does not stipulate that the vendee shall have possession pending payment, "it may be considered as settled in this state that the vendor retains the possession until the legal title passes to his vendee." Explained in *Royal v. Dennison*, 109 Cal. 563, where the court say of the principal case: "It is said in the opinion, and is undoubtedly true, that a conveyance by the grantee of a vendor of real property, together with an assignment of the vendor's covenants, gives to the vendee all that he would obtain by a literal performance of the vendor's contract, but it was not decided, and the case did not require decision, that the vendee is obliged to accept such substantial performance in place of strict and literal performance"; and the court holds that where the vendor offered the deed of a third party conveying the title, and the vendee failed to specify the objection to it that he was entitled to the vendor's personal deed, he cannot make such objection later, "for in such a case, where the holder of the title is willing and ready to convey to the vendee at the request of the vendor, it is to be presumed he would be equally ready and willing to convey to the vendor in order that he might literally comply with his contract." Cited also in *Cartin v. Hammond*, 10 Mont. 45, holding that in an action against the vendor for breach of contract, the vendee cannot recover the value of improvements placed by him on the property.

15 Cal. 213-219. COGHILL v. BORING.

Presumption.—It does not follow, because a man is insolvent on one day, that he was insolvent at any subsequent or antecedent period, p. 219.

Cited in *Scott v. Wood*, 81 Cal. 405, holding that the true rule is the one established by section 1963, subdivision 32, of the Code of Civil Procedure, "a thing once proved to exist continues as long as is usual with things of that nature"; held, an instruction as matter of law to the effect that wages of a salesman continued for several years at two hundred and fifty dollars per month was erroneous, but it might be inferred by the jury under the circumstances.

Seller's Offer to Return purchase price, on his rescinding the sale, may be made at any time before the trial, or at the trial, and need not be before suit is brought, p. 218.

Affirmed in *Allbright v. Griffin*, 78 Ind. 191; *Warner v. Vallily*, 13 R. I. 487; *Sisson v. Hill*, 18 R. I. 215. Cited in *Whyte v. Rosencrants* 123 Cal. 642, 69 Am. St. Rep. 97, holding offer to surrender note and its production for cancellation sufficient; *Crossen v. Murphy*, 31 Oreg. 121, holding that plaintiff, in a suit in equity to rescind a contract for fraud in transfer of notes, "having deposited in court the notes in question, did all that was required of him in an equitable proceeding"; also in *Johnson v. Burnside*, 3 S. Dak. 236, 238, holding that formal tender is not necessary where the other party refuses to receive it; and in *Potter v. Taggart*, 54 Wis. 403, holding that before judgment, plaintiff may be required to place the property where defendant can get it.

15 Cal. 220-221. ESTATE OF SCOTT.

Probate Court first taking jurisdiction cannot, by consent of parties, transfer the estate to the probate court of another county. Probate proceedings are not civil actions within the meaning of Practice Act, sections 18 to 21 (Code Civ. Proc., secs. 392-397), p. 221.

Cited in *Carpenter v. Superior Court*, 75 Cal. 599, holding that the provisions for appointing a guardian ad litem in civil actions (Code Civ. Proc., sec. 372) do not apply to probate proceedings; and if they did, they were substantially complied with in the present case by appointment of an attorney to represent minors, under section 1718 of the Code of Civil Procedure; and in *Estate of Joseph*, 118 Cal. 663, holding that the contest of a will is not an "action" under section 1036 of the Code of Civil Procedure, requiring security for costs, but it is a special proceeding. Also in *Territory v. Klee*, 1 Wash. St. 188, holding that the probate court where application is first made has jurisdiction of the estate.

15 Cal. 221-223. **JACOBS v. MURRAY.**

Election.—In an ordinance providing that supervisors shall elect an official annually in October, to hold office for a year and until his successor qualifies, the provision as to time is directory, and failure to elect in October does not render a subsequent election invalid, p. 223.

Cited in *Tuohy v. Chase*, 30 Cal. 526, holding that a statute authorizing supervisors to change the boundaries of districts at certain times is directory only; also, in *Hesper v. Burr Oak*, 34 Iowa, 309, holding that where a statute provides that polls in a school district election shall be open from 9 to 5, an election called for 1 P. M. is void; also in *Piper v. Batt*, 38 La. Ann. 958, holding that failure to elect officers of an association at the time named in the charter does not invalidate an election held at the next regular meeting; and in note to 83 Am. Dec. 751, on elections.

15 Cal. 223-226. **FOX v. BRISSAC.**

Landlord has no right to forcibly re-enter leased premises for breach of covenants in the lease, p. 225.

Approved in *Entelman v. Hagood*, 95 Ga. 392. Cited in note to 69 Am. Dec. 756, on this point.

15 Cal. 226-259. **NORRIS v. HARRIS.**

Conflict of Laws.—The common law is the basis of the laws of those states which were originally colonies of England or carved out of those colonies. In those states it must be presumed that such common law exists, and it rests upon parties who assert a different rule to show that matter by proof. A similar presumption exists as to those states that were not occupied by organized and civilized communities at the time of their acquisition. But no such presumption can apply to states in which a government already existed at the time of their accession to the country; in such a case, in the absence of any proof on the subject, we presume the law of that state to be in accordance with our own, pp. 252, 253.

Cited in *Estate of Fair*, 132 Cal. 534, 84 Am. St. Rep. 80, on point that no presumption as to existence of English common law prevails as to states not created from former English possessions; *St. Louis etc. Co. v. Brown*, 67 Ark. 302, applying rule to action for personal injuries; cases where the *lex fori* was presumed to exist in another state, viz.: *Hickman v. Alpaugh*, 21 Cal. 226, as to law and statutes of Oregon; *Hill v. Grigsby*, 32 Cal. 60, and *Shumway v. Leakey*, 67 Cal. 460, as to laws of Nevada; *Marsters v. Lash*, 61 Cal. 624, as to laws of Indiana and Minnesota; *Palmer v. Atchison Co.*, 101 Cal. 196, as to laws of Missouri; *Wickersham v. Johnston*, 104 Cal. 411, 43 Am. St. Rep. 119, as to laws of England since the Declaration of Inde-

pendence. Also in *Peet v. Hatcher*, 112 Ala. 521, 57 Am. St. Rep. 49, as to laws of Louisiana and Georgia, but holding that a contract for "futures" made in Georgia, and valid there, could be enforced in Alabama, though contrary to statute there (see 38 N. J. Eq. 223, post); *Kollock v. Emmert*, 43 Mo. App. 570, as to law of Kansas; *Thomas v. Pendleton*, 1 S. Dak. 153, 36 Am. St. Rep. 728, as to laws of Pennsylvania; *Meuer v. Chicago Co.*, 5 S. Dak. 574, 49 Am. St. Rep. 900, as to laws of Missouri. Cited in cases where the common law was presumed to exist in another state, viz.: *Thorn v. Weatherly*, 50 Ark. 241, 242, as to Tennessee; *Hofheimer v. Losen*, 24 Mo. App. 658, as to Illinois; *Flagg v. Baldwin*, 38 N. J. Eq. 223, 48 Am. Rep. 311, as to New York, and holding that a contract for "margins," made in New York and valid there, was not enforceable in New Jersey, this class of contracts being excepted from the rule of comity between states as to enforcement of judgments (see 112 Ala. 521, ante); and in *Cressey v. Tatom*, 9 Oreg. 545, generally. Cited, on other points, viz.: *Herr v. Johnson*, 11 Colo. 396, holding that the common law never existed in Colorado; *Gatton v. Chicago Co.*, 95 Iowa, 117, 136, holding that there is no national common law, but only the common law of the several states; *Hamilton v. Kneeland*, 1 Nev. 57, holding that the common law and English statutes prior to 1776 prevailed in Nevada. In *Shively v. Bowlby*, 152 U. S. 52, Gray, J., says: "The settlers of Oregon, like the colonists of the Atlantic states, coming from a country in which the common law prevailed to one that had no organized government, took with them as their birthright the principles of the common law, so far as suited to their condition in their new home." In *Pyeatt v. Powell*, 51 Fed. Rep. 555, it is said: "In the federal courts, in the absence of statutes repealing or modifying it, the common law is the rule of decision and guide of action"; and the court holds that the registry laws of Kansas do not apply to a chattel mortgage executed in Kansas by a resident of the Indian Territory on animals in the territory; also that by common law a mortgagee has absolute title to the mortgaged property after default of the mortgagor; therefore in this case the mortgagee is entitled to the increase of the horses. In *The Henry B. Hyde*, 82 Fed. Rep. 684, it is held that "there is no presumption that the general commercial law relating to bills of lading has been changed by the legislature of the state of New York" to conform to section 2176 of our Civil Code.

Cited in notes to 20 Am. Dec. 294, on *lex loci contractus*, and 89 Am. Dec. 672, 673, 674, on judicial notice of foreign laws.

Testamentary Powers, given by a will to the executor and guardian to control or dispose of the estate without the aid of a court, take the matter out of the jurisdiction of the statutes regarding sales by executors and guardians. The statute is only operative where there is no testamentary power, pp. 255, 256.

Affirmed in *Payne v. Payne*, 18 Cal. 303. Cited in *Fallon v. Butler*, 21

Cal. 31, 81 Am. Dec. 143, holding that the statute as to sales being only by order of the probate court does not apply to judicial sales or those made in pursuance of testamentary authority; *Larco v. Casaneuava*, 30 Cal. 567, holding that where the will gives power to an executor, the will takes the place of the statute and becomes the executor's source of power. Cited also in *Clark v. Hornthal*, 47 Miss. 489, holding that the sale by an executor of real estate to pay decedent's debts, under a power in the will, did not need the order or approval of the court; *Faulk v. Dashiell*, 62 Tex. 647, holding that an executor empowered by will may act without authority of the court; *In re Walker's Estate*, 6 Utah, 373, as to power to sell; note to 29 Am. Dec. 715, on guardian's power.

Entire Contract is indivisible—the whole must stand or fall together. But a contract made at the same time of different articles, at different prices, is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by agreement of the parties, or unless it is of such a nature that a failure to obtain a part of the articles would materially affect the objects of the contract, and thus have influenced the sale, had such failure been anticipated, p. 256.

Cited in *Field v. Austin*, 131 Cal. 383, admitting parol evidence to segregate consideration among respective properties transferred; *Amanda G. M. Co. v. People's M. Co.*, 28 Colo. 256, when contract to convey land or in case of failure to pay certain sum is in alternative, if time lapses, right of election shifts to promisee and he may sue for one or other; *Herzog v. Purdy*, 119 Cal. 101, holding a contract for sale of hides and tallow severable; also in *Campbell v. Marsh*, 20 Colo. 31, holding that where the buyer was allowed to rescind because the seller could not comply with the contract, the seller was not entitled to be reimbursed for all his loss; also in *McGrath v. Cannon*, 55 Minn. 460, where it is said: "The courts are inclined, whenever they consistently can in cases of this kind, to construe the contract as severable rather than entire. This works out substantial justice, for it permits the one party to recover for what he has performed, but at the same time permits the other party to counterclaim or recoup whatever damages he has sustained by the nonperformance of other items of the contract"; *Potsdamer v. Kruse*, 57 Minn. 196, where a contract for the sale of neckties was held divisible; and in notes to 59 Am. St. Rep. 277, 292, on this point.

15 Cal. 259-265. CURTIS v. SUTTER.

Section 738 of the Code of Civil Procedure enlarges the class of cases in which equitable relief could formerly be sought in the quieting of title. It authorizes the interposition of equity in cases where previously bills of peace would not lie; plaintiff need not delay seeking the equitable interposition of the court until he has been disturbed

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in his possession by the institution of a suit against him, and until judgment in such suit has passed in his favor. It is sufficient if, whilst in the possession of the property, a party out of possession claim an interest or estate adverse to him. He can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed and judicially determined, and the question of title be thus forever quieted, pp. 262, 263.

Cited in *Maskey v. Lackmann*, 146 Cal. 780, where apparent validity of sheriff's sale against plaintiff depended on continuance of attachment levied prior to plaintiff's deed, and complaint shows acceptance by sheriff of bond to release attachment, and release thereof, sheriff's deed casts no cloud on title; *Angus v. Craven*, 132 Cal. 696, holding scope of section more extensive than that of bills of peace; *Collins v. Lavery*, 136 Cal. 34, on point that administrator may sue; *California etc. Co. v. Miller*, 96 Fed. 20, quoting *Castro v. Barry*, 79 Cal. 446; *Fulkerson v. Chisna Min. etc. Co.*, 122 Fed. 786, under Alaska Code, section 475, one in possession of mining claim under valid location has sufficient title to quiet title against an adverse claimant; *Montana Ore etc. Co. v. Boston etc. Min. Co.*, 27 Mont. 305, 307, 309, 450, in action under Code of Civil Procedure, section 1310, against defendant not in possession neither party is entitled to jury trial; *Arington v. Liscom*, 34 Cal. 389, 94 Am. Dec. 740, holding that where plaintiff claims by adverse possession, and defendant by an invalid paper title, it is a proper case for removing a cloud; also in *Archbishop v. Shipman*, 69 Cal. 592, 593, holding that the action did not lie, because it appeared that there was no legal cloud on the title, and that there was an adequate remedy at law. Approved in *Castro v. Barry*, 79 Cal. 446, holding that the action may be brought to determine any adverse claim whatever, and plaintiff is not required to set forth the nature of defendant's claim. Cited in *Wall v. Magnes*, 17 Colo. 478, 480, saying in regard to defendant's obligation to plead the nature of his claim: "The statute says in effect to him, you shall not put plaintiff upon proof of his possession and title, unless you assert by plea an adverse interest in the premises; you have the alternative of either asserting a claim and pleading its nature, or of disclaiming, or filing no answer"; and to same effect in *Amter v. Conlon*, 22 Colo. 152. But in *Blasdel v. Williams*, 9 Nev. 172, a majority of the court hold that the cause of action being the assertion by defendant of a claim prejudicial to plaintiff, plaintiff must show the prejudicial effect of the claim, and "produce such evidence as will tend to sustain his cause of action, before the defendant is called upon to move. . . . It is probable that the California decisions which look the other way, and which are based upon an identical statute with that of this state, were rendered upon the remembrance of the New York cases, without any critical examination." Hawley, J., dissenting, cites the principal case. And in *King v. Higgins*, 3 Oreg. 409, with regard to former restrictions

being removed by the statute, the court say: "It may be questioned, however, whether that restriction was universal before that enactment. . . . It cannot fairly be inferred from the opinion expressed in the case of *Curtis v. Sutter*, that it is not now necessary to state facts from which the court can properly draw the conclusion that the claim is a cloud on the plaintiff's title, or, in other words, from which the court can infer that it works some injury that entitles the plaintiff to equitable relief." In *Stark v. Starrs*, 6 Wall. 409, the court, per Field, J., holds that mere naked possession of plaintiff is not enough; "his possession must be accompanied with a claim of right, that is, must be founded upon title, legal or equitable, and such claim or title must be exhibited by the proofs and perhaps in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest." And in *Holland v. Challen*, 110 U. S. 19, it is said: "A bill to quiet title, or to remove a cloud upon the title of real estate, differed from a bill of peace in that it did not seek so much to put an end to vexatious litigation respecting the property, as to prevent future litigation by removing existing causes of controversy as to claimant's title. It was brought in view of anticipated wrongs or mischiefs, and the jurisdiction of the court was invoked because the party feared future injury to his rights and interests." Held, such an action can be brought in the circuit court, if the citizenship of the parties permits. Cited in *Sharon v. Tucker*, 144 U. S. 543, holding that one who has obtained title by adverse possession may bring the suit; also in *Central Pac. Co. v. Dyer*, 1 Sawy. 649, holding that the circuit court has jurisdiction if citizenship of the parties allows; to same effect in *Holmes v. Oregon Co.*, 6 Sawy. 273; 5 Fed. Rep. 84; *Wells F. & Co. v. Miner*, 11 Sawy. 285, 286, 25 Fed. Rep. 536, as illustrative of the doctrine of enlargement of equitable jurisdiction by a statute of interpleader; *Chamberlain v. Marshall*, 8 Fed. Rep. 407, holding that a bill showing on its face that plaintiff had no title was properly dismissed. Cited in *Burke v. McDonald*, 2 Idaho, 321, holding that in proceedings under section 2326 of the United States Revised Statutes, regarding adverse claimants to public lands, practice of state courts may prevail; also in *Green v. Glynn*, 71 Ind. 339, holding that a judgment quieting title is a bar to later assertion of adverse interest by a party thereto; also in *Ragadale v. Mitchell*, 97 Ind. 461, holding that a complaint showing title in defendant is bad; *Faught v. Faught*, 98 Ind. 476, holding that a judgment quieting title under a will is a bar to a later suit, by one of the defendants in the first suit, to set aside the will on the ground of the testator's insanity; *Indiana Co. v. Allen*, 113 Ind. 588, holding that a decree in an action to quiet title is a bar to further litigation; *Davis v. Lennen*, 125 Ind. 188, holding that a decree quieting title is not subject to collateral attack; *Woodward v. Mitchell*, 140 Ind. 412, holding that plaintiff may show that defendant is grantee under a void lease; *Gold Hill Co. v. Ish*, 5 Oreg. 106, holding that a

patent to agricultural lands, issued after the act of Congress of 1866 which protected the rights of miners in their claims, was void as against miners who were in occupancy at the date of the act; *Flagstaff Co. v. Patrick*, 2 Utah, 318, holding that if the complaint sets out a cause of action, it is immaterial if other facts are omitted; *Bullion Co. v. Eureka Co.*, 5 Utah, 43, holding that a cross-complaint stated an equitable cross-cause of action; and in notes to 67 Am. Dec. 112, and 68 Am. Dec. 274, on quieting title.

Equity Jurisdiction.—It does not follow from the fact that the suit is brought in equity that the determination of questions of a purely legal character in relation to the title will necessarily be withdrawn from the ordinary cognizance of a court of law. The court sitting in equity may direct, whenever in its judgment it may become proper, an issue to be framed upon the pleadings and submitted to the jury, p. 263.

Cited in *Warring v. Freear*, 64 Cal. 56, which was a case of injunction against a dam, holding that if the court sent the case to the jury, it should direct proper issues to be framed and submitted. Approved in *Donahue v. Meister*, 88 Cal. 124, 126, 127, 22 Am. St. Rep. 285, 286, 287, holding that defendant is entitled to a jury in a suit to quiet title, if he demands it, "where the answer shows that the defendant was rightfully in possession and was ousted by plaintiff and wrongfully kept out of possession" (p. 129). "The code confers equitable rights so far as it grants the power to maintain the action at all, and the decree is in form equitable; but if it has to deal with ordinary common-law rights clearly cognizable in courts of law, it is to this extent an action at law," p. 127.

Affirmed in *Union Co. v. Warren*, 82 Fed. Rep. 521.

Preliminary Injunction is dissolved upon the filing of an answer setting up title, p. 263.

Cited in *Real Co. v. Pond Co.*, 23 Cal. 84, holding that a preliminary injunction must be dissolved, where the answer denied the equities of the complaint, unless plaintiff filed additional affidavits; *State v. District Court*, 23 Mont. 566, on point that motion to dissolve or modify is unnecessary, when application based on grounds already urged in opposition to issuance of order.

Possession by Plaintiff of the premises is required by the statute, p. 264.

Referred to in *Smith v. Brannan*, 13 Cal. 116, holding possession by plaintiff to be essential. Cited in *San Francisco v. Beideman*, 17 Cal. 461, holding that the complaint therein was not to quiet title, because plaintiff was not in possession, and was not to remove a cloud on title, because no cloud was possible under the averments; *Horn v. Jones*, 28 Cal. 202, holding that possession by plaintiff was followed by the same consequences in an action to quiet title as in ejectment; *Pralus v. Jef-*

ferson Co., 34 Cal. 559, holding that the complaint must aver plaintiff's possession; Pralus v. Pacific Co., 35 Cal. 34, holding that possession under a possessory title is enough; Nevada Co. v. Kidd, 37 Cal. 307, holding possession necessary; Sepulveda v. Sepulveda, 39 Cal. 19, 21, holding that where lands were uninclosed and uncultivated, it was not such possession as the statute required. The law having been changed by section 738 of the Code of Civil Procedure, it was held in People v. Center, 66 Cal. 555, that the action might be brought by one out of possession. Cited in Northern Pac. Co. v. Cannon, 46 Fed. Rep. 229, saying that the California courts have always held that plaintiff must be in actual possession, and holding that a plaintiff out of possession did not show grounds for equitable relief, for he could bring ejectment; also in Northern Pac. Co. v. Amacker, 49 Fed. Rep. 536, and Coolidge v. Forward, 11 Oreg. 120, holding that plaintiff must be in possession.

Defendants in Ejectment can all be included in one suit and may be enjoined during its pendency from committing waste, p. 264.

Cited in Haggin v. Kelly, 136 Cal. 483, noted under Water Co. v. Clarkin, 14 Cal. 544; note to 60 Am. Dec. 599.

Administrator may bring suit to quiet title, for benefit of the estate, p. 264.

Affirmed in Teschemacher v. Thompson, 18 Cal. 20, 79 Am. Dec. 153; Pennie v. Hildreth, 81 Cal. 130. Cited in Griffith v. Godey, 113 U. S. 84, where an administrator is compelled to account for his fraudulent acts; also in Sharon v. Terry, 13 Sawy, 410, 36 Fed. Rep. 353, holding there is no reason "why a suit to quiet title may not be brought by an executor to cancel a forged paper, and if so, why he may not file a bill of revivor to obtain the benefit of a decree rendered in favor of the deceased in a suit of that character"; Hyde v. Heller, 10 Wash. St. 602, holding that an administrator can convey as good a title as the decedent could if alive; Scott v. Lloyd, 16 Fla. 155, holding that heirs at law of lessor are not proper parties plaintiff in a suit for unlawful detainer, but the right of possession and right of action passes to the administrator.

15 Cal. 266-267; 76 Am. Dec. 480. **HASWELL v. PARSONS.**

Household Furniture held exempt from execution, p. 267.

Cited in notes to 45 Am. Dec. 256, 97 Am. Dec. 161, and 5 Am. St. Rep. 58, on this subject.

Absence of Debtor when execution sale took place, on account of illness in his family, held a sufficient excuse for his not claiming the exemption at the sale, p. 267.

Cited in Thompson v. Ogle, 55 Ark. 103, holding that death of the debtor was a sufficient excuse for his not claiming exemption; also in Harrington v. Smith, 14 Colo. 382, 20 Am. St. Rep. 276, holding that

where property levied on was clearly exempt, the levy and sale were absolutely illegal; *Stark v. Bare*, 39 Kan. 104, 7 Am. St. Rep. 540, holding that where a creditor transferred his claim to a citizen of another state to prevent the debtor from availing himself of a statutory exemption of wages, the debtor could recover damages; to same effect in *Kestler v. Kern*, 2 Ind. App. 494; *Hardin v. Wolf*, 29 La. Ann. 335, holding that a homestead exemption could not be waived; *Albrecht v. Treitschke*, 17 Neb. 207, holding that a creditor who had garnished a debtor's exempt wages must refund them; and in *Union Pac. Co. v. Smerish*, 22 Neb. 755, 3 Am. St. Rep. 293, holding that the fact that wages were exempt was a complete defense to any proceeding for applying them to a debt.

15 Cal. 271-275. **WEAVER v. EUREKA LAKE CO.**

Appropriation of Water held to depend upon priority, and not upon a comparison of the value of conflicting rights, p. 274.

Cited in *Nevada Co. v. Kidd*, 37 Cal. 314, holding that while a dam and canal were in process of construction, their owner was not entitled to an injunction against the use of the water by others; also in *Fabian v. Collins*, 2 Mont. 515, holding that one party cannot deprive another of his claim to water simply because the former can make a more profitable use of it; *Keeney v. Carillo*, 2 N. Mex. 493, holding that the rule that appropriation of water related back to the time of beginning work on a dam did not apply where the work was not prosecuted with due diligence; *Union Co. v. Ferris*, 2 Sawy. 184, holding that no title by prescription to water from a stream in public lands can be acquired so long as the lands belong to the government; *Woodruff v. North Bloomfield Co.*, 9 Sawy. 542, 18 Fed. Rep. 807, where after an extended discussion of the relative rights of farmers and miners, it was held that the debris from hydraulic mining could not be allowed to flow on agricultural lands; *Hewitt v. Story*, 64 Fed. Rep. 515, holding an abandonment of water rights had been shown; *Union Co. v. Dangberg*, 81 Fed. Rep. 95, holding that irrigation rights were not superior to those of milling and mining; and in notes to 43 Am. Dec. 281, and 60 Am. St. Rep. 804, 807, on appropriation of water.

15 Cal. 275-284. **MORTON v. FOLGER.**

Deposition of a surveyor who ran the boundary lines of a grant, taken in one action, is admissible in another action between different parties as to the location of such lines, after his death, p. 278.

Affirmed in *Cornwall v. Culver*, 16 Cal. 428. Distinguished in *Ayers v. Watson*, 132 U. S. 401, 405, holding that where a deponent had died, his deposition could not be impeached by former statements made by him contrary thereto. Referred to in *Ayers v. Watson*, 137 U. S. 597, as having "quite fully discussed" the subject.

Prior Possession of a plaintiff in ejectment is *prima facie* evidence of title, and a nonsuit in such case is improper, even though the plaintiff fails to prove a paper title on which he also relies, p. 283.

Approved in *Leonard v. Flynn*, 89 Cal. 545, *Zilmer v. Gerichten*, 111 Cal. 77; *Fulkerson v. Chisna Min. etc. Co.*, 122 Fed. 784, under Alaska Code, section 475, one in possession of mining claim under valid location has sufficient title to support action to quiet title. Cited in *Minah Co. v. Briscoe*, 47 Fed. Rep. 278, holding that where defective proof of plaintiff has been sufficiently supplemented by defendant's evidence, the defect is cured.

Repealed Statute has no further force, p. 284.

Cited in *Huffman v. Hall*, 102 Cal. 31, holding that section 2619 of the Political Code having been amended, "the section as it had previously stood on the statute book ceased to have any statutory force and was no longer a portion of the laws of the state."

15 Cal. 284-286. **GIBBONS v. SCOTT.**

Equity will not set aside a judgment at law, where plaintiff fails to allege his readiness and willingness to perform his part of an agreement on which he bases his claim, p. 286.

Affirmed in *Logan v. Hillegass*, 16 Cal. 202. Cited in *People v. Rains*, 23 Cal. 129, to the point that defendants must show they had a meritorious defense, to entitle them to an order opening a default; also in *Collins v. Scott*, 100 Cal. 452, to the point that to entitle a defendant to relief against a judgment on the ground of fraud, it must appear that he had a good defense on the merits and that such defense has been lost to him without fault on his part; and in note to 73 Am. Dec. 645, on this point.

15 Cal. 287-294; 76 Am. Dec. 481. **JOHNSON v. SHERMAN.**

Assignment of Lease by lessee to a third party terminates the responsibility of the lessee for rent thereafter due, p. 290.

Affirmed in *Dengler v. Michelsson*, 76 Cal. 127; *Smith v. Ingram*, 90 Ala. 533; *Tibbals v. Iffland*, 10 Wash. St. 456. Cited in *M'Bee v. Sampson*, 66 Fed. Rep. 418, where the court refused to enjoin the assignment of a lease; and, as to assignee's liability for rent, in notes to 88 Am. Dec. 331; 1 Am. St. Rep. 83, 10 Am. St. Rep. 559, 47 Am. St. Rep. 485.

Parol Evidence is admissible to show that a conveyance or assignment, absolute upon its face, was intended as a mortgage, p. 291.

Affirmed in *Cunningham v. Hawkins*, 27 Cal. 606; *Sears v. Dixon*, 33 Cal. 332; *Gay v. Hamilton*, 33 Cal. 690; also in *Jackson v. Lodge*, 36 Cal. 47, 48, holding, after a long discussion of authorities, that parol evidence for this purpose was admissible at law as well as in equity, and that this point was "directly decided" in the principal case; and in *Raynor v. Lyons*, 37 Cal. 454. Cited on this point in notes to 15 Am. Dec. 48; 79 Am. Dec. 374; 82 Am. Dec. 51; and note to the principal

case, 76 Am. Dec. 488, is cited in notes to 90 Am. Dec. 708 and 100 Am. Dec. 63.

Mortgage, in this state, is regarded as a mere security, and not as a conveyance vesting in the mortgagee any estate in the land either before or after condition broken. Possession does not abridge or enlarge his interest, or convert what was previously a security into a seisin of the freehold, p. 293.

Affirmed, on the point that a mortgage is a mere security, in *Goodenow v. Ewer*, 16 Cal. 468, 76 Am. Dec. 544; *Lord v. Morris*, 18 Cal. 488; *Dutton v. Warschauer*, 21 Cal. 621, 625, 82 Am. Dec. 768, 771; *Cunningham v. Hawkins*, 24 Cal. 409; 85 Am. Dec. 75; *Willis v. Farley*, 24 Cal. 498; *Jackson v. Lodge*, 36 Cal. 39, 42, 43, and cited in dissenting opinion on page 64; affirmed also in *McGurren v. Garrity*, 68 Cal. 568, and *Sava. & L. Soc. v. McKoon*, 120 Cal. 179; Approved in *London etc. Bank v. Dexter, Horton & Co.*, 126 Fed. 607, in action by mortgagee who purchased property on foreclosure to cut off right of redemption of a defendant, who was not party to foreclosure, but is in privity with defendant therein, decree of general foreclosure and resale may be made under prayer for general relief; *Cargill v. Thompson*, 57 Minn. 543, saying: "We think the decisions of the California court in accordance with the better reason." Cited in *Kidd v. Temple*, 22 Cal. 262, holding that a mortgagee has no right to possession till after foreclosure sale; and in *Witherell v. Wiberg*, 4 Sawy. 238, holding that a mortgagor cannot be deprived of possession against his will, except by foreclosure and sale; also in notes to 70 Am. Dec. 675; 79 Am. Dec. 360; 81 Am. Dec. 639; 82 Am. Dec. 775; 83 Am. Dec. 396, on mortgage being a mere security; and the note to the principal case, in 84 Am. Dec. 510. General Citation: *Boggs v. Douglass*, 105 Iowa, 347.

15 Cal. 294-296. SACRAMENTO v. BIRD.

Later Statute, if clearly intended to prescribe the only rule which should govern a case, will be construed as repealing the original act, p. 296.

Cited in *Mack v. Jastro*, 126 Cal. 133, holding earlier statute (County Government Act, 1893) repealed; *People v. Ames*, 27 Colo. 129, ruling similarly as to local statutes; *State v. Conkling*, 19 Cal. 512, holding that "when the legislature makes a revision of particular statutes and frames a general statute upon the subject matter, and from the framework of the act it is apparent that the legislature designed a complete scheme for this matter, this is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is ignored"; also in *Fraser v. Alexander*, 75 Cal. 152, saying: "We think it may be stated as a general rule that acts of the legislature prohibiting the same offenses and injuries as former acts, but imposing different penalties or giving different remedies, repeal, so far, such former acts"; and in *People v. Henshaw*, 70 Cal. 441, where the court

say: "The law does not favor the repeal of statutes by implication, and will in all proper cases, in the absence of an express clause repealing a former act, so construe the new law that both may stand; but where, as in the present case, the latter statute is repugnant to the former, and both cannot stand together, the latter will repeal the former." Affirmed in *Ogbourne v. Ogbourne*, 60 Ala. 620; *State v. Palmes*, 23 Fla. 623; *Culver v. Third Nat. Bank*, 64 Ill. 536; *State v. Studt*, 31 Kan. 246; *Gibbons v. Brittenum*, 56 Miss. 255; *Phillips v. Eureka Co.*, 19 Nev. 353; *Strickland v. Geide*, 31 Oreg. 377; *Roche v. Mayor*, 40 N. J. L. 263. Cited in *Barden v. Wells*, 14 Mont. 464, holding that a statute cannot be repealed by implication; and in *Union Pac. Co. v. Ryan*, 2 Wyo. 412, in dissenting opinion, a majority of the court holding that a later statute on taxation was not a repeal of a former one.

15 Cal. 296-302. **LOWE v. ALEXANDER.**

Justice's Docket, containing a recital that a summons was "returned duly served," amounts to nothing more than the opinion of the justice as to the legal sufficiency of the return. The return is as much a part of the record as the docket, p. 300.

Cited in *Borchard v. Supervisors*, 144 Cal. 14, 16, on point that findings which are part of record certified may be resorted to in certiorari; *Jolley v. Foltz*, 34 Cal. 326, where the docket failed to show that the justice had jurisdiction, and the party relying on it was allowed to prove it by parol evidence; also, in *Cardwell v. Sabichi*, 59 Cal. 493, holding that jurisdiction sufficiently appeared from the return on the summons; *Kane v. Desmond*, 63 Cal. 467, where recitals in the docket were held not to show jurisdiction. Cited, also, in *Hunter v. Eddy*, 11 Mont. 264, holding that an entry in a justice's docket of "judgment confessed" was not the record of an oral plea, but merely a statement of the justice's conclusion; and in *Scorpion Co. v. Marsano*, 10 Nev. 382, holding that an entry in a docket of service of summons proves nothing.

Certiorari lies to review the judgment of an inferior court establishing the existence of a fact essential to the exercise of its jurisdiction, p. 301.

Cited in *Stumpf v. Board*, 131 Cal. 368, applying rule to annulment of order creating sanitary district for lack of evidence as to genuineness of signatures to petition; *Blair v. Hamilton*, 32 Cal. 53, holding that the lower court may be required to certify the facts as to jurisdiction; also in *Central Pac. Co. v. Placer Co.*, 32 Cal. 585, 34 Cal. 362 (same decision), in the dissenting opinion, a majority of the court holding that the clerk of a board of equalization is not obliged to certify up the evidence in a case before the board, that not being a part of his duties; In re *Madera District*, 92 Cal. 335, 27 Am. St. Rep. 134, holding that the inferior court is required to certify up such facts or evidence of facts as may be necessary to determine questions of jurisdiction; and in *Schwarz v. Superior Court*, 111 Cal. 112, holding that the review ex-

tends to the evidence taken in the lower court. Cited in *In re Dance*, 2 N. Dak. 191, 33 Am. St. Rep. 772, holding that a duly authenticated transcript from a justice of the peace on certiorari imports verity and cannot be contradicted by the testimony of the justice himself, and saying that in the principal case there was no question of certiorari.

Jurisdiction of a justice of the peace, over the person of a defendant, must affirmatively appear, p. 301.

Cited in *Fagg v. Clements*, 16 Cal. 392, holding that the return on the summons sufficiently showed jurisdiction, and saying that in the principal case there was no evidence of jurisdiction on the record; *Hamilton v. McDonald*, 18 Cal. 130, where defendant, before filing his answer, moved to dismiss the suit because it did not appear that the court had jurisdiction, and it was held that although a showing to that effect would result in a dismissal, the whole case could not be defeated in limine upon the insufficiency of the record; Cited in *Asbell v. Edwards*, 63 Kan. 618, applying rule to records and proceedings of sanitary commission under local statutes; *Paul v. Armstrong*, 1 Nev. 98, holding that judgment cannot be confessed before a justice of the peace in a suit of unlawful detainer, and consent of parties cannot give jurisdiction; *Mallett v. Uncle Sam Co.*, 1 Nev. 198, 90 Am. Dec. 489, holding that nothing can be presumed as to legal service of parties; *McDonald v. Prescott*, 2 Nev. 111, 90 Am. Dec. 518, holding that jurisdiction cannot be presumed; to same effect in *Dick v. Wilson*, 10 Oreg. 491.

Constable cannot serve summons from a justice of the peace outside of his township, p. 302.

Distinguished in *Lafontaine v. Green*, 17 Cal. 297, holding that under the statute a constable could levy an execution outside his township, and saying that the principal case was decided under the statute in effect at that time; also in *Rowley v. Howard*, 23 Cal. 403, holding that a return of service by a deputy sheriff is invalid unless made in name of the sheriff; *Allen v. Napa Co.*, 82 Cal. 188, 189, holding that "constables may execute criminal process outside of their counties, if such process be properly issued and indorsed."

Partnership rights to real estate can be considered only in equity, p. 302.

Cited in *McCauley v. Fulton*, 44 Cal. 362, holding that a purchaser of an interest in the real estate of a partnership acquires a legal title, subject to an equitable right to have the property applied in payment of partnership debts. Also in *Aspen Co. v. Rucker*, 28 Fed. Rep. 222, holding that the rights of discoverers of a mine, before a patent issues, may be the subject of partition.

15 Cal. 302-304. **FRANK v. DOANE. GREEN v. DOANE.**

Attorney's Nonappearance at argument of his motion for new trial is a virtual abandonment of the motion, pp. 303, 304.

Cited (as modified by *Carder v. Baxter*, 28 Cal. 99, and *People v. Center*, 61 Cal. 191) in *State v. Central Pacific Co.*, 17 Nev. 266.

15 Cal. 304-307. SEAWARD v. MALOTTE.

Appeal.—Errors against the appellant are the only ones that can be considered, p. 307.

Affirmed in *Jones v. St. John Co.*, 2 Idaho, 60, and *Maher v. Swift*, 14 Nev. 332.

Court and Jury.—Questions as to validity and effect of conveyances are for the court alone, p. 307.

Cited in note to 69 Am. Dec. 454.

15 Cal. 308-313. VON MAREN v. JOHNSON.

Separate Property of wife being under the control and management of the husband, he is properly joined as plaintiff in a suit to recover it, but the wife may sue alone if she wishes, pp. 310-311.

Cited in *Kays v. Phelan*, 19 Cal. 129, holding that the wife could sue alone for her separate property; also in *Corcoran v. Doll*, 32 Cal. 90, holding that the husband may be joined.

Supplemental Complaint.—Facts occurring after filing of complaint, and changing the liabilities of defendants, should be set forth in a supplemental complaint, not by amending the original complaint, p. 311.

Cited in *McMinn v. O'Connor*, 27 Cal. 247, applying the same rule to a supplemental answer; and to same effect in *Moss v. Shear*, 30 Cal. 474; also in note to 50 Am. St. Rep. 739, on jurisdiction over new parties.

Community Property is liable for wife's antenuptial debts. The title to that property rests in the husband. He can dispose of the same absolutely, as if it were his own separate property. The interest of the wife is a mere expectancy, p. 311.

Cited in *Henley v. Wilson*, 137 Cal. 274-276, holding husband liable for wife's torts, though committed without his knowledge or consent; *Feiser v. Griffin*, 125 Cal. 12, on point that wife's attempt to convey community property is a nullity; *Packard v. Arellanes*, 17 Cal. 537, the court saying: "Of course, similar debts of the husband would stand upon the same footing"; also in *Vlantin v. Bumpus*, 35 Cal. 215, as to wife's antenuptial debts. Cited in *Godey v. Godey*, 39 Cal. 164, holding that after divorce an injunction lies to prevent the husband disposing of the community property, and saying of the expression "mere expectancy" in the principal case: "While, perhaps, no other technical designation would so nearly define its character, it is at the same time an interest so vested in her as that the husband cannot deprive her of it by his will (5 Cal. 256), nor voluntarily alienate it for the mere purpose of divesting her of her claims to it (12 Cal. 226)." Cited, also, in *Alexander v. Bouton*, 55 Cal. 20, holding that a judgment against a

married woman on a contract concerning her separate property may be enforced against that property; *Greiner v. Greiner*, 58 Cal. 119, 120, holding that the wife cannot sue to recover community property transferred by the husband; *Directors v. Abila*, 106 Cal. 362, holding that the wife's interest in community property is not such as to make her an owner within the meaning of the "Wright Irrigation Act"; by *Harrison, J.*, dissenting, in *Estate of Burdick*, 112 Cal. 398, where a majority of the court hold that the probate court can distribute to the wife her share in the community property, as part of the husband's estate; and in *Spreckels v. Spreckels*, 116 Cal. 346, 347, 58 Am. St. Rep. 175, 176, where it is said in regard to the phrase "mere expectancy": "I doubt if a happier phrase could have been devised to express the interest of the wife in the community than that used by Judge Field"; and the court holds that the amendment of 1891 to section 172 of the Civil Code, requiring the wife's written consent to gifts by the husband of community property do not affect such property acquired prior to the passage of the amendment. Cited in *Ray v. Ray*, 1 Idaho, 579, holding that a wife's separation from her husband, with intent to bring a suit for divorce, does not affect the husband's right to dispose of the community property; and in dissenting opinion in *Yancy v. Batte*, 48 Tex. 77, where a majority of the court held that children were entitled to their mother's half of community property at her death; also in notes to 60 Am. Dec. 260, 261, 264, on liability for wife's antenuptial debts, and 51 Am. Rep. 458, on rights of married women.

Common Law constitutes the basis of our jurisprudence, and rights and liabilities must be determined in accordance with its principles, except so far as they are modified by statute, p. 312.

Cited in *Leonis v. Lazzarovich*, 55 Cal. 55, holding that equity could not reform a married woman's deed whose acknowledgment did not conform to the statute; also in *Sesler v. Montgomery*, 78 Cal. 487, 12 Am. St. Rep. 76, holding that a husband could not commit slander by talking to his wife alone in their house, and the court, per *McFarland, J.*, said: "When husbands and wives talk to each other alone, the conversation differs but little from the process of talking to one's self, or, as it is sometimes called, thinking aloud. . . . To a curious person asking what had occurred between a husband and wife in the seclusion of their home the appropriate answer would be, *Id est nullum tui negotii*."

Objection not interposed at trial comes too late on appeal, p. 312.

Cited in *Kirsch v. Kirsch*, 83 Cal. 635, where it was held too late for plaintiff in a divorce suit to object to a supplemental cross-complaint of defendant.

15 Cal. 313-315. **MAHONEY v. CAPERTON.**

Notice of motion for new trial given six days after filing of referee's report and one day before entry of judgment is ineffectual, p. 315.

Cited in *Dominguez v. Mascotti*, 74 Cal. 270, holding that a premature notice of motion is ineffectual. Affirmed in *Walker v. Hamburg Co.*, 2 Utah, 110.

Pledge.—Sale in gross of stock pledged to secure different debts held an error, p. 315.

Cited in note to 49 Am. Dec. 734, on pledge.

15 Cal. 315-318. **PRESTON v. KEHOE.** S. C. 10 Cal. 445.

Forcible Entry.—Uncompleted fence is not evidence of possession of premises, p. 318.

Affirmed in *Cummins v. Scott*, 20 Cal. 84.

Forcible Detainer is not proof of forcible entry, p. 318.

Affirmed in *McMinn v. Bliss*, 31 Cal. 126. Distinguished in *Taylor v. Scott*, 10 Oreg. 485, where entry was peaceable and there was no tenancy.

15 Cal. 319-320. **WOLF v. ST. LOUIS CO.**

Stockholder is not a competent witness for a corporation, p. 320.

Affirmed in *Contra Costa Co. v. Moss*, 23 Cal. 329.

Stockholder cannot avoid liability for debts of corporation, if the stock stands in his name on the books, p. 320.

Affirmed in *Moore v. Boyd*, 74 Cal. 174. Cited in note to 3 Am. St. Rep. 859.

15 Cal. 321; 76 Am. Dec. 489. **WILLIAMS v. BOWERS.**

Retiring Partner must give notice of his withdrawal from a firm, p. 321.

Affirmed in *Dellapiazza v. Foley*, 112 Cal. 384, holding that the notice must be actual. Cited in *Stoddard Co. v. Krause*, 27 Neb. 89, holding that advertisement in a local paper was not notice to a resident of a distant state; note 58 Am. Dec. 414; note 63 Am. St. Rep. 683.

15 Cal. 322-324; 76 Am. Dec. 490. **GEORGE v. RANSOM.**

Separate Property of wife, and rents and profits thereof, are not liable for husband's debts. Separate property means an estate held, as well in its use as in its title, for the exclusive benefit and advantage of the wife, p. 323.

Cited in *Spear v. Ward*, 20 Cal. 674, holding that where a wife mortgages her separate property for the debts of another, she becomes a mere surety; also in *Lewis v. Johns*, 24 Cal. 101, 102, 85 Am. Dec. 50, 51, holding that crops raised by husband and wife on wife's land are not subject to levy for husband's debts; *Kraemer v. Kraemer*, 52 Cal. 305, holding that where husband and wife moved from Illinois to California, with money that was the husband's separate property by

law of Illinois, and invested it in California, the investment was still the husband's separate property, although by California law the money would have been community property. Cited, also, in *Charauleau v. Woffenden*, 1 Ariz. 260, holding that the presumption that property conveyed to the wife after marriage is community property is rebutted by proof that it was bought with the wife's separate funds; *Carn v. Royer*, 55 Iowa, 652, holding that the fact that an insolvent husband worked for wages on his wife's farm was no badge of fraud; *Lake v. Bender*, 18 Nev. 383, holding that under the statute the rents and profits of the husband's separate estate were not community property; *Yealer v. Hochstetler*, 4 Wash. St. 356, holding that because a husband allowed his wife to use the rents and profits of his separate estate, it was no proof of a gift of them to her; *Harris v. Van De Venter*, 17 Wash. St. 493, holding that a wife was entitled to the increase of livestock belonging to her, and the fact that the husband returned the stock for taxation as his did not make it community property; and in note to 86 Am. Dec. 629, 631, on community property.

15 Cal. 324-327. **KARTH v. LIGHT.**

Dismissal of Appeal, for want of prosecution, is an affirmance of the judgment, unless vacated during the term, p. 325.

Affirmed in *Chamberlain v. Reed*, 16 Cal. 207, and *Chase v. Beraud*, 29 Cal. 138; also in *State v. Biesman*, 12 Mont. 15, by majority of the court, and cited in dissenting opinion on pp. 18, 19. Affirmed in *Simpson v. Prather*, 5 Oreg. 88, *Casanova v. Kreusch*, 21 W. Va. 727; *Perry v. Horn*, 21 W. Va. 736. Cited in *Western Union Co. v. Graham*, 1 Colo. 184, 189, holding that dismissal of writ of error, for failure to file proper bond, was no bar to taking out another. Distinguished in *Freas v. Engelbrecht*, 3 Colo. 383, saying that the principal case was decided under a law that did not provide for a second appeal or writ of error. Cited in *Dooley v. Foster*, 5 Kan. 279, holding that dismissal of one appeal was no bar to filing another under the statute. Doubted in *Cooper v. Pacific Co.*, 7 Nev. 119, holding that dismissal of an appeal without prejudice was no bar to taking another appeal.

15 Cal. 327-329. **PEOPLE v. CUINTANO.**

Grand Jury, summoned by special order of court after defendant was in custody charged with murder, held valid under the statute, p. 329.

Affirmed in *People v. Moice*, 15 Cal. 331. Distinguished in *State v. McNamara*, 3 Nev. 76, where a jury drawn by a judge and county commissioner was held invalid under a statute requiring it to be drawn by a judge and county clerk.

15 Cal. 329-331. **PEOPLE v. MOICE.**

Grand Jury.—See note to *People v. Cuintano*, 15 Cal. 327-329, *ante*.

Charge to Jury, that a crime was murder in the first degree, unless justified or excused, held correct, p. 331.

Affirmed in *People v. Williams*, 73 Cal. 537.

15 Cal. 332-333. PEOPLE v. CHU QUONG.

Kidnapping.—Cited in note to 4 Am. St. Rep. 449, on this topic.

15 Cal. 334-336. PALMER v. McCAFFERTY.

Evidence, offered under counsel's promise to connect it with the case, should be admitted, if it tends legally to prove any part of the case, p. 335.

Affirmed in *State v. Rhoades*, 6 Nev. 359. Cited in dissenting opinion in *State v. Meader*, 54 Vt. 656, a majority of the court holding that if such evidence proves to be incompetent, it will render the verdict void, unless the court can say it did no harm.

15 Cal. 336-344. STATE v. WELLS, FARGO & CO.

State Bonds, illegally issued in payment of state warrants, cannot be recovered back by the state from the holder, who had no notice of the illegality, p. 342.

Distinguished in *District of Columbia v. Cornell*, 130 U. S. 659, holding that the district was not bound to pay canceled sewer certificates fraudulently reissued by a clerk, even though they were held by a bona fide purchaser. Cited in *Blackman v. Lehman*, 63 Ala. 550, 35 Am. Rep. 60, holding municipal bonds not to be negotiable; *Bond Debt cases*, 12 S. Car. 276, holding that negotiable state bonds are subject to the same rules as negotiable paper of individuals or corporations; *Pugh v. Moore*, 44 La. Ann. 224, saying that in the principal case there was no question of constitutional prohibition or power of the government to pay, and holding that the buyer of bonds illegally issued could recover the price from a broker who sold them without disclosing his principal, and the state was not responsible, although the bonds were fraudulently issued by the state treasurer; and in *Long Island Co. v. Columbia Co.*, 65 Fed. Rep. 459, holding that negotiable railway bonds, in the hands of a bona fide purchaser for value before maturity, were valid, in spite of the president of the railway having fraudulently sold them for his own benefit.

General Citation.—*Fogg v. School Dist. of Sedalia*, 75 Mo. App. 171.

15 Cal. 344-347. KREUTZ v. LIVINGSTON. S. C. 20 Cal. 110.

Money Had and Received.—Action lies where one person has money of another that he has no right conscientiously to retain, p. 346.

Affirmed in *Keller v. Hicks*, 22 Cal. 463; 83 Am. Dec. 81; *Dashaway Assn. v. Rogers*, 79 Cal. 213; and *Ehrman v. Rosenthal*, 117 Cal. 496;

Cited in *Gregory v. Clabrough's Exrs.*, 129 Cal. 478, as to money received under mutual mistake of law; *Mumford v. Wright*, 12 Colo. App. 219, sustaining sufficiency of complaint in such action; *Johnson-Brinkman Co. v. Central Bank*, 116 Mo. 568, 38 Am. St. Rep. 620, holding that a seller of wheat could recover the price from a bank who had applied the check of the buyer to settlement of his account with it; also in *Missouri Pacific Co. v. McLiney*, 32 Mo. App. 176, as to rights of property under an assigned bill of lading; *Corrigan v. Brady*, 38 Mo. App. 667, holding that where it is one's duty to pay money, the law will imply a promise; to same effect in *White Pine Bank v. Sadler*, 19 Nev. 103, and *Siems v. Pierre Bank*, 7 S. Dak. 342; and in note to 13 Am. Dec. 41, on money had and received.

Third Person may sue to enforce trust for his benefit, although not a party thereto, p. 347.

Cited in notes to *Baxter v. Camp*, 71 Am. St. Rep. 182, 187, on general subject.

15 Cal. 348-349. **HARRIS v. TAYLOR.**

Creditor's Bill, to defeat a conveyance for fraud, must aver the specific facts constituting the fraud, p. 349.

Affirmed in *Meeker v. Harris*, 19 Cal. 289, 79 Am. Dec. 216, the court saying: "We do not propose to depart from the rule"; also in *Pehrson v. Hewitt*, 79 Cal. 598, and *Heller v. Dyerville Co.*, 116 Cal. 134.

Insolvency of vendor must also be alleged, p. 349.

Distinguished in *Hager v. Shindler*, 29 Cal. 60, holding that vendee at sheriff's sale, who sues to vacate a fraudulent deed of the judgment debtor, need not aver the latter's insolvency. Affirmed in *Thomas v. Mackey*, 3 Colo. 393.

Equity will not interfere if the vendor has other property that can be reached by the ordinary legal remedies. "It must be affirmatively shown that such remedies have been exhausted, or that a resort to them would be fruitless and unavailing, p. 349.

Affirmed in *Herrlich v. Kaufmann*, 99 Cal. 277, 37 Am. St. Rep. 55; also in *Burdsall v. Waggoner*, 4 Colo. 259. Cited in *Rockford Co. v. Rumpf*, 12 Wash. St. 650, holding that a temporary injunction should not issue to restrain a debtor from disposing of his property, when a statutory proceeding, such as *lis pendens*, would answer the purpose; also in note to 90 Am. Dec. 289, 297, on creditors' bills.

15 Cal. 354-359. **BARRETT v. TEWKSBURY.** S. C. 18 Cal. 334; 9 Cal. 13.

Statement on Appeal must distinctly set forth the questions of law or fact raised, "accompanied with only so much of the evidence as may be necessary to explain and show their pertinency and materiality, and no more (Practice Act, sec. 338)," p. 356.

Affirmed in *Reynolds v. Lawrence*, 15 Cal. 361; *Dobbins v. Dollarhide*, 15 Cal. 375; *Weil v. Paul*, 22 Cal. 493, where it was held that consent of counsel that the statement on motion for new trial should be the statement on appeal was a waiver of the statutory requirement; also in *Wixon v. Bear River Co.*, 24 Cal. 372; 85 Am. Dec. 72; and in *Hutton v. Reed*, 25 Cal. 485, 486, 491, where the court say that in the principal case "the requisites of a statement are so fully and precisely laid down that we have quoted at length from the opinion in the case for the purpose of calling particular attention to the subject" (p. 487); and the court prescribes at length the proper practice under section 338 of the Practice Act as amended. See secs. 936-959, Code Civ. Proc., and amendments. Cited, also, in *Haggin v. Clark*, 28 Cal. 165, holding that an assignment as error that a decision was "against law" was "too general to subserve any useful purpose and might as well have been omitted." Cited in *Purdy v. Steele*, 1 Idaho, 217, holding that exceptions are considered waived unless assigned as errors; *Griswold v. Boley*, 1 Mont. 552, holding that specification of errors must be made when the statement is originally prepared; *Rose v. Richmond Co.*, 17 Nev. 51, holding a statement to be sufficiently in form; and in *Bankhead v. Union Pacific Co.*, 2 Utah, 510, holding that an assignment of errors not filed in the lower court cannot be used on appeal.

Appeals Pending may be amended nunc pro tunc to conform to the rule laid down by this decision, p. 358.

Referred to in *Goss v. Commissioners*, 4 Colo. 473, where a similar order had been made.

15 Cal. 359-361. REYNOLDS v. LAWRENCE.

N. B.—Same point as *Barrett v. Tewksbury*, 15 Cal. 354-359.

See note to that case, ante. Cited in 15 Cal. 357; 24 Cal. 372; 28 Cal. 165.

15 Cal. 361-372. STARK v. BARRETT.

Justification of Sureties to an undertaking on appeal, without notice to appellee, is a ground for dismissal of appeal; but the supreme court allows appellants to file a new undertaking, p. 364.

Affirmed in *Gray v. Superior Court*, 61 Cal. 338, holding that a new undertaking may be filed in the superior court, on appeal from justice's court. Cited in *Bank v. Superior Court*, 106 Cal. 46, holding that if at the time for justification of sureties the appellee fails to appear, he is deemed to have waived exceptions; also in *Salt Lake Co. v. Gillman*, 2 Idaho, 183, saying that in the principal case there was no question as to the sufficiency of the undertaking, but only the question of jurisdiction; and holding that under the Idaho statute it was immaterial whether the undertaking was filed prior to service of notice, or vice versa.

Ejectment.—To entitle plaintiff to recover, it is only necessary to establish his right of possession and the occupation of the defendant, at the time of bringing suit, p. 365.

Cited in *Moore v. Tice*, 22 Cal. 516, holding that if defendant has title or right of possession at the trial, it is immaterial whether he had it at the filing of the suit; and in *Tarpey v. Deseret Co.*, 5 Utah, 215, holding that plaintiff may show he entered into possession under a lease.

United States Patent to lands is the last act of a series of proceedings taken for the recognition and confirmation of the patentee's right to the land it embraces, the first of which is the petition to the board of land commissioners. With reference to such proceedings, therefore, the patent takes effect, by relation, at the date of the first act, it is to be regarded as if it had been executed at that time. The patent, in recognizing the validity of the grant, necessarily establishes the validity of all properly executed intermediate transfers of the grantee's interest, p. 366.

Affirmed in *Walsh v. Abbott*, 145 Cal. 289, construing deed of uncertain third part of undivided half of ranch as quit claim deed of grantor's whole interest; *Teschmacher v. Thompson*, 18 Cal. 26, 79 Am. Dec. 158, 159, holding that a patent was evidence that the grantees had, at the date of cession of California, a vested interest in the quantity of land named in the grant, to be afterward laid off by official authority; also in *Leese v. Clark*, 18 Cal. 571, where Field, C. J., says of a patent: "Upon all the matters of fact and law essential to authorize its issuance it imports absolute verity; and it can only be vacated and set aside by direct proceedings instituted by the government, or by parties acting in the name and by the authority of the government. Until thus vacated it is conclusive, not only as between the patentee and the government, but between parties claiming in privity with either by title subsequent." Affirmed in *Touchard v. Crow*, 20 Cal. 160, 162, 81 Am. Dec. 114, 116, holding that a deed, pending confirmation of the grant, passed whatever interest the vendor acquired under the patent; and in *Walbridge v. Ellsworth*, 44 Cal. 355, as to the patent establishing the validity of intermediate transfers. Cited in *Houck v. Kelsey*, 17 Kan. 335, holding that a patent cannot be attacked collaterally even for fraud, as the right of interference rests only with the government; also in *Brown v. Warren*, 16 Nev. 235, holding that where a vendor gave a quitclaim deed and received a patent later, he acquired no more title than he had at the time he sold; in *South End Co. v. Tenney*, 22 Nev. 226, holding that a variance between the date of seisin alleged in the complaint and the date of the patent was immaterial. In *Henshaw v. Bissell*, 18 Wall. 265, the court, per Field, J., say of the principal case and other California decisions: "The patent, treated merely as the deed of the government, is held in these cases to have the operation of a quitclaim, or rather of such interest as the United States

possessed in the land, and to take effect by relation at the time when proceedings were instituted before the board of land commissioners"; and hold that an earlier patent whose description can be certainly identified is better than a floating grant made later. Cited in *Biasell v. Henshaw*, 1 Sawy. 567, holding that a patent under an elder grant carries the superior title; also in *Hardy v. Harbin*, 4 Sawy. 543, where Field, J., says of the point, in the principal case, that the patent establishes the validity of intermediate transfers. "But this is no more than saying that if the grant was valid, a valid title was transferred by properly executed conveyances of the grantee, a proposition which requires no explanation"; and holds that a patent "is not evidence of any equitable relations of the holders of subsequent conveyances from the grantees to each other or to third parties, for such relations were not submitted to the tribunals of the United States for adjudication in the settlement of private land claims under Spanish and Mexican grants."

Cotenancy.—A conveyance by a joint tenant or tenant in common of a parcel of a general tract owned by several is inoperative to impair any of the rights of his cotenants. The grantee must take subject to the contingency of the loss of the premises if, upon the partition of the general tract, they should not be allotted to the grantor. The grantee is entitled to the possession of the entire premises as against all parties but the other cotenants and their grantees, pp. 368-372.

Cited in *Kimball v. Railway Co.*, 173 Mass. 154, holding deed by one cotenant merely voidable; *Mather v. Dunn*, 11 S. Dak. 200, 74 Am. St. Rep. 789, sustaining ejectment by one cotenant against stranger to title; to the point that one cotenant may recover the whole premises, in *Hart v. Robertson*, 21 Cal. 348; *Mahoney v. Van Winkle*, 21 Cal. 583; *Blum v. Robertson*, 24 Cal. 147. Cited in *Reed v. Spicer*, 27 Cal. 64, holding that where two cotenants conveyed to two strangers, the grantees were cotenants; also in *Carpentier v. Webster*, 27 Cal. 560, holding that if one cotenant excludes another from a part of the common lands, it is an ouster; *Gates v. Salmon*, 35 Cal. 588, 594, 595, 95 Am. Dec. 142, 147, 148, holding that a grantee of a cotenant gets only the rights of his grantor, and saying that the principal case did not decide who were proper parties to a partition. In *Pfeiffer v. Regents*, 74 Cal. 163, *McFarland, J.*, says of the principal case and *Gates v. Salmon*, 35 Cal. 588: "These decisions are admitted to have been in conflict with many authorities of high standing, and were based, no doubt, to some extent, on equitable considerations growing out of particular circumstances, and they should not be pushed further than the limits of their express terms. But there were no questions about easements in those cases"; and the court holds that one cotenant cannot convey to a stranger the right to divert water from the land. Cited in *Mora v. Murphy*, 83 Cal. 16, holding that one cotenant who agrees with a stranger to pay him in land for boring a well on the premises

binds only himself. In *Emeric v. Alvarado*, 90 Cal. 456, *McFarland, J.*, after commenting on the principal case, says: "Where, as in the case at bar, a cotenant undertakes to convey the whole title to a specific tract, his conveyance, under well-settled principles, operates as an alienation of at least all the right and interest which the grantor had in the specific tract, so that he comes within the rule that his conveyance is not void"; and on page 458 the court says that in *Pfeiffer v. Regents*, 74 Cal. 163, "defendants had sought to invoke the rule as to conveyances of specific tracts in behalf of a water right, and it was in that connection that the court said that the former decisions on the subject should not be pushed further, that is, that they should not be so extended as to embrace the asserted right of one tenant in common to create an easement on the common land. The case, however, recognizes the rule as before stated." Cited in *Howze v. Dew*, 90 Ala. 182, 24 Am. St. Rep. 785, holding that a conveyance by a cotenant passed the interest that the grantor had or subsequently acquired in the land; also in *Shepherd v. Jernigan*, 51 Ark. 278, 14 Am. St. Rep. 52, holding that where several parcels of land were held in common by cotenants, one tenant could convey his interest in one of the parcels. Cited, to the point that one cotenant is entitled to recover the whole tract except as against his cotenants and their grantees, in *Simmons v. Spratt*, 26 Fla. 461; *King v. Hyatt*, 51 Kan. 512; 37 Am. St. Rep. 308; *Crook v. Vandervoort*, 13 Neb. 507; *Brown v. Warren*, 16 Nev. 241; *Le Franc v. Richmond*, 5 Sawy. 604. Cited in *Mee v. Benedict*, 98 Mich. 262, 272, 39 Am. St. Rep. 544, 552, holding that where one cotenant sold his interest in timber on the land to a stranger, the buyer was entitled to have the land partitioned and to take the timber on the part apportioned to his grantor; and in the dissenting opinion, on page 275, the principal case is claimed to be not in point because it said nothing about conveyances of timber or minerals. Cited in *Holbrook v. Bowman*, 62 N. H. 321, holding that the deed of one cotenant to a specific part of the land is valid against his cotenant, except so far as it may injuriously affect their right to partition; also in *Harlan v. Langham*, 69 Pa. St. 238, where it is said: "Of course, this principle must be held applicable only where there has been an original tract held in common, and not to the case of several tracts so held under different grants"; *Boggess v. Meredith*, 16 W. Va. 29, holding that conveyance by one cotenant of part of a tract cannot give the vendee any greater right than the vendor had, but when partition is made this part may be set off to the vendor if it does not injure the other cotenants; and to same effect in *Worthington v. Staunton*, 16 W. Va. 238, holding also that if the vendee does not get the land after partition, equity will annul the deed and put the parties in statu quo. Cited in *Hardy v. Johnson*, 1 Wall. 373, holding that if defendant in ejectment acquires title from a cotenant after beginning of suit, he must set it up by supplemental answer, and cannot show it under the original pleadings; also in *Lamb v. Wakefield*, 1 Sawy. 256, holding

that the deed of a tenant in common for a particular part of the premises, though void as against a cotenant, is good as against himself; and in notes to 6 Am. Dec. 24, 31 Am. Dec. 617, and 21 Am. St. Rep. 594, on cotenancy.

Court and Jury.—Sufficiency of execution of deed is a matter solely for the court, p. 372.

Cited in note to 69 Am. Dec. 454. N. B.—Bywaters v. Paris Co., 73 Tex. 627, cites "15 Cal. 365," meaning 45 Cal. 365.

15 Cal. 374-375. DOBBINS v. DOLLARHIDE.

Undertaking on Appeal being sufficient, motion to dismiss appeal does not lie. If the undertaking does not operate as a stay, motion must be made for leave to proceed on the judgment in the lower court, p. 375.

Approved in *Boyer v. Superior Court*, 110 Cal. 404, holding that where sureties have justified before the county clerk, the superior court cannot require of them a second justification before the court. Cited in *State v. California Mining Co.*, 13 Nev. 212, holding that an undertaking to stay execution operated as an undertaking on appeal, under the circumstances.

Statement on Appeal must conform to the statute, p. 375.

Affirmed in *Hutton v. Reed*, 25 Cal. 489.

15 Cal. 375-382. DUFF v. FISHER.

Verdict in Equity can be reviewed only by motion for new trial, pp. 379-382.

Affirmed in *Gagliardo v. Hoberlin*, 18 Cal. 396; *Allen v. Fennon*, 27 Cal. 69; *Hihn v. Peck*, 30 Cal. 287; *Campbell v. Jones*, 41 Cal. 519. Cited in *Carpentier v. Atherton*, 25 Cal. 571, holding that where specific execution of a contract relating to personal property ought to be enforced, and an adequate remedy is not afforded by a suit for damages, equity will give relief; and to same effect in *Senter v. Davis*, 38 Cal. 453, refusing to enforce the sale of a newspaper route, damages being a sufficient remedy. Cited in *Doe v. Vallejo*, 29 Cal. 391, holding that the rule as to not considering the weight of contradictory evidence on appeal is the same in law and equity. Affirmed in *Hall v. Linn*, 8 Colo. 288; *Fox v. West*, 1 Idaho, 784; *Whitmore v. Shiverick*, 3 Nev. 303. Cited in *Bassey v. Gallagher*, 20 Wall. 681, holding that in equity the report of a master or the findings of a jury are only advisory; and to same effect in *Mantle v. Noyes*, 5 Mont. 287, *Smith v. Richardson*, 2 Utah, 427, 428, *Silva v. Pickard*, 14 Utah, 254.

Stare Decisis.—A single erroneous decision is not binding as a precedent, p. 382.

Cited in note to 27 Am. Dec. 633; note to *Truxton v. Fait etc. Co.*, 73

Am. St. Rep. 104, on general subject; *Kimball v. City*, 19 Utah, 397, noted under *McFarland v. Pico*, 8 Cal. 626.

15 Cal. 383-384. **ELLIOTT v. CHAPMAN.**

Undertaking on Appeal must be filed within five days after the notice, and the court has no power to extend the time. The statutory provision as to time is mandatory, p. 384.

Affirmed in *Shaw v. Randall*, 15 Cal. 386; and in *Gordon v. Wansey*, 19 Cal. 82, without prejudice to a second appeal. Affirmed in *Shissler v. Crooks*, 1 Idaho, 370; *People v. Hunt*, 1 Idaho, 372; *Canyon Co. v. Lawrence*, 3 Oreg. 520. Cited in *McDonald v. Paris*, 9 S. Dak. 314; see note to next case, *Shaw v. Randall*.

15 Cal. 384-387. **SHAW v. RANDALL.**

Undertaking on Appeal must be filed within five days after the notice, the statute being mandatory, p. 386.

Cited in *Brady v. Bartlett*, 56 Cal. 357, holding that a statute requiring superintendent of streets to record the due performance of a street contract was directory, and failure to record it did not invalidate the assessment; also in *Perine v. Forbush*, 97 Cal. 309, holding that a statute requiring street contracts to be executed within a certain time is mandatory. Affirmed in *Shissler v. Crooks*, 1 Idaho, 370; *People v. Hunt*, 1 Idaho, 372. Cited in *Territory v. Flowers*, 2 Mont. 394, holding that a statute prescribing time in which a transcript shall be filed is directory; *Barber v. Johnson*, 4 S. Dak. 530, holding that failure to file an undertaking is fatal to the appeal; and *McDonald v. Paris*, 9 S. Dak. 314, holding that where no undertaking was filed in a justice's court, on appeal to a circuit court, it could not be filed in the latter court; *Cook v. Oregon etc. Co.*, 7 Utah, 420, holding that failure to file undertaking is fatal to appeal.

15 Cal. 387-406. **VALENTINE v. STEWART.**

Statement on motion for new trial may be amended in the lower court by inserting specifications of the grounds of the motion. The signature of the judge to the statement is presumptive evidence of the regularity of the previous proceedings, p. 396.

Cited in *Sweet v. Gray*, 141 Cal. 68, as to amendment to statement to cure defective specifications; *Loucks v. Edmondson*, 18 Cal. 204, holding that the statement may be amended in the lower court; also in *Hutton v. Reed*, 25 Cal. 489, holding that the statement must specifically set forth the grounds of the motion; *Sullivan v. Wallace*, 73 Cal. 309, holding that the certificate of the judge who settles the statement carries the presumption that it was regularly and properly done; and in *In re Lamb*, 95 Cal. 408, where a superior court was held to have properly allowed the bill of exceptions to be amended.

Attorney, having acted in a case and gained knowledge of the facts, cannot render assistance to the other side, p. 401.

Approved in *In re Cowdery*, 69 Cal. 50, 57, 58; 58 Am. Rep. 550; and *In re Boone*, 83 Fed. Rep. 952, 955. Cited in *Bliss v. United States*, 37 Fed. Rep. 195, holding that a district attorney was not entitled to extra fees.

Contracts against Public Policy cannot be enforced by a court of equity. If any portion of the consideration is against public policy, the whole contract fails, p. 404.

Cited in *Davis v. Mitchell*, 34 Cal. 90, holding that the payee of a note cannot allege fraud in the making thereof, to defeat the rights of an innocent holder; also in *Santa Clara Co. v. Hayes*, 76 Cal. 393, 9 Am. St. Rep. 215, holding that a contract between lumber dealers to increase the price and limit the supply was illegal as being in restraint of trade; *Kreamer v. Earl*, 91 Cal. 118, where the court refused to enforce a contract to illegally acquire public lands, and said: "A court of equity will not allow itself to become a handmaid of iniquity of any kind. It intervenes, not for the sake of the party who is benefited by the intervention, but for the sake of the law itself. It matters not that no objection is made by either party; when the court discovers a fact which indicates that the contract is illegal and ought not to be enforced it will, of its own motion, instigate an inquiry in relation thereto." Cited in *Young v. Thomson*, 14 Colo. App. 315, applying rule to agreement for suppression of testimony; *Pueblo Co. v. Taylor*, 6 Colo. 18, 45 Am. Rep. 520, holding that a condition in a contract that a railway should not build a certain sidetrack was against public policy and rendered the contract void; in *Garlington v. Priest*, 13 Fla. 568, holding that a bond given under an illegal statute was void; in *Sheldon v. Pruessner*, 52 Kan. 590, holding that transfer of a mortgage to escape taxation was void; in *Cotten v. McKenzie*, 57 Miss. 420, holding a note given for an illegal consideration to be void; in *Green v. Corrigan*, 87 Mo. 370, holding that a contract by the attorney of a water company, to share the profits of a contractor in building the works, was illegal; *Gaston v. Drake*, 14 Nev. 181, 33 Am. Rep. 551, holding that an agreement to divide the fees of a district attorney's office was void; note to *Western Union Co. v. Burlington Co.*, 3 McCrary, 144, holding that a railway cannot grant a monopoly to a telegraph company; *Bierbauer v. Wirth*, 10 Biss. 62, 5 Fed. Rep. 337, holding that a contract to keep a witness out of the jurisdiction was void; and in notes to 94 Am. Dec. 376, on contracts for the production or destruction of evidence, and 3 Am. St. Rep. 737, on executed and executory contracts.

15 Cal. 408-411. PEOPLE v. SMITH.

Confession, made under inducement, is inadmissible, p. 410.

Cited in note to 6 Am. St. Rep. 246, 247.

15 Cal. 411-418; 76 Am. Dec. 492. **GREEN v. PALMER.**

Pleading.—Facts only must be stated as contra-distinguished from the law, from argument, from hypothesis, and from the evidence of the facts. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged. It is the ultimate fact and not the probative facts which should be set forth. Statements when once made must not be repeated, pp. 414-417.

Cited in *Simons v. Bedell*, 122 Cal. 346, 68 Am. St. Rep. 39, sustaining complaint as against general demurrer; *Nellis v. Bank*, 127 Cal. 170, and *Allen v. Home etc. Co.*, 133 Cal. 30, on point that plaintiff must allege every fact he is required to prove; *Melone v. Ruffino*, 129 Cal. 519, 79 Am. St. Rep. 131, on point that plaintiff need not prove his negative averments; *Singer v. Salt Lake etc. Co.*, 17 Utah, 157, 70 Am. St. Rep. 776, holding answer insufficient; to the point that evidence should not be pleaded, in *Dreux v. Domec*, 18 Cal. 88; *Wilson v. Cleaveland*, 30 Cal. 200; *Patterson v. Keystone Co.*, 30 Cal. 364; *Larco v. Casanueva*, 30 Cal. 565; *Racouillat v. Rene*, 32 Cal. 456; *Jones v. Petaluma*, 36 Cal. 233; *Bruck v. Tucker*, 42 Cal. 351; *Smith v. Richmond*, 19 Cal. 483, to the point that matters of defense should not be averred; *Bowen v. Aubrey*, 22 Cal. 569, holding that irrelevant matter should be stricken out; *Grewell v. Walden*, 23 Cal. 169, to the point that ultimate facts only should be alleged; *O'Connor v. Dingley*, 26 Cal. 21, holding that a contract should be set forth in the complaint; *Johnson v. Santa Clara*, 28 Cal. 547, to the point that every fact must be alleged that has to be proved; *Joseph v. Holt*, 37 Cal. 255, holding that the rule as to pleading a contract in *haec verba* does not apply to a memorandum of a contract; *Thomas v. Desmond*, 63 Cal. 427, holding that ultimate facts only must be pleaded; *Feeney v. Howard*, 79 Cal. 536, 12 Am. St. Rep. 170, to the point that a fact need be stated only once; and in dissenting opinion in *Spring Valley v. San Francisco*, 82 Cal. 321, 323, to the point that the complaint should not allege conclusions of law, and that everything requiring to be proved must be alleged. Cited in *Territory v. Virginia Co.*, 2 Mont. 101, holding that the court may at any time inquire if a complaint is sufficient; in *United States v. Williams*, 6 Mont. 385, holding that matters of defense should not be pleaded; *Perkins v. Barnes*, 3 Nev. 565, in dissenting opinion, the majority of the court holding that no demand need be proven in replevin where defendant admits the detention and claims title; in *McNabb v. Wixom*, 7 Nev. 172, holding that the pleadings were insufficient to warrant judgment for the amount claimed by plaintiff; *Holaday v. Elliott*, 3 Oreg. 346, and *Cline v. Cline*, 3 Oreg. 359, to the point that evidence should not be pleaded; *Meyer v. School District*, 4 S. Dak. 425, holding that facts alleged were ultimate and required an answer. The principal case, and note in 76 Am. Dec. 498, are cited on this point in notes to 79 Am. Dec. 283; 82 Am. Dec. 84; 83 Am. Dec.

69; 84 Am. Dec. 781; 97 Am. Dec. 231; 16 Am. St. Rep. 134; 30 Am. St. Rep. 705; 59 Am. St. Rep. 179.

Execution.—Money in a bag held in the hand is not exempt from seizure any more than a horse held by its bridle, p. 418.

Cited in *Dahms v. Sears*, 13 Oreg. 55, holding that money taken from a prisoner's person is not subject to attachment; note to 38 Am. Dec. 709, on levy upon property in use or possession.

15 Cal. 418-421. **LOEHR v. LATHAM.**

Change of Venue.—When convenience of witnesses is the ground alleged for change of venue or in opposition thereto, the evidence as to the convenience must be full and particular, p. 419.

Cited in *Pierson v. McCahill*, 22 Cal. 131, holding that where a party failed to urge his objection to a change of venue, "it is doubtful whether he could afterward apply to the court to which it had been thus removed to have it sent back again"; in *Jenkins v. California Co.*, 22 Cal. 538, holding that where defendant applies for change of venue because suit was not brought in proper county, plaintiff may resist it on the ground of convenience of witnesses; to same effect in *Edwards v. Southern Pacific Co.*, 48 Cal. 461. In *Cook v. Prendergast*, 61 Cal. 77, 78, the court reviews the preceding cases and prescribes the proper practice under sections 396, 397, of the Code of Civil Procedure. Approved in *Thurber v. Thurber*, 113 Cal. 610, holding that defendant was entitled to change of venue to the county where he resided. Cited in *Crookston v. Mining Co.*, 13 Utah, 122, where it did not appear how the witnesses would be inconvenienced by a change of venue; and in note to 74 Am. Dec. 243, on this point.

15 Cal. 421-426. **EARL v. BULL.**

Recoupment.—Breach of warranty may be ground for recoupment in a suit for price of goods sold, p. 426.

Cited in *Stoddard v. Treadwell*, 26 Cal. 305, holding that a counterclaim must be specially pleaded; and in note to 40 Am. Dec. 326, 329, on recoupment.

15 Cal. 426-429. **PEOPLE v. MAGALLONES.**

Verdict is conclusive of a question as to tendency of evidence, p. 428.

Affirmed in *Territory v. Stone*, 2 Dak. 170.

15 Cal. 429-459. **STATE v. McCAULEY.**

State Revenues may be appropriated in anticipation of their receipt as effectually as when actually in the treasury. The appropriation of moneys when received meets the services as they are rendered, thus discharging the liabilities as they arise, or rather anticipating and pre-

venting their existence. The appropriation accompanying the services operates in fact in the nature of a cash payment, p. 455.

Corrected, as to statement of fact, in footnote to *McCauley v. Brooks*, 16 Cal. 25. Cited in *Buck v. Eureka*, 124 Cal. 68, and *Pleasant etc. Co. v. Board*, 15 Utah, 106, on point that liability is incurred when services rendered and benefit thereof knowingly accepted; *Johnson v. Bank*, 125 Cal. 8, 73 Am. St. Rep. 19, applying rule as to creation of liability to action on stockholder's liability; *State v. Helena*, 24 Mont. 529, quoting from *Springfield v. Edwards*, 84 Ill. 626; *Montgomery v. Kason*, 16 Cal. 194, holding that a statute repealing a grant of swamp lands was unconstitutional because it destroyed contract rights; also in *Koppikus v. State Capitol Commrs.*, 16 Cal. 253, holding that an act for construction of a state capitol was constitutional, as the expenditure it authorized was within the constitutional limit; *People v. Pacheco*, 27 Cal. 207, 208, 219, holding that an appropriation to pay coupons on railway bonds issued as a war necessity was legal; and in *McBean v. Fresno*, 112 Cal. 167, 53 Am. St. Rep. 197, holding that an appropriation for a sewer farm, where the expenses of each year were to be paid from the revenues, was proper. Cited in *People v. May*, 9 Colo. 411, holding that incoming revenues may be appropriated to payment of expenses of current year; *Springfield v. Edwards*, 84 Ill. 631, and *Law v. People*, 87 Ill. 422, holding that revenue may be appropriated before it is collected, and where a tax has been levied, warrants may be drawn against it; *Valparaiso v. Gardner*, 97 Ind. 11, 49 Am. Rep. 424, holding that where current revenues are sufficient to discharge current expenses, no indebtedness is created; to same effect in *Saleno v. Neosho*, 127 Mo. 641, 48 Am. St. Rep. 660; *Davenport v. Kleinschmidt*, 6 Mont. 540, holding that issuing warrants to pay for water supply of a city does not create an indebtedness, even though they bear interest; *Ash v. Parkinson*, 5 Nev. 25, holding that warrants for pay of legislative officers were not an indebtedness, though bearing interest; *Salem Co. v. Salem*, 5 Oreg. 32, 33, holding that a contract for a term of years with a water company created a debt, because no provision was made to meet liabilities as they fell due; *Little v. Portland*, 26 Oreg. 246, holding that municipal expenditures to be met by certain funds did not create a debt, but the city would be liable if the funds were not collected within a reasonable time; *In re State Warrants*, 6 S. Dak. 522, 55 Am. St. Rep. 855, holding that warrants did not create a debt, even though they bore interest; *Western Co. v. Lane*, 7 S. Dak. 9, holding that to render warrants illegal it must affirmatively appear that no tax was provided for paying them; *State v. Hopkins*, 14 Wash. St. 63, holding that taxes for county purposes must be deducted from amount of county indebtedness. Denied in *Spilman v. Parkersburg*, 35 W. Va. 619, holding that a city already indebted up to the constitutional limit cannot contract for electric lighting for a term of years; and to same effect in *Hebard v.*

Ashland Co., 55 Wis. 148, but in this case the question of pledging future revenue did not arise.

Convict Labor may be leased out by the state. Their conviction has subjected them to a constitutional involuntary servitude; and their labor and the proceeds of it belong to the state, and may be disposed of in such way as the legislature in its discretion may determine, p. 455.

Affirmed in *Mason Co. v. Main Co.*, 87 Ky 474. Cited in note to 37 Am. St. Rep. 590, on ex post facto laws.

Public Officer's contract is the contract of the state, p. 456.

Affirmed, as to deed, in *Sheets v. Selden*, 2 Wall. 187.

Rescission of Contract cannot be allowed unless the party rescinding restores the other party his rights or property, p. 458.

Cited in dissenting opinion of *San Francisco Bridge Co. v. Dumbarton Co.*, 119 Cal. 280, a majority of the court holding that a contractor who threw up a contract because his employer failed to comply with the terms as to monthly payments, was entitled to recover on a quantum meruit. Affirmed in *Bishop v. Stewart*, 13 Nev. 41.

15 Cal. 459-472. **RAUN v. REYNOLDS.** S. C. 11 Cal. 14; 14 Cal. 667; 18 Cal. 275.

Mortgagee in possession must account for rents and profits of mortgaged estate, p. 469.

Affirmed in *Murdock v. Clarke*, 90 Cal. 438. Cited in *Conro v. Crane*, 110 U. S. 412, holding that a purchaser of property at an execution sale, where the sale was later set aside, was not obliged to account for rents and profits of the land while he had it.

Mortgage.—A court of equity should adjust the accounts of all parties in interest in the foreclosure, p. 472.

Affirmed in *Wise v. Walker*, 81 Cal. 13.

15 Cal. 472-476. **THURN v. ALTA CO.**

Telegraph.—Statute creating a penalty for breach of duty by a telegraph company is construed strictly, p. 474.

Cited in *Western Union Co. v. Buchanan*, 35 Ind. 436, 9 Am. Rep. 750, holding a company liable for negligence of an operator in delivery of message.

15 Cal. 476-482. **PEOPLE v. ARNOLD.**

Exceptions to Grand Jurors must be taken in the manner prescribed by statute, p. 479.

Affirmed in *People v. Colmere*, 23 Cal. 632; *People v. Henderson*, 28 Cal. 469.

Threats of deceased against defendant must be shown to have been communicated to the accused before they are admissible for any purpose. In this case there is no pretense that this threat, if there was any, was so communicated. Declaration of deceased, at the time he got a pistol, as to what he intended to do with it, "was a part of the *res gestae* and illustrative of the transaction. We have no doubt that it may enter into the deliberations of the jury with all the other facts, as a matter to be weighed by them with the rest of the proofs, pp. 480-482.

Affirmed, on the point that an uncommunicated threat of deceased against defendant is admissible, in *People v. Scoggins*, 37 Cal. 684, 700; *People v. Alivtre*, 55 Cal. 264; *People v. Carlton*, 57 Cal. 84; 40 Am. Rep. 113; *People v. Iams*, 57 Cal. 127; *People v. Campbell*, 59 Cal. 247, 258; 43 Am. Rep. 257; *People v. Thompson*, 92 Cal. 511; *Bond v. State*, 21 Fla. 752; *State v. Helm*, 92 Iowa, 549; *Johnson v. State*, 54 Miss. 432, 433; *Hawthorne v. State*, 61 Miss. 754; *Johnson v. State*, 66 Miss. 191; *State v. Faile*, 43 S. C. 62; *Wiggins v. People*, 93 U. S. 467. Cited in *People v. Williams*, 17 Cal. 146, holding that defendant may show why he was armed or other facts explaining his conduct; *Bell v. State*, 69 Ark. 150, 86 Am. St. Rep. 189, holding evidence of threats by deceased improperly excluded; notes to 1 Am. Dec. 373, on declarations; 61 Am. Dec. 55, 56, on threats; and 43 Am. Rep. 262, on threats.

Jurisdiction must be proven by defendant, by a preponderance of evidence, when the fact of a homicide is shown; but this proposition is subject to the qualification that where the testimony of the prosecution leaves a doubt as to the character of the homicide—as whether justifiable or not—then the benefit of the doubt is to be given to the prisoner, p. 482.

Affirmed in *People v. Hong Ah Duck*, 61 Cal. 395; *People v. Rodrigo*, 69 Cal. 605; *People v. Knapp*, 71 Cal. 9, 10; *People v. Elliott*, 80 Cal. 305; *People v. Dillon*, 8 Utah, 96, as to defense of insanity.

Instruction to Jury must necessarily be dependent upon the facts in proof, p. 482.

Affirmed in *People v. Byrnes*, 30 Cal. 207. Cited in *People v. Best*, 39 Cal. 691, holding that an instruction should not be given unless there is evidence to which it is applicable; also in *Richards v. Fanning*, 5 Oreg. 359, holding that the propriety of an instruction depends upon the facts.

15 Cal. 483-496. **DE LEON v. HIGUERA.**

Mortgage.—No particular words are necessary to bind the property, p. 496.

Cited in *Merrill v. Ressler*, 37 Minn. 86, 5 Am. St. Rep. 826, holding that an instrument will be construed to be a chattel mortgage if it is apparent that such was its purpose; *Harris v. Jones*, 83 N. Car. 321,

holding a document to be a crop mortgage; *Bank v. Johnson*, 47 Ohio St. 311, holding that it is not necessary that the person to be secured should hold the legal title.

Husband and Wife may mortgage wife's property for husband's debt, p. 496.

Cited in *Franklin Bank v. Miller*, 17 R. I. 274, holding that where husband and wife made an illegal mortgage of the wife's land, and later made to another party a valid mortgage of the same land, the latter mortgage prevailed.

15 Cal. 499-501; 76 Am. Dec. 499. **HAWKINS v. HILL.**

Mortgages on the same property may be foreclosed together, though one of them is not due at the time of bringing suit, if it becomes due before judgment is rendered, p. 500.

Affirmed in *Bostwick v. McEvoy*, 62 Cal. 503; *Bank v. Duncan*, 133 Cal. 256, sustaining decree providing for foreclosure of second mortgage put in issue in action on first.

15 Cal. 501-502. **SMITH v. RICHMOND.** S. C. 19 Cal. 476.

Pleading.—Complaint on a note, alleging a new promise by the maker after his discharge in bankruptcy, held to be based on the new promise and to aver the note as inducement, p. 502.

Cited in *Doll v. Good*, 38 Cal. 290, holding that the rules of pleading are intended to prevent evasion; also in *Pfister v. Dasey*, 65 Cal. 405, to the point that, "We see no reason why an action to set aside the conveyances averred to be fraudulent, and to recover possession of the land to which such conveyances related, should not be prosecuted in the same action"; and in *Norris v. Glenn*, 1 Idaho, 591, holding that an evasive denial is bad.

New Trial.—Discretion of lower court in granting it cannot be revised unless there was an abuse of discretion, p. 502.

Affirmed in *Nooney v. Mahoney*, 30 Cal. 227.

15 Cal. 503-507; 76 Am. Dec. 500. **STEVENS v. IRWIN.**

Statute of Frauds requires that in a sale of personal property there shall be immediate delivery and actual and continued change of possession. The vendee must be in the usual relation to the property which owners of goods occupy to their property. This possession need not necessarily continue indefinitely, when it is bona fide and openly taken, and is kept for such a length of time as to give general advertisement to the status of the property and the claim to it by the vendee, pp. 506-507.

Approved in *Engles v. Marshall*, 19 Cal. 329. Cited in *George v. Pierce*, 123 Cal. 177, holding transfer fraudulent and stating law of

main case to stand "impregnable and unassailable"; *Hunt v. Hamnel*, 142 Cal. 459 (cf. dissenting opinion, page 462), holding sale valid; *Gallagher v. Williamson*, 23 Cal. 334, 83 Am. Dec. 117, where it was held proper to ask a witness whether there was any difference in the appearance and management of things before and after the sale; also in *Godchaux v. Mulford*, 26 Cal. 323, 85 Am. Dec. 182, as giving "for the first time in this state a true and rational exposition of the rule," and the court holds that the employing of the vendor as a clerk by the vendee after the sale is colorable only, not conclusive, and is to be left to the jury; *Woods v. Bugbey*, 29 Cal. 472, holding that where the vendor of bricks in a kiln retained possession for the purpose of burning them, it was not a sale; *Waldie v. Doll*, 29 Cal. 560, holding that where a blacksmith and a wheelwright built wagons on shares, and the smith pledged his interest to the other for advances, it was valid as against the pledgor's creditors. In *Hesthal v. Myles*, 53 Cal. 625, the court say: "Since the decision in *Stevens v. Irwin*, this court has repeatedly held that to constitute such change of possession as to make the transfer valid against creditors of the vendor, there must be such change of the apparent custody of the property as to put one dealing with the vendor, with respect to it, upon inquiry, or such at least as might suggest a change of ownership. And without accepting in its fullest sense the language employed by the learned judge in *Stevens v. Irwin*, we may add that we have been referred to no case which excludes from consideration the circumstances of an advertisement of the vendee's claim, such as would enable an ordinarily prudent man to ascertain that he could no longer rely upon his knowledge of the ownership of the former proprietor." Cited in *Bell v. McClellan*, 67 Cal. 284, 285, holding that where hay presses remained in possession of the vendor, the sale was void; also in *Kelly v. Murphy*, 70 Cal. 563, saying that the principal case "has been steadily adhered to in this state as a correct exposition of the law in numerous cases," and holding the sale of a saloon void, there having been no change of possession; *Gould v. Huntley*, 73 Cal. 402, holding the sale of a mare valid; *Bunting v. Saltz*, 84 Cal. 172, holding the transfer of a wagon void and saying: "If the transfer was not accompanied by an immediate delivery and followed by an actual and continued change of possession, it is conclusively presumed to be fraudulent and therefore void as against the creditors of the vendor. (Civ. Code, sec. 3440.) Actual means existing in act, and truly and absolutely so; really acted or acting; carried out; opposed to potential, possible, virtual, or theoretical." Cited in *Etchepare v. Aguirre*, 91 Cal. 295, 25 Am. St. Rep. 185, holding that where there was no change of possession after a sale of cows, the sale was void. Approved in *Porter v. Bucher*, 98 Cal. 459, where a sale of hay by husband to wife was held good, the court saying: "Section 3440 of the Civil Code lays down no new rule as to what shall constitute a delivery. Any delivery that is sufficient to pass the title as between the parties is still sufficient, the statute only adding

that it shall be immediate"; also in *Levy v. Scott*, 115 Cal. 48, where it is said: "The continuous change which the statute contemplates does not demand, at the peril of avoiding the sale, that the vendor shall never again at any time or under any circumstances be found in the possession of the property sold. It does, however, require an unequivocal and substantial change of possession, so long continued as to give notice to the world that ownership has been parted with. . . . In the present case we think that the change was fully sufficient to satisfy the requirements of the statute." In *Rothschild v. Swope*, 116 Cal. 678, it is said that in the principal case the court "gave an interpretation to the statute which has stood unassailed ever since. Perhaps no better general interpretation of the law has since been given. . . . It has been found impossible to formulate a rule for all cases. It must always rest with the enlightened judge or jury to say whether, under the given facts and circumstances, the sale should be upheld as against existing creditors"; and it was held that a transfer of a debtor's stock in trade to a creditor was not good as against another creditor. Cited in *Bassinger v. Spangler*, 9 Colo. 185, holding a sale void for lack of notorious delivery to and possession of the vendee; *Grady v. Baker*, 3 Dak. 300, holding that the employment by the vendee of the vendor after the sale was a circumstance to be considered by the jury; *O'Gara v. Lowry*, 5 Mont. 436, holding that where the vendee of a team employed the vendor to drive it, the sale was still good; *Dodge v. Jones*, 7 Mont. 131, 141, 145, 146, holding it was a sufficient delivery of horses where they were branded by the vendee and allowed to run on the vendor's range; *Carpenter v. Clark*, 2 Nev. 247, where delivery of mules was held to be sufficient; *Gray v. Sullivan*, 10 Nev. 424, 430, where the employing of vendor's driver by the vendee was held no badge of fraud; *Chamberlain v. Stern*, 11 Nev. 271, where the question was held not to arise on a sale of horses; *Davis v. Bigler*, 62 Pa. St. 249, 1 Am. Rep. 397, where a vendee of lumber gave it to the vendor to haul to market, the vendor sold it to another party, and it was held that the latter could keep it; *Shaver v. Alterton*, 151 U. S. 624, holding a bill of sale of stock from one brother to another to be valid; in *Everett v. Taylor*, 14 Utah, 245, holding that the trial court erred in instructing the jury that delivery and continuous possession had not been proven, but it should have been left to the jury; notes to 60 Am. Dec. 617, on delivery; 80 Am. Dec. 789, on retention of possession by vendor; to same effect in 82 Am. Dec. 556; 85 Am. Dec. 187; 87 Am. Dec. 483; and 97 Am. Dec. 341, 344, 345.

General citation: *Walters v. Ratliff*, 10 Okla. 272.

15 Cal. 507-511. **GAMBLE v. VOLL.**

Judgment for too large an amount is not necessarily proof of fraud, p. 510.

Cited in *Mendes v. Freiters*, 16 Nev. 397, holding that an attachment

for too large an amount was not fraudulent, but was good for the amount actually due; note to 70 Am. Dec. 754.

Mortgagee not Party to foreclosure of subsequent lien is not bound by decree, p. 510.

Approved in *Gaines v. Childers*, 38 Or. 203, mortgagee whose mortgage had been so inaccurately drawn as to omit certain tract intended to be included, not made party to foreclosure of subsequently acquired lien on tract, may redeem from sale.

15 Cal. 512-513. PEOPLE v. GREEN.

Description of Money, in an indictment for larceny, need not aver the value of each coin, p. 513.

Cited in *People v. Poggi*, 19 Cal. 601, as to form of indictment; and in notes to 51 Am. Dec. 233, 234; 73 Am. Dec. 632; and 10 Am. St. Rep. 174, on this point.

15 Cal. 514-515. HEYDENFELDT v. HITCHCOCK.

Commissioners of sinking fund of 1850 had no power to sell beach and water lots in San Francisco, p. 514.

Affirmed in *Board of Education v. Fowler*, 19 Cal. 21; *People v. Broadway Wharf Co.*, 31 Cal. 39; *Ellis v. Eastman*, 32 Cal. 449.

15 Cal. 515-529. TUOLUMNE REDEMPTION CO. v. SEDGWICK.

Redemption is created by statute and can be exercised only as the statute provides. The right to redeem land is no part of the contract of indebtedness. The statute giving the right may be repealed at any time before a party avails himself of it, for the legislature has a right to alter the remedy, pp. 522-524.

Cited in *Hooker v. Burr*, 137 Cal. 671, as to amendment of 1897 to Code of Civil Procedure, section 702; *Moore v. Martin*, 38 Cal. 439, as overruling *Thorne v. San Francisco*, 4 Cal. 127; and the dissenting opinion of Heydenfeldt, J., in the latter case is affirmed, to the effect that the Redemption Act of 1851 applied to judicial sales made thereafter on "judgments then existing or upon judgments thereafter to be obtained upon contracts then existing." Cited in *Boyle v. Dalton*, 44 Cal. 334, holding that the owner of land sold under execution must redeem from a prior redemptioner within sixty days after such redemption; also in *Eldridge v. Wright*, 55 Cal. 533, holding that where land of tenants in common was sold under a judgment against them, and redeemed by a judgment creditor of only one of them, the redemptioner took the interests of all the cotenants; in the dissenting opinion in *Hibernia Soc. v. Hayes*, 56 Cal. 303, a majority of the court holding that the amendments of 1874 to sections 1493 and 1500 of the Code of Civil Procedure, regarding foreclosure of mortgages against estates of decedents, were not retroactive; *Oullahan v. Sweeney*, 79 Cal. 539, 12

Am. St. Rep. 173, holding that the amendment of 1885 to section 3785 of the Political Code, regarding redemption under tax sales, affected the remedy only, and applied to redemptions on sales previously made; and in dissenting opinion in *Allen v. Allen*, 95 Cal. 205, where a majority of the court distinguish *Oullahan v. Sweeney*, ante, from the case at bar, and hold that a mortgagor's right to redeem was fixed by the law in force at the time of execution of the mortgage, and could not be extended by later legislation; section 346 of the Code of Civil Procedure having been enacted after the mortgage was executed, and the decisions on that section not applying; and in *Teralta Co. v. Shaffer*, 116 Cal. 523, 58 Am. St. Rep. 196, 197, holding that the amendment of 1895 to section 3817 of the Political Code regarding redemptions on tax sales did not apply to sales previously made. Cited also in *Slocum v. Fayette Co.*, 61 Iowa, 171, holding that a statute limiting the right of appeal from a board of equalization applied to pending appeals; *Lawson v. Jeffries*, 47 Miss. 706, 12 Am. Rep. 354, holding that a constitutional convention cannot grant a new trial in certain cases already decided by a court; and in note to 10 Am. Dec. 138, on redemption. Denied in *Welsh v. Cross*, 146 Cal. 630, subsequent change in statute relating to redemption of realty from execution sale does not apply to sale under judgment rendered prior to statute.

15 Cal. 530-624. **HART v. BURNETT.** S. C. 20 Cal. 169.

Pueblo of San Francisco held the lands within its limits, that were dedicated to common use or to special purposes, in trust for the benefit of the entire community. The remaining lands could be granted to private persons by the municipal officers, and the acts of such officers within the general scope of their powers are presumed to have been done by lawful authority, pp. 537-573.

Affirmed in *Payne v. Treadwell*, 16 Cal. 225-228, 230, 240, holding that the conquest and cession did not change the powers of the officers of the pueblo or the presumptions attached to the exercise of those powers; also in *Brown v. San Francisco*, 16 Cal. 457 to 461, holding that in spite of certain land being within the limits of the pueblo, the legal title may still have remained in the general government; and in *Leese v. Clark*, 18 Cal. 573, where Field, C. J., says: "Admitting the power of these de facto municipal officers to the fullest extent ever asserted by the present court, it only extended to lands which had not been previously granted by the superior authorities of the department under the former government." Cited in *White v. Moses*, 21 Cal. 41, 42, holding that the fact that a lot was sold at auction by order of the town council did not render the Alcalde grant of it void. Approved in *Branham v. Mayor*, 24 Cal. 602, as an "able and learned opinion, . . . a monument to the learning and industrious research of the justice by whom it was delivered," and the court holds that the ayuntamiento had no power to mortgage the pueblo lands; also

in *Greely v. Townsend*, 25 Cal. 610-617, holding that in a case involving a similar question a writ of error from the federal supreme court did not lie, Sanderson, C. J., saying of the principal case: "Having decided that the title to the land was in the pueblo of San Francisco prior to the date of the treaty, and that it was held in trust, . . . the determination of the leading and controlling question did not involve the validity or construction of the treaty or the act of Congress, or the authority of the land commission, because its solution necessarily depended entirely upon the laws of Mexico as they existed prior to the date of the treaty" (617).

Cited in *Redding v. White*, 27 Cal. 235, holding that the power of the municipal authorities, under Mexican law, to grant or lease pueblo lands, was limited to solares and suertes, and saying: "For the purpose of inducing colonization and encouraging the building up of towns and villages, a certain quantity of land was allotted to each, to be distributed in small quantities among the inhabitants, for building lots and for cultivation upon a moderate scale. In view of the quantity of the land thus allotted and the purposes for which it was allotted, it is apparent to us that leases by the municipal authorities of five hundred acre tracts for nearly a thousand years at a rent of only three dollars per annum could not have been authorized consistently with the end in view." Cited in *Steinbach v. Moore*, 30 Cal. 506, holding that a grant of pueblo lands, made by the departmental governor in 1841, must be presented to the board of land commissioners for confirmation; also in *Stevenson v. Bennett*, 35 Cal. 432, 433, holding that no formal grant to the pueblo was required, but when legally established it became immediately entitled to four square leagues of land, "to be surveyed and marked by boundaries which could be readily known by official authority. Until that was done it could not be known what particular land had become the property of the pueblo, nor could it be subdivided into solares and suertes for distribution among the inhabitants." Cited in *Scott v. Dyer*, 54 Cal. 433-435, holding a grant by an American alcalde to be valid; also in *Weisenberg v. Truman*, 58 Cal. 69, holding that a grant of pueblo lands by the city of Los Angeles in 1857 for a public cemetery was valid, and saying: "That such a conveyance by the pueblo would have been good, we have no doubt. . . . And the City of Los Angeles, by virtue of the authority conferred upon it by its charter, possessed the same power over its lands that appertained to it as a pueblo under the Mexican law." Cited, to the point that pueblos became invested with a certain title to their lands without any formal assignment, in *Hale v. Akers*, 69 Cal. 167. Approved in *Lux v. Haggin*, 69 Cal. 328, *McKinstry, J.*, saying: "By analogy and in conformity with the principles of that decision, we hold the pueblos had a species of property in the flowing waters within their limits, or a certain right or title in their use, in trust to be distributed to the common lands and to the lands originally set apart to the settlers or subsequently granted by the municipal authorities."

In *Norris v. Moody*, 84 Cal. 149-151, the court say of the principal case: "It will be found upon examination that the court has occupied more than fifty pages in the discussion of general powers and rights of a pueblo, which were entirely unnecessary to the determination of the question of the character of its right in lands, or of whether or not they were subject to seizure and sale under execution. This was especially so of its discussion of the question of denouncement and forfeiture. It was a discussion wholly foreign to the determination of the fact that the lands held by the pueblo were held in trust, and were not, therefore, subject to seizure and sale under execution—so foreign to it that anything which was said upon the subject is not entitled, according to the rule laid down by the same court in the same case, to be cited as an authority"; and the court holds that "formal denouncement was not necessary in case of forfeiture for nonperformance of condition subsequent in an alcalde grant." In *Ohm v. San Francisco*, 92 Cal. 452, the principal case is cited to the point that the prefects in their respective districts were not expressly conferred with power to grant lands in private ownership; and the court say: "The claim of such power by the prefects has been repudiated by the city from the beginning. . . . This power may have been derived from the departmental authorities and exercised independently and against the will of the municipal authorities"; and hold that such a claim "is and always has been a claim hostile and adverse to that of the city, and the city's claim is hostile and adverse to it." Cited in *Vernon Co. v. Los Angeles*, 106 Cal. 245, where an elaborate distinction is made between the Spanish and American systems as to rights of land and water in towns, holding that an irrigation company, taking water from the Los Angeles river for sale, was not entitled to an injunction forbidding the city to divert the water, as the city was the successor to the pueblo with regard to water rights.

Referred to, as deciding the rights of pueblos, in *Singleton v. Touchard*, 1 Black, 345; *Townsend v. Greeley*, 5 Wall. 337; *Merryman v. Bourne*, 9 Wall. 602; *Brownsville v. Cavazos*, 2 Woods, '298. Cited in *United States v. Pico*, 5 Wall. 540, where Field, J., says that the lands of a pueblo were "set apart and assigned to it by the government. No other evidence of title than such assignment was required nor was any other given"; also in *San Francisco v. United States*, 4 Sawy. 566, 567, 585, 586, holding that the pueblo held its lands in trust for the inhabitants, and confirming the city's title to the four square leagues held by the pueblo; in *Crespin v. United States*, 168 U. S. 213, holding that the prefect of a district in New Mexico, before the cession, had no power to make a grant of lands.

City of San Francisco, by virtue of the Van Ness Ordinance as confirmed by the state legislature, holds its municipal lands in trust for public uses, and they are not subject to levy and sale on execution, pp. 573-616.

Distinguished in *Holladay v. Frisbie*, 15 Cal. 635, where Field, C. J., says that the beach and water lots in San Francisco "are held by a very different tenure from that by which the city holds the lands of the old pueblo. . . . Those lands were given upon express trusts and are now held, if not upon precisely the same trusts, yet upon trusts equally effectual to protect them from forced sale under execution. As to the beach and water lot property the case is different. In that property the interest of the city is absolute, qualified by no conditions and subject to no specific uses. It is, therefore, a leviable interest, subject to sale under execution." Cited in *Risdon etc. Works v. Citizens' etc. Co.*, 122 Cal. 97, 68 Am. St. Rep. 26, on point that property of street railway corporation is subject to execution; *Holladay v. San Francisco*, 124 Cal. 356, on point that city as successor of pueblo holds its property in trust for public uses and subject to governmental control; *City v. Jacks*, 139 Cal. 548 et seq., discussing effect of legislative affirmance of grant by city; *Payne v. Treadwell*, 16 Cal. 233, holding that an alcalde grant, made after the session, was validated by the Van Ness Ordinance as affirmed by the legislature, and saying: "The legislature may, by law operating immediately upon the subject dispose of this property or give effect to any previous disposition or attempted disposition of it. The property itself is a trust, and the legislature is the prime and original controlling power, managing and directing the use, disposition and direction of it." Affirmed, "on same principles," in *Wheeler v. Hampson*, 16 Cal. 291. Cited in *San Francisco v. Beideman*, 17 Cal. 461, holding that a certain lot had never been conveyed to the city in trust for her creditors, and, even if it had been, the city "could dispose of the subject of the trust, with the assent of the legislature, subject only to the rights of the creditors or of their trustees; or the legislature, as the paramount political authority, could authorize such disposition. . . . Until it became necessary to enforce the trust, or to apply the trust property to its purposes, there is no pretense of any right to an interference on the part of the city with the use of the property or its possession by the grantee." Referred to in *Seale v. Doane*, 17 Cal. 484, where it was suggested that some of the lots in controversy were like those considered in the principal case, and the court said that if so, a sheriff's deed of them was "a mere nullity." Distinguished in *Grogan v. San Francisco*, 18 Cal. 614, where the city had sold the "City Slip" lands at auction, under an ordinance that the court held void and a statute that the court held had never been properly complied with by the city; and Field, C. J., in holding that the city must refund the price paid for the lots, said that the principal case and *Payne v. Treadwell*, 16 Cal. 233, were not in conflict with the case at bar; "they both treat of lands, . . . held by the pueblo and the city as its successor, in trust for municipal purposes; . . . They have no application to a case like the present, where the legislature has undertaken to divest property, which is not held upon any such trusts, without the city's previous consent, or the

city's subsequent acceptance of its act." Referred to in *Board of Education v. Fowler*, 19 Cal. 20, as containing, in an appendix, the Van Ness Ordinance. Cited in *Fulton v. Hanlow*, 20 Cal. 480-485, where the court held that the rule of the principal case, that pueblo lands could not be sold on execution, applied to the case at bar, notwithstanding a decree in another suit between the same parties to the effect that the sheriff's sale of the land was valid.

Affirmed, as to sale of pueblo lands on execution, in *Carleton v. Townsend*, 28 Cal. 222, 223. Referred to in *Kisling v. Shaw*, 33 Cal. 445, 91 Am. Dec. 650, where it was testified that prior to the decision in the principal case, property whose title was affected by it had little market value. Affirmed, as to sale of pueblo lands on execution, and control of them by the legislature, in *San Francisco v. Canavan*, 42 Cal. 556, 559, holding that the legislature had the power to authorize the city to sell part of the pueblo lands and with the proceeds to erect a city hall on another part. Cited in *Byrne v. Alas*, 74 Cal. 640, to the point that a confirmation by the land commission of a claim that had been subject to a trust, did not divest the trust. Affirmed, as to the trust annexed to the pueblo lands continuing after the Van Ness Ordinance, in *Board of Education v. Martin*, 92 Cal. 217, holding that a schoolhouse site was public property to which no title could be acquired by adverse possession. Affirmed, as to sale of pueblo lands on execution, in *Ames v. San Diego*, 101 Cal. 392, 393, but holding that while pueblo lands dedicated to public use could not be alienated by adverse possession, yet in regard to other pueblo lands, "such as house lots, we see no reason why the statute of limitations should not apply in favor of an adverse possessor precisely the same as if such land had been acquired by the city by purchase and for purposes of sale, or for any other use not strictly municipal." Cited in *Oakland v. Oakland Waterfront Co.*, 118 Cal. 196, holding that the waterfront of a city was not subject to sale on execution.

Cited, as regards legislative control over a municipal corporation, in *Wooster v. Plymouth*, 62 N. H. 210, holding that in suit against a town for injuries caused by defect in a highway, the right of jury trial is not secured to defendant by the constitution, but the case may be submitted to referees; also in *Eisenbach v. Hatfield*, 2 Wash. St. 276, in dissenting opinion, a majority of the court holding that the rights of a riparian proprietor on tidelands are subject to state control; in *San Francisco v. Le Roy*, 138 U. S. 668, as holding that the Van Ness Ordinance was justified by a policy analogous to the laws and purposes that gave existence to the rights of the pueblo; *United States v. Santa Fe*, 165 U. S. 700, holding that the claim of the City of Santa Fe to four square leagues of land was an inchoate claim under Spanish and Mexican laws, that could not be determined in the court of private land claims, but must be referred to the political department of the government; *Hitchcock v. Galveston Co.*, 4 Woods, 305, 50 Fed. Rep. 269, 270, holding that a city was trustee for the public of its water-

front, and could not alienate it except by consent of the legislature; in *Pacific Co. v. Ellert*, 64 Fed. Rep. 433, 435, holding that San Francisco has control of her tide lands; and in notes to 15 Am. Dec. 595, on executions against franchises, and 70 Am. Dec. 746, on judgment against a county.

Stare Decisis.—It sometimes happens that the reversal of an erroneous ruling would prove of greater evil consequence than to suffer it to remain. It becomes then a matter of policy to refuse to overrule it (p. 600). We cannot conceive that the application of the rule could be rightly so made as to overthrow the paramount public policy of deciding causes by the rules of the law, when those rules work justice and do equity in the major part of the cases to which they apply, and protect the rights of the many against the claim of a few (p. 607). We cannot see that, under the circumstances of this case, we should not be violating our duty in giving perpetuity to an error, as much as if, in the first instance, we consciously committed it (p. 611). Titles must rest upon some better and more stable basis than upon an erroneous judgment of this court. We uphold everything decided in the past jurisprudence which we think not plainly erroneous, p. 612.

Cited in *Alferitz v. Borgwardt*, 126 Cal. 209, and concurring opinion in *Town v. Ralston*, 48 W. Va. 192, 193, discussing exceptions to general doctrine and overruling prior decisions; *Houghton v. Austin*, 47 Cal. 668, *McKinstry, J.*, says: "A grave question of constitutional construction cannot be definitely settled by any number of judgments which do not commend themselves to the profession, nor receive the assent of an intelligent public opinion (p. 666). If, after fully considering a former decision, a judge is convinced that it is wrong, it becomes simply a question of public policy whether proprietary rights have grown up to such an extent that it will produce more of evil than of good to restore the law to its integrity (p. 667). No such rule ever existed as that a court should be absolutely bound by a previous decision. And it would be especially dangerous to apply this inexorable standard to questions decisive of the constitutional rights of the citizen" (p. 668). Cited in *People v. Lynch*, 51 Cal. 39, 21 Am. Rep. 696, where *McKinstry, J.*, says: "If after events have made apparent the enormity of an evil, and upon fuller consideration a court is satisfied that a former judgment is wrong, it ought not to be precluded from asserting the correct rule, unless some principle of public policy shall intervene; as when the establishment of the true rule would so disturb vested interests as would constitute a greater evil than would result from holding fast by the former decision"; also in *Norris v. Moody*, 84 Cal. 149, where the court was asked to apply the doctrine of stare decisis to the ruling in the principal case, on page 599, that *Touchard v. Touchard*, 5 Cal. 307, had been overruled by *Holliday v. West*, 6 Cal. 525, and the court say that the principal case is "not even

authority upon the point actually passed upon by the court in either of the former cases or directly involved therein."

Cited in *Hibbits v. Jack*, 97 Ind. 578, where the court say: "The decisions of courts are not the law. They are only evidence of the law, and this evidence is stronger or weaker according to the number and uniformity of adjudications, the unanimity or dissensions of the judges, the solidity of the reasons on which the decisions are founded, and the perspicuity and precision with which those reasons are expressed"; also in *Paul v. Davis*, 100 Ind. 428, where the court say: "Consistency purchased by adherence to decisions, at the sacrifice of sound principle, is dearly bought. . . . Much as we respect the principle of stare decisis, we cannot yield to it when to yield is to overthrow principle and do injustice. . . . We have thought it wisest to overrule outright, rather than to evade, as is often done, by an attempt to distinguish when distinction there is none." Cited in *Board of Commissioners v. Allman*, 142 Ind. 594, where the court say that certain cases "do not involve property rights nor has the rule which they declare in any sense become a rule of property or a basis for contracts. The overruling of these cases will not produce uncertainty in titles or introduce doubt and confusion in questions of property or contracts. Under such circumstances, it is the duty of the court to correct its own errors, and the doctrine of stare decisis cannot be successfully invoked to perpetuate them."

15 Cal. 630-638. HOLLADAY v. FRISBIE.

Beach and Water Lots.—The interest of San Francisco in these lots is a legal estate for ninety-nine years. The property is not devoted by the grant of the estate to any specific public purposes, or made subject to the performance of any trusts by the city. It is, therefore, a leviable interest, subject to sale under execution, p. 635.

Affirmed in *Wheeler v. Miller*, 16 Cal. 125; also in *Le Roy v. Dunkerly*, 54 Cal. 459, holding that the title to the beach and water lots vested in the commissioners of the funded debt, and a deed from them of one of such lots gave the vendee right to bring ejectment against a mere intruder, and in such suit the question of a breach of trust by the commissioners in selling the lot could not be considered. Cited in *People v. Williams*, 64 Cal. 499, holding that the grant by the state to the city did not divest the state of control over her navigable highways, and that a wharf belonging to the state in the city was under the control of the state harbor commissioners; *San Francisco v. Straut*, 84 Cal. 124, holding that the city's title to these lots is as free from any public trust as that of any private proprietor, and title by adverse possession may be acquired to the lots as against the city; *School Dist. v. Board*, 65 Ark. 351, holding school district property subject to sale under local statutes; *United States v. Mission Rock Co.*, 189 U. S. 405, President's order reserving for naval purposes Mission Rock

in San Francisco bay was not an appropriation of surrounding tide lands; *Hart v. New Orleans*, 12 Fed. Rep. 295, holding that the private property of a municipal corporation can be sold for its debts; also in *Pacific Co. v. Ellert*, 64 Fed. Rep. 432, 434, 435, to the point that the beach and water lots can be sold on execution; *Hughes v. Commissioners*, 107 N. C. 604, where a complaint praying for sale of railway stock to pay debts of a county was held bad on demurrer; and in *Brown v. Gates*, 15 West Va. 154, holding that city revenues were not subject to levy on fl. fa. for city debts.

Van Ness Ordinance, as confirmed by the legislature, gave title to the holders of beach and water lots as therein provided. "If, therefore, the city held at that date any interest in the premises, such interest was transferred to and vested in the defendant by the operation of this ordinance and the legislative confirmation thereof, p. 638.

Referred to in *Hart v. Burnett*, 15 Cal. 623, as a case where the Van Ness Ordinance was part of the record. Affirmed in *Carleton v. Townsend*, 28 Cal. 223. Cited, as to legislative control over a city, in *San Francisco v. Canavan*, 42 Cal. 557, holding that the legislature had power to authorize the city of San Francisco to sell part of a public park and with the proceeds to build a city hall on the remainder.

15 Cal. 638-646. **BLANKMAN v. VALLEJO.**

Pleading.—General denials do not put in issue specific allegations, p. 644.

Cited in *Woodworth v. Knowlton*, 22 Cal. 168, holding that a denial in an answer was not of a taking, but of an unlawful taking, in replevin; *Fish v. Redington*, 31 Cal. 194, holding that denying the facts of the complaint conjunctively was improper; and in *Doll v. Good*, 38 Cal. 290, holding that every specific averment of a sworn complaint must be denied in spirit and substance or it will be deemed admitted; *Coal Co. v. Sanitarium Assn.*, 7 Utah, 162, and *Board v. Prior*, 11 S. Dak. 293, holding answers negative, pregnant and insufficient; *Banta v. Savage*, 12 Nev. 156, holding defendant estopped by his answer from relying on a defense not included therein, as he had failed to amend; and in *Scovill v. Barney*, 4 Oreg. 290, holding a general denial of conjunctive allegations improper.

Testimony of Absent Witness may be admitted by the opposite party to avoid a continuance, but the court is not bound to believe it, p. 645.

Cited in *Alden v. Carpenter*, 7 Colo. 89, holding that an admission as to what an absent witness will testify is not an admission of its truth, and the party who admits the evidence may rebut it.

Disbelieving a Witness is discretionary with the court. We do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears. A court may reject the most positive testimony, though the witness be not dis-

credited by direct testimony impeaching him or contradicting his statements. The inherent improbability of a statement may deny to it all claims to belief, p. 645.

Cited in *People v. Milner*, 122 Cal. 180, and *County v. Stofen*, 125 Cal. 35, discussing conflict of evidence in respective cases; *The Dauntless* 129 Fed. 721, in suit to recover for death of person on launch sunk in collision with steamer, where persons on launch all drowned, court need not believe uncontradicted testimony of pilot where it was inherently improbable; *Mogk v. Peterson*, 75 Cal. 501, saying that the doctrine is peculiarly true of questions of mere knowledge or intent; also in *Baker v. Fireman's Fund Co.*, 79 Cal. 41, holding that the finding of the lower court as to the truth of testimony could not be reviewed; *McLennan v. Bank*, 87 Cal. 574, holding that the evidence of a witness was so contradictory that the court was not obliged to believe any of it; *Estate of Blythe*, 110 Cal. 236, holding certain evidence to be "so slight and flimsy" that the finding of the lower court on it could not be disturbed; and in *People v. Knutte*, 111 Cal. 456, holding that the trial court's instruction to the jury to acquit defendant on the evidence for the prosecution, was not an abuse of discretion. Cited in *Landsman v. Thompson*, 9 Mont. 191, holding there was no abuse of discretion by the trial court in granting a new trial on the ground of disbelief of evidence; *Mattock v. Goughnour*, 11 Mont. 273, 274, holding in a similar case that there was an abuse; and in a like case, *Nelson v. Big Blackfoot Co.*, 17 Mont. 556, ordering a new trial.

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VOLUME XVI.

By ALBERT RAYMOND.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

16 Cal. 11-65. **McCAULEY v. BROOKS.** S. C. State v. McCauley, 15 Cal. 429.

Contract of Prison Commissioners may be affirmed by state by subsequent legislation, p. 26.

Cited in Los Angeles etc. Co. v. City, 88 Fed. 743, applying rule to municipal contract for lease of waterworks.

Legislative Appropriation.—Requisites are designation of amount and of fund to be drawn upon, p. 28.

Cited to same effect in *People v. Pacheco*, 27 Cal. 207, 208, 209, 219, holding further as to nature of appropriation and power of state to make, in aid of railroad for military purposes; in same case, p. 207, *McBean v. Fresno*, 112 Cal. 168, 53 Am. St. Rep. 197, *State v. Parkinson*, 5 Nev. 25, and *Little v. Portland*, 26 Oreg. 246, holding that appropriation or contract to pay in installments, does not create debt for total amount; *Proll v. Dunn*, 80 Cal. 225 (cited in note to *Carr v. State*, 22 Am. St. Rep. 642, 643), holding appropriation valid though drawn on general fund, and on same point in *Humbert v. Dunn*, 84 Cal. 59 (cited in note 22 Am. St. Rep. 644), and *State v. Kenney*, 10 Mont. 487, where appropriation made in advance of collection of fund; (and see *State v. Burdick*, 4 Wyo. 281, discussing these cases); *McBean v. Fresno*, 112 Cal. 168, 53 Am. St. Rep. 197, holding further that supervisors may contract for payments beyond their term of office; *Hockaday v. County Commissioners*, 1 Colo. Ap. 373, as to power of legislature to direct future county revenues to specific purposes, and holding further that special fund cannot be diverted; in *Beshoar v. Las Animas Co.* 7 Colo. App. 450, on point that appropriation act should be liberally construed; *Carr v. State*, 127 Ind. 210, 22 Am. St. Rep. 629 (and see notes 640, 641, 647), holding as to general nature of appropriation and that it may be implied, and further as to its repudiation by state; *State v. La Grave*, 23 Nev. 27, holding no appropriation made, under facts; and in *State v. Moore*, 50 Nev. 96, ruling similarly; *Shattuck v. Kincaid*, 31 Oreg. 387; In re State Warrants, 6 S. Dak. 522, 55 Am. St. Rep. 855, as to

warrants issued in anticipation of revenues, holding further that provision as to bearing interest does not make appropriation a debt; and as to distinction from debt in *Western etc. Co. v. Lane*, 7 S. Dak. 9, holding further that to render warrants invalid it must affirmatively appear that no tax had been provided for their payment when issued. *Oklahoma Agr. etc. College v. Willis*, 6 Okla. 601. Distinguished in *Salem Water Co. v. Salem*, 5 Oreg. 32, 33, holding void an agreement to pay quarter installments for supply of water, when no provision was made for raising and appropriating revenue therefor; and in *Ingram v. Colgan*, 106 Cal. 116; 46 Am. St. Rep. 223, holding void act appropriating five dollars for each coyote scalp produced, aggregate appropriation not being fixed; *Baggett v. Dunn*, 69 Cal. 77, holding appropriation void when fund is exhausted. Overruled as to warrant on general fund in *Stratton v. Green*, 45 Cal. 151, but see note to *Carr v. State*, 22 Am. St. Rep. 641.

Vested Rights to Appropriation cannot be affected by legislative action, p. 28.

Cited to same effect in *Montgomery v. Kasson*, 16 Cal. 194, as to grant for canal purposes; *English v. Supervisors*, 19 Cal. 184, as to funding act, when original indebtedness surrendered; *Rose v. Estudillo*, 39 Cal. 274, holding void an act declaring forfeiture of claim for failure to accept bonds, revenue having been raised to pay debt (but see *Sharp v. Contra Costa Co.*, 34 Cal. 290); *McCracken v. Moody*, 33 Ark. 87, as to reissue and cancellation of school warrants; *Youngs v. Hall*, 9 Nev. 225, as to repeal of redemption acts; *United States v. Johnson County*, 5 Dill. 215, 26 Fed. Cas. 636, as to diversion of funds for payment of railroad aid bonds; and in note to *Goshen v. Stonington*, 10 Am. Dec. 135, as to impairment of vested rights. Distinguished in *Easer v. Spaulding*, 17 Nev. 302, 307, affirming act diverting moneys from fund on which warrants had been drawn.

Repeal of Statute does not affect contracts made under it, p. 33.

Cited in *Auding v. Levy*, 57 Miss. 58, on point that repeal does not validate contracts invalidated by act.

Departments of Government.—Theory of division discussed, p. 39.

Cited in *Smith v. Judge*, 17 Cal. 557, as to power of legislature to direct court to change venue in particular case; *In re Jessup*, 81 Cal. 486, as to subordination of supreme court to constitutional provisions; *Lawson v. Jeffries*, 47 Miss. 705, 706, 12 Am. Rep. 354, as to power of legislature to perform judicial acts; and in *In re Legislative Adjournment*, 18 R. I. 831, holding court cannot inquire into facts on which governor acted in adjourning legislature.

Mandamus.—Ministerial act may be directed by, p. 39.

Cited to same effect in *California etc. Co. v. Butte Co.*, 18 Cal. 675, where issued to compel supervisors to issue bonds; *Middleton v. Low*, 30 Cal. 603, to compel governor to issue patent; *Beaudry v. Valdez*, 32

Cal. 278, to compel mayor to countersign warrant for street work; Harpending v. Haight, 39 Cal. 210, 2 Am. Rep. 445, to compel governor to authenticate act; dissenting opinion in Tilden v. Sacramento, 41 Cal. 77, main opinion denying writ as act judicial; Howell v. Cooper, 2 Colo. App. 532, to compel action by military board, when matter properly before it; though not to control its discretion; State v. Board, 42 La. Ann. 657, as to issuance against governor, but refusing writ when act of board of liquidation was discretionary; State v. Young, 29 Minn. 535, upon question of enforcement of judicial remedy against state by mandamus; State v. Kenney, 10 Mont. 495, to compel auditor to draw warrant, although no funds to meet it; State v. Brown, 10 Oreg. 223, as to like proceeding against auditor, holding further as to effect of allowance by secretary of state, when auditor of public accounts; Kuechler v. Wright, 40 Tex. 619, to compel commissioner of general land office to issue land patent; Flack v. Jacob, 8 W. Va. 662, as to mandamus against governor, holding, however, that court cannot enjoin him from removing papers to new county seat until validity of act established; and in note to Dane v. Derby, 89 Am. Dec. 734, as to mandamus against auditing officers for ministerial acts.

Eminent Domain.—There can be no taking until compensation is made, p. 47.

Cited to same effect in San Francisco etc. Co. v. Mahoney, 29 Cal. 117, holding further that entry before compensation can be enjoined or prosecuted as a trespass.

16 Cal. 65-69. SCHLOSS v. WHITE.

Default Judgment is reversible on appeal where record fails to show jurisdiction, p. 68.

Cited to same effect in Linott v. Rowland, 119 Cal. 453, where affidavit of service held insufficient; Lonkey v. Keyes etc. Co. 21 Nev. 320, holding further no other method of service presumable than appears from record; Burke v. Interstate etc. Assn., 25 Mont. 320, but holding irregularity as to service not attackable collaterally; Trullinger v. Todd, 5 Oreg. 39; note to Wood v. Watkinson, 44 Am. Dec. 570, on effect of joint judgment when some defendants not served.

Sureties on Sheriff's Bond are not liable for acts outside of official duty, p. 68.

Cited to same effect in Best v. Johnson, 78 Cal. 220, 12 Am. St. Rep. 44, where rule applied to conversion of stranger's property by assignee in insolvency; Hawkins v. Thomas, 3 Ind. App. 404, as to liability for unauthorized arrest by special deputy marshal; Feller v. Gates, 40 Or. 547, sureties on constable's bond not liable for conversion of money received by constable from execution debtor under contract not to serve execution and to repay money if judgment reversed on appeal; Dysart v. Lurty, 3 Okla. 606; as to seizure of goods by deputy marshal without

process; *Heidenheimer v. Brent*, 59 Tex. 535, as to money retained by sheriff where no proof of receipt under process; *People v. Hilton*, 36 Fed. Rep. 174, where embezzling sheriff had received money deposit in lieu of replevin bond; and in notes to *Commonwealth v. Code*, 46 Am. Dec. 516, and to *Palmer v. St. Albans*, 6 Am. St. Rep. 132, upon liability of such sureties.

16 Cal. 73-76. **PAUL v. SILVER.**

Forcible Entry—Appeal.—Query whether supreme court has jurisdiction of appeal from county court, p. 75.

Cited in *Quinn v. Kenyon*, 22 Cal. 83.

16 Cal. 77-79. **THOMPSON v. PAIGE.**

Insolvency.—Means outside of state are to be considered, p. 79.

Cited in *Cook v. Cockins*, 117 Cal. 155, as to facts constituting insolvency.

16 Cal. 79-81. **BROADUS v. NELSON.**

Discretion of Trial Judge.—Not interfered with unless injustice suffered, p. 81.

Cited to same effect in *Calderwood v. Tevis*, 23 Cal. 387, as to trial before demurrer to answer disposed of, no objection being then raised.

16 Cal. 83-85. **NATOMA ETC. CO. v. PARKER.**

Dissolution of Preliminary Injunction will not be allowed on motion before final hearing, unless granted *ex parte*, p. 84.

Cited to same effect in *Hicks v. Michael*, 15 Cal. 117; *Curtiss v. Bachman*, 110 Cal. 439; 52 Am. St. Rep. 115. *State v. District Court*, 23 Mont. 566, on point that court need not entertain motion to dissolve or modify when based on grounds originally urged in opposition to issuance. Cited, also, in *Goyhinech v. Goyhinech*, 80 Cal. 409, on point that appeal cannot be taken from order refusing to set aside appealable judgment or order. Distinguished in *Lake v. Bender*, 18 Nev. 374, affirming right to grant new trial in divorce suit as to part of issues.

16 Cal. 85-87. **EAGAN v. DELANEY.**

Pleading—Source of Title.—Where plaintiff avers particular facts constituting title he cannot recover on another and different title, p. 87.

Cited to same effect in *Eberhardt v. Coyne*, 114 Cal. 286, as to title founded on adverse possession.

New Trial—Surprise.—Held under facts new trial should have been granted, p. 87.

Cited in note to *Delmas v. Margo*, 78 Am. Dec. 519, upon general subject.

16 Cal. 88-90. **SMITH v. SHAW**. S. C. 16 Cal. 90.

Notice to Quit.—Tenant who denies landlord's title is not entitled to, p. 89.

Cited to same effect in *Dodge v. Walley*, 22 Cal. 229, 83 Am. Dec. 63, where grantor had conveyed land but claimed to hold as tenant at will; *Bolton v. Landers*, 27 Cal. 105; *Simpson v. Applegate*, 75 Cal. 345, when tenant had disclaimed relation; *McCarthy v. Brown*, 113 Cal. 19, 20; and in note on general subject to *Stedman v. McIntosh*, 42 Am. Dec. 134. Cited, also, in dissenting opinion in *Campbell v. Jones*, 38 Cal. 512, as to necessity of demand in conversion where defendant claimed title; and to same effect in *Daggett v. Gray*, 110 Cal. 172, under like facts as to bailee.

16 Cal. 93-98. **PALMER v. SHAW**.

Statute of Limitations.—"Return to State" applies to foreign citizens equally with citizens temporarily absent, p. 96.

Cited to same effect in *Dugall v. Schulenberg*, 101 Cal. 159; *Higgins v. Graham*, 143 Cal. 133, noted under *Patten v. Ray*, 4 Cal. 287; *Burnes v. Crane*, 1 Utah, 182, and in note to *Langdon v. Doud*, 83 Am. Dec. 645, upon effect of absence from state. Cited, also, in *Rogers v. Hatch*, 44 Cal. 282, upon point that successive absences must be aggregated; and in *Knox v. Gerhauser*, 3 Mont. 273, where defendant departed after accrual of cause of action and did not return.

16 Cal. 98-100. **PEOPLE v. LEVISON**. 76 Am. Dec. 505.

Possession of Stolen Goods does not constitute legal conclusion of guilt, p. 99.

Cited to same effect in *People v. Chambers*, 18 Cal. 384, holding further as to requirements of additional testimony; dissenting opinion in *State v. Jennings*, 81 Mo. 214, main opinion holding burden cast on prisoner to prove innocence when recent possession shown; *People v. Hart*, 10 Utah, 209, where rule applied to prosecution for housebreaking; *Ingalls v. State*, 48 Wis. 656; and in note to *Hunt v. Commonwealth*, 70 Am. Dec. 448, 451, and to *Castleberry v. State*, 60 Am. St. Rep. 54, upon general subject when applied to larceny. Cited, also, in *People v. Kraker*, 72 Cal. 461, 1 Am. St. Rep. 66, upon effect of evidence of thief in prosecution for receiving stolen goods.

Instructions should be hypothetical and should not assume facts as proved, p. 99.

Cited in *People v. Strong*, 30 Cal. 158, as to assumption of confessions; *People v. Buster*, 53 Cal. 613, as to assumption of intentional shooting; *Krum v. State*, 19 Neb. 732, as to intent in rape case; note to *Horne v. State*, 81 Am. Dec. 503, and to *Stockman v. State*, 5 Am. St. Rep. 896, upon instructions assuming facts or as to weight of evidence;

and in notes to *Hill v. State*, 86 Am. Dec. 740 and to *Hendrickson v. Commonwealth*, 7 Am. St. Rep. 600, upon form of instructions in criminal cases.

Instructions Erroneous Under Every State of Facts may be reviewed without statement, p. 100.

Cited to same effect in *People v. King*, 27 Cal. 514, 87 Am. Dec. 89, holding further as to converse of rule; *People v. Dick*, 32 Cal. 215; and same case, 34 Cal. 665, where error in charging as to facts did not affirmatively appear; *People v. Torres*, 38 Cal. 143, also affirming judgment; *People v. Smith*, 57 Cal. 131, affirming judgment, and considering instructions properly refused as abstract; *State v. Mason*, 24 Mont. 342, 346, reviewing instruction in robbery case, on judgment-roll alone; *Thompson v. People*, 4 Neb. 531, holding instruction reviewable though no exception taken.

16 Cal. 100-103. **SCHUHMAN v. GARRATT.**

Estoppel.—Grantee is not estopped from denying title in grantor, by taking of deed, p. 102.

Cited to same effect in *Cannon v. Stockman*, 36 Cal. 539, 95 Am. Dec. 205, as to pleading statute of limitations by grantee; and in *Littler v. Lincoln*, 106 Ill. 368.

16 Cal. 107-110. **MINTURN v. BURR.** S. C. 20 Cal. 48.

Forcible Entry.—"Actual Possession" does not necessarily mean actual occupancy, p. 109.

Cited to same effect in *Shelby v. Houston*, 38 Cal. 423, where rule applied to action for unlawful entry; *Giddings v. Land etc. Co.*, 83 Cal. 99, an action for forcible detainer, holding further inclosure of land unnecessary under facts; and in *Stevenson v. Anderson*, 87 Ala. 232, where rule applied to adverse possession. See, also, *McEvoy v. Igo*, 27 Cal. 375, where evidence held sufficient to show forcible entry, and holding further as to form of complaint in such action.

16 Cal. 110-113. **PEOPLE v. ECKERT.**

Accomplice.—Corroborating Evidence must connect the accused with the crime, p. 112.

Cited to same effect in *People v. Ames*, 39 Cal. 405; and in note to *Commonwealth v. Price*, 71 Am. Dec. 678, on testimony of accomplice.

Change in Judges during trial is irregular, p. 113.

Cited in *Horne v. Rogers*, 110 Ga. 371, but holding absence of judge for a short period during trial not reversible error when attorneys did not object at time; *Durden v. People*, 192 Ill. 508, holding change of judges during argument reversible error under local statutes.

Distinguished in *People v. Henderson*, 28 Cal. 475, holding that new judge may pronounce sentence.

Credibility of Witness is for consideration of jury, p. 113.

Cited in *People v. Compton*, 123 Cal. 409, holding instruction erroneous.

16 Cal. 113-119. PEOPLE (ALLEN) v. HILL.

Special Verdict—New Trial—Time to move begins to run from rendition, p. 117.

Cited to same effect in *Imperial etc. Co. v. Kiernan*, 83 Ky. 478, holding further as to form of verdict and entry of judgment thereon. Distinguished in *Bates v. Gage*, 49 Cal. 127, holding entry of judgment necessary when special verdict advisory in equity case. Cited, also, in *Cooney v. Furlong*, 66 Cal. 522, as to inefficacy of amended notice of intention.

Surviving Partner is entitled to possession and disposition of firm assets pending settlement, p. 118.

Cited to same effect in *Hargadine v. Gibbons*, 45 Mo. App. 467, as to suit on firm judgment; *McGorray v. O'Connor*, 79 Fed. Rep. 864, holding heirs of deceased partner incompetent to redeem from sale of firm property; *State v. Withrow*, 141 Mo. 78, sustaining assignment by such partner for benefit of creditors; *McGorray v. O'Connor*, 87 Fed. 539, 59 U. S. App. 457, denying right of heirs of deceased partner to redeem from foreclosure sale of firm property; note to *Shields v. Fuller*, 65 Am. Dec. 296, on rights of surviving partner.

Stock—Voting.—Real owner of, may vote although standing in books in another's name, p. 119.

Cited to same effect in *Smith v. San Francisco etc. Co.*, 116 Cal. 591, 56 Am. St. Rep. 123, interpreting Civil Code, sections 307, 312; *State v. Smith*, 15 Oreg. 112, granting pledgor right to vote when transfer unlawfully registered; *Bank v. Allen*, 90 Fed. 553, 61 U. S. App. 118, granting pledgor right to vote under Colorado statutes.

16 Cal. 119-123. SACRAMENTO (CITY AND COUNTY OF) v. CROCKER.

License Tax may by ordinance be collected by suit, p. 122.

Cited to same effect in *Western Union etc. Co. v. Fremont*, 39 Neb. 703, holding further as to taxation for messages from other states. Distinguished in *Santa Cruz v. Santa Cruz etc. Co.*, 56 Cal. 150, denying right in absence of ordinance.

License.—Business or Occupation may be subjected to license tax, p. 123.

Cited to same effect in *San Jose v. San Jose etc. Co.*, 53 Cal. 481, as to license of street railroad by city though partly outside it; *McGrath*
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v. Newton, 29 Kan. 369, as to general business licenses (and see Newton v. Atchison, 31 Kan. 156; 47 Am. Rep. 489); Holberg v. Macon, 55 Miss. 115, holding such tax not unequal because not embracing all occupations; and in note to Robinson v. Mayor, 34 Am. Dec. 639, upon general subject. Cited, also, as to nature of such license tax in Santa Barbara v. Stearns, 51 Cal. 501 (cited in State v. French, 17 Mont. 59); Wiggins etc. Co. v. East St. Louis, 102 Ill. 566; and in note to People v. Naglee, 52 Cal. 332.

License May be Graduated according to profits, p. 123.

Cited to same effect in Western Union etc. Co. v. State Board, 80 Ala. 279, 60 Am. Rep. 105, and Same v. Mayer, 28 Ohio St. 538, where made percentage of gross income, and holding further such tax not violative of Interstate Commerce Act; Newton v. Atchison, 31 Kan. 164, 47 Am. Rep. 496, where graduated on average amount of stock in trade; Hill v. Council, 59 S. C. 428, sustaining license tax uniform as to members of each occupation specified. Tulloss v. Sedan, 31 Kan. 168, where discrimination made between druggists on basis of permits to sell liquors.

16 Cal. 124-126. WHEELER v. MILLER.

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Cited to same effect in Le Roy v. Dunkerly, 54 Cal. 459, holding further as to effect of deed from Commissioners of Funded Debt; Pacific Gas Imp. Co. v. Ellert, 64 Fed. Rep. 432, 434, as to power of state to dispose of its tide lands; Approved in United States v. Mission Rock Co., 189 U. S. 406, President's order reserving for naval purposes Mission Rock in San Francisco bay was not an appropriation of surrounding tide lands.

16 Cal. 126-128. McALPIN v. DUNCAN.

Mechanics' Liens—Subcontractor.—Payment by owner to contractor in ignorance of subcontractor's claims is good, p. 127.

Cited to same effect in Renton v. Conley, 49 Cal. 188 (cited in Dingley v. Greene, 54 Cal. 336), under act of 1868; Cutler v. McCormick, 48 Iowa, 416, holding claim of subcontractor subordinate to orders by contractor on and accepted by owner, before notice filed; Henry v. Rice, 18 Mo. App. 513, where moneys paid contractor went toward satisfying subcontractor's claim. Distinguished in Kellogg v. Howes, 81 Cal. 175, holding owner liable when contract void for nonrecording; McFadden v. Stark, 58 Ark. 14, holding generally as to subcontractor's rights; Colter v. Frese, 45 Ind. 110, holding lien properly filed not defeated by prior payments, and to same effect in Hunter v. Truckee Lodge, 14 Nev. 43, denying Renton v. Conley, *supra*. Cited, also, in Bates v. Santa Barbara, 90 Cal. 546, as to owner's liability after notice, where lien filed against public building.

16 Cal. 128-137. PEOPLE v. REYNOLDS.

Challenge of Juror for implied bias must be specific, p. 130.

Cited to same effect in *People v. Hardin*, 37 Cal. 259; *People v. Dick*, 37 Cal. 279, where rule applied to challenge "for cause"; *People v. Renfrow*, 41 Cal. 38, where no ground at all stated; *People v. Walsh*, 43 Cal. 448; *People v. Buckley*, 49 Cal. 242; *State v. Taylor*, 134 Mo. 142 (cited in *State v. Reed*, 137 Mo. 132) and in *S. P. etc. Co. v. Rauh*, 49 Fed. Rep. 701, where general challenge for cause; and in *People v. Hopt*, 3 Utah, 398; *Shields v. State*, 149 Ind. 400, holding general objection properly overruled. Distinguished in *State v. Raymond*, 11 Nev. 107, where challenge treated as sufficient and error not prejudicial. Cited, also, in *People v. Hamilton*, 62 Cal. 381, holding errors in examination on voir dire immaterial unless challenge interposed.

Peremptory Challenge After Juror Sworn is not matter of right, p. 131.

Cited to same effect in *People v. Durrant*, 116 Cal. 198, and in *State v. Anderson*, 4 Nev. 275. Distinguished in dissenting opinion in *People v. Scoggins*, 37 Cal. 690, main opinion following principal case.

Jurors May be Sworn individually before panel completed, p. 131.

Cited to same effect in *State v. Anderson*, 4 Nev. 275, although practice disapproved.

Disqualification for Bias.—Rules for, stated, p. 132.

Cited in *People v. Williams*, 17 Cal. 146, holding juror not disqualified for hypothetical or unfixed opinion; to same effect in *People v. Symonds*, 22 Cal. 351; in *People v. King*, 27 Cal. 512, 87 Am. Dec. 98, where opinion was "conditional or qualified"; in *People v. Johnston*, 46 Cal. 79, where it was a "mere impression or hypothetical opinion"; in *People v. Brown*, 59 Cal. 354, where hypothetical opinion formed from newspaper reports; in *State v. Millain*, 3 Nev. 429, and concurring opinion, p. 460, where opinion formed in like manner held a "mere suspicion"; in dissenting opinion in *Conway v. Clinton*, 1 Utah, 224, main opinion holding opinion not fixed; and in *People v. O'Loughlin*, 3 Utah, 141, holding also as to when unqualified opinion disqualifies juror; *Territory v. Bryson*, 9 Mont. 38, where hypothetical opinion formed from newspaper reports; *State v. Davis*, 14 Nev. 450, upon point of hypothetical question to establish juror's bias; and in notes to *Smith v. Eames*, 36 Ark. 523, 524, 525, and 526, as to various phases of disqualification for bias.

16 Cal. 137-138. PEOPLE v. AH FUNG. S. C. 17 Cal. 377.

Instructions.—Assumption of Facts not admitted is error, p. 138.

Cited to same effect in *People v. Ybarra*, 17 Cal. 172, as to dying declarations; in *People v. Strong*, 30 Cal. 158, as to assumption of confessions by defendant; and in *People v. Buster*, 53 Cal. 613, as to assumption of intentional shooting.

16 Cal. 138-140. ADLER v. FRIEDMAN.

Parol Evidence is Admissible of subsequent valid parol agreement superseding prior written agreement, p. 140.

Cited in note to *Harris v. Murphy*, 56 Am. St. Rep. 662, as to varying written agreement by subsequent parol agreement; at page 665, as to necessity of consideration therefor; at p. 666 and 671 on point that such agreement must be in se enforceable; at p. 668 as to necessity of proof of abandonment of original agreement; and at p. 671, as to operation of statute of frauds in the matter.

16 Cal. 140-142. BRENNAN v. SWASEY. 76 Am. Dec. 507.

Mechanics' Lien.—Notice need not set out items of account, p. 142.

Cited to same effect in *Seldon v. Meeks*, 17 Cal. 131; *McClain v. Hutton*, 131 Cal. 136, holding claim sufficient; *Davis v. Livingston*, 29 Cal. 287, holding notice sufficient as to other particulars; in dissenting opinion in *Hicks v. Murray*, 43 Cal. 522, holding unnecessary the segregation of amounts due for labor and for materials; in *Jewell v. McKay*, 82 Cal. 150, 151, where rule held to apply under code; in *Leftwich etc. Co. v. Florence etc. Assn.*, 104 Ala. 594, where amount due was admitted; in *Nichols v. Culver*, 51 Conn. 179, holding sufficient statement of balance, without enumerating payments on account; in *Skyrme v. Occidental etc. Co.*, 8 Nev. 237, where rule applied to statement of character of work done; in *Lonkey v. Wells*, 16 Nev. 274; in note to *Lyon v. Logan*, 2 Am. St. Rep. 515, as to description of land in notice; and in note to *Spears v. Lawrence*, 45 Am. St. Rep. 792; and to *Mitchell etc. Co. v. Allison*, 60 Am. St. Rep. 549, as to sufficiency of notice generally.

Waiver of Lien is not effected by bringing attachment suit for moneys due, p. 142.

Cited to same effect in *Roberts v. Wilcoxson*, 36 Ark. 363, where lienor took mortgage on wife's interest in the land; in *Salt Lake etc. Co. v. Ibex etc. Co.*, 15 Utah, 444; in note to *Chapin v. Pernse etc. Works*, 79 Am. Dec. 277, as to waiver by taking note for lien debt; and to *Kirkwood v. Hoxie*, 35 Am. St. Rep. 553, as to waiver by taking personal judgment. Cited also in *Bates v. Santa Barbara*, 90 Cal. 548, upon point that right to personal judgment against immediate employer or vendee is not waived by proceeding to enforce lien.

16 Cal. 143. GROSS v. PARROTT.

Surety is Released by extension of time given to principal debtor, p. 145.

Cited in *Tuohy v. Woods*, 122 Cal. 668, holding amount of damage occasioned to surety immaterial; *Daneri v. Gazzola*, 139 Cal. 418, holding sureties on note so released.

16 Cal. 145-152. **NEALL v. HILL**. 76 Am. Dec. 508.

Final Decree.—Decree for dissolution of corporation is final, although it appoints receiver to wind up business, p. 147.

Cited to same effect in *Humphreys v. Stafford*, 71 Miss. 141, as to decree on creditor's bill for dissolution of partnership; and in note to *Williams v. Field*, 60 Am. Dec. 429, defining and illustrating final decree. Cited also in *Emeric v. Alvarado*, 64 Cal. 624, on point that order appointing receiver in action for partition is not appealable.

Amotion of Corporate Officers cannot be decreed by court of equity, p. 148.

Cited in *State v. Judges*, 35 La. An. 1080, upon point that city council can remove official for just cause, and action cannot be interfered with by equity; and in *Flagstaff etc. Co. v. Patrick*, 2 Utah, 317 (cited in *Jones v. Williams*, 139 Mo. 103), on point that directors cannot delegate to strangers their power of appointment and removal.

Corporations.—Receiver cannot be appointed in action by stockholder for settlement of its affairs, p. 149.

Cited in *Murray v. Superior Court*, 129 Cal. 633, denying right of appointment in action for winding up life insurance company; *Gibson v. Thornton*, 107 Ga. 562, *Dudley v. Dakota etc. Co.*, 11 S. Dak. 562, and *Sidway v. Missouri etc. Co.*, 101 Fed. 483, applying rule to action by minority stockholders for dissolution and distribution of assets; note to *Cameron v. Groveland etc. Co.*, 72 Am. St. Rep. 51, 59, on receivers; *French Bank case*, 53 Cal. 550 (cited and distinguished in *State v. District Court*, 15 Mont. 331, 48 Am. St. Rep. 684), as to similar action by depositor and also creditor; in *Fischer v. Superior Court*, 110 Cal. 140, in action for fraud, holding prohibition as proper remedy when appointment illegal; in dissenting opinion in *State v. Rosa*, 118 Mo. 61, as to ex parte application by insolvent corporation (and see, further, same case, 122 Mo. 461). Distinguished in *People v. Superior Court*, 100 Cal. 117, 119, holding appointment proper in action to liquidate bank under Bank Commissioner's Act. Cited also in note to *Cortheyean v. Hathaway*, 64 Am. Dec. 485, as to equitable jurisdiction to appoint receiver in dissolution proceedings; and on same question in note to *State v. District Court*, 48 Am. St. Rep. 692.

Dissolution of Corporation.—Equity jurisdiction does not extend to, in absence of statute, p. 150.

Cited to same effect in *State etc. Co. v. San Francisco*, 101 Cal. 146, construing section 601, Penal Code; in *McGeorge v. Big Stone Gap etc. Co.*, 57 Fed. Rep. 269, holding further as to appointment of receiver and denying right of minority stockholder to sue in absence of fraud. Cited also in note to *People v. Albany etc. Co.*, 82 Am. Dec. 301; to *Folger v. Columbian Ins. Co.*, 96 Am. Dec. 755; and to *Germantown etc. Co. v. Fidler*, 100 Am. Dec. 557, as to power of equity to wind up, or restrain operation of, corporations.

Stockholder May Sue Corporation for accounting when trustees have committed breach of trust, p. 151.

Cited to same effect in *Ashton v. Dashaway Assn.*, 84 Cal. 68, as to suit to prevent misappropriation of corporate funds; in *Waymire v. S. F. etc. Co.*, 112 Cal. 650, as to power of stockholder to sue for benefit of corporation when its directors wrongfully refuse to do so. Cited also in note to *Hodges v. New England etc. Co.* 53 Am. Dec. 646, and to *Goodin v. Cincinnati etc. Co.*, 98 Am. Dec. 102, as to right of stockholder to sue for benefit of corporation when directors refuse.

Directors of Corporation are liable for loss caused by negligence or improper conduct, p. 151.

Cited to same effect in *Spering's Appeal*, 71 Pa. St. 24, 10 Am. Rep. 692, discussing subject generally; in *Budd v. Walla Walla etc. Co.*, 2 Wash. Tr. 353, as to validity of contract between corporation and one of its trustees; in *Prescott v. Haughey*, 65 Fed. Rep. 658, as to liability for deceit. Cited, also, as to liability of directors, in note to *Hodges v. New England etc. Co.*, 53 Am. Dec. 640, and to *Marshall v. Farmers' etc. Bank*, 17 Am. St. Rep. 97.

Corporate Directors.—Acquiescence of other stockholders will not bar relief sought because of directors' mismanagement, p. 152.

Cited in *Winchester v. Howard*, 136 Cal. 446, holding creditor not barred by acquiescence of stockholders.

16 Cal. 152-153. REEVES v. HOWE.

Indorsement on note in case held to be guaranty and to entitle indorser to notice, p. 153.

Cited as to last point in *Crooks v. Tully*, 50 Cal. 257, also holding to same effect as to guaranty; in note to *Riggs v. Waldo*, 56 Am. Dec. 359; note to *Cadwallader v. Hirshfeld*, 72 Am. St. Rep. 680, upon indorsement by stranger.

16 Cal. 153-156. GILLAN v. HUTCHINSON.

Entry by Miners cannot be granted upon public land actually settled on and used, p. 155.

Cited to same effect in *Rogers v. Soggs*, 22 Cal. 453, 454, as to right to use growing wood and timber; and in notes to *McClintock v. Bryden*, 63 Am. Dec. 96, 97, and to *Levaroni v. Miller*, 91 Am. Dec. 694, 695, as to conflicting rights of settlers and miners.

Private Property cannot be transferred by legislature from one person to another, p. 156.

Cited to same effect in *Palairret's Appeal*, 67 Pa. St. 487, 5 Am. Rep. 454, as to act extinguishing ground rents.

Amendment to Answer is matter within discretion of court, p. 156.

Cited to same effect in *Buddee v. Spangler*, 12 Colo. 222, affirming allowance of amendment at trial without notice of motion.

16 Cal. 156-158. SKINNER v. BEATTY.

Writ of Assistance in foreclosure may run against mortgagor and those entering under him after decree, p. 157.

Cited to same effect in *Huerstal v. Muir*, 64 Cal. 453, holding wife subject to writ where no claim of separate property made; in *Hibernia etc. Soc. v. Lewis*, 117 Cal. 580, as to mortgagor's vendee pending foreclosure suit; and in note to *Wilson v. Polk*, 51 Am. Dec. 156, upon general subject of writ.

Mortgage for Purchase Money is superior to claim of homestead, p. 157.

Cited in note to *Magee v. Magee*, 99 Am. Dec. 574, as to vendor's lien on homestead property; and at p. 575, as to rights of mortgagee for purchase money.

Writ of Assistance Improperly Issued may be set aside on motion, and possession restored, p. 158.

Cited to same effect in *Enos v. Cook*, 65 Cal. 178, holding that conflicting rights of strangers to foreclosure suit will not be adjudicated on application for writ; and in *McLane v. Piaggio*, 24 Fla. 100, holding further as to necessity of notice of application for writ to person in possession.

16 Cal. 158-160. COYE v. PALMER.

Certificate of Deposit.—Transferee from indorsee after maturity takes subject to all equities against indorsee, p. 159.

Cited to same effect in *First Natl. Bk. v. Security Natl. Bk.* 34 Neb. 77, 33 Am. St. Rep. 621, holding further as to maturity of such certificate. Cited also in *Mills v. Barney*, 22 Cal. 249, as to liability of indorsers of certificate when prior indorsement forged; in *Poorman v. Mills*, 35 Cal. 120, 95 Am. Dec. 91, as to rights of indorsee against drawer; and in *McPherson v. Weston*, 85 Cal. 96, where rule as to overdue paper applied to note.

16 Cal. 160, 161. VALLEJO v. GREEN.

Order Made Without Service of Moving Papers and in party's absence is erroneous, p. 161.

Cited to same effect in *Reilly v. Ruddock*, 41 Cal. 313, as to order setting aside default; and in *Ray v. Norseworthy*, 23 Wall. (90 U. S.) 136; S. C. sub nom. *Ray v. Brigham*, 12 B. R. 151, as to order of sale of bankrupt's mortgaged property without notice to mortgagee. Cited in note to *Furman v. Furman*, 60 Am. St. Rep. 660, on notice of motion to vacate judgment.

16 Cal. 161-165. ESTATE OF KIRTLAN.

Letters of Administration.—Waiver of right to cannot be withdrawn, p. 165.

Cited to same effect in *Estate of Moore*, 68 Cal. 283, holding right revived, however, on application during insanity of incumbent, though not after restoration to capacity; and in *In re Bedell*, 97 Cal. 343, applying rule to successive nominations by father of deceased.

16 Cal. 165-167. JONES v. MARTIN.

Recording.—Notarial Seal need not be transcribed, p. 167.

Cited in *Heisen v. Smith*, 138 Cal. 218, as to omission of word "seal" in publication of citation; *Summer v. Mitchell*, 29 Fla. 218, 30 Am. St. Rep. 122, holding presumption that seal of clerk was affixed to original certificate; in *Geary v. Kansas City*, 61 Mo. 379, holding, also, as last case; in *Mitchner v. Holmes*, 117 Mo. 211, holding same presumption as to notary; in *Todd v. Union etc. Instn.*, 118 N. Y. 347, where presumption applied to seal to conveyance when delivered. Doubted in *Putney v. Cutler*, 54 Wis. 70, where, however, record showed scroll. Cited, also, in *Emmal v. Webb*, 36 Cal. 203, as to effect of mistake in recording seal, see p. 201. *Strain v. Fitzgerald*, 130 N. C. 601.

16 Cal. 167-173. FALKNER v. HUNT.

Taxes Paid Under Protest are recoverable back if not justly due, p. 170.

Cited to same effect in *Guy v. Washburn*, 23 Cal. 113, as to taxes on real estate. Distinguished in *Bucknall v. Story*, 46 Cal. 597, 13 Am. Rep. 225, holding payment of tax voluntary unless made under compulsion or coercion; and to same effect in *Wabunsee Co. v. Walker*, 8 Kan. 436, and *Detroit v. Martin*, 34 Mich. 177, 22 Am. Rep. 517, where threatened sale under void tax would have created no cloud. Cited, also, in *Meek v. McClure*, 49 Cal. 627 (cited in note to *Detroit v. Martin*, 22 Am. Rep. 520) on point that no protest necessary where official has notice of illegality of collection; and in *Rushton v. Burke*, 6 Dak. 482, upon point that treasurer cannot escape liability to return illegal taxes paid under protest, by his payment to another official after this notice.

Mortgage is not Taxable under act of 1856, p. 172.

Cited in *People v. Park*, 23 Cal. 140 (cited in *San Francisco v. Lux*, 64 Cal. 485) on point that debts are assessable in county of holder's residence; to same effect in *People v. Eastman*, 25 Cal. 604 (mortgage debt), where judgment of foreclosure entered; in *People v. Whartenby*, 38 Cal. 467, as to situs of "money at interest" secured by mortgage or not; *Comptoir v. Board*, 52 La. Ann. 1329, but holding non-negotiable notes taxable irrespective of owner's residence, when kept within taxing state in which they were received; *Johnson v. Oregon City*, 2 Oreg. 330, where

assessment of mortgage debt held properly made at residence of mortgagee's executor.

Lumping Assessment as "personal property" is bad, p. 172.

Approved in *Helman v. Los Angeles*, 147 Cal. 658, where bonds of specific kind described in ordinance making levy as bonds of previous year in which no bonds issued, levy is void. Distinguished in *People v. McCreery*, 34 Cal. 439, 440, holding assessment of money sufficient under the act; in *San Francisco v. Flood*, 64 Cal. 505, sustaining assessment as "mining stock." Cited, also, in *Huntington v. C. P. etc. Co.*, 2 Sawy. 512, upon point that taxes not assessed in strict accordance with statute are void, in reference to railroad taxation.

16 Cal. 173-180. **BAKER v. JOSEPH.**

Statute of limitations does not run in favor of trustee until after demand, p. 176.

Cited to same effect in *Schroeder v. Jahns*, 27 Cal. 279, as to money deposited, holding further as to demand on trustee's administrator; in *Green v. Williams*, 21 Kan. 72, action against agent for money collected; *Larsen v. Utah Loan etc. Co.*, 23 Utah, 457, allegation of special deposit with defendant to be loaned on realty, but that money loaned to party without security and with knowledge of insolvency is sufficient to support recovery for fraud on part of defendant; note to *Miles v. Thorne*, 99 Am. Dec. 394, on general subject.

General Objection to evidence is bad, if evidence admissible for any purpose, p. 177.

Cited to same effect in *Rush v. French*, 1 Ariz. Ter. 125.

Impeachment of Witness for Declarations of Hostility.—Matter, time and place of declarations or acts must be brought to his knowledge by cross-examination, p. 177.

Cited to same effect in *Silvey v. Hodgdon*, 48 Cal. 188, as to letter written by witness; in *State v. McDonald*, 8 Oreg. 117, holding foundation improperly laid; in *Sheppard v. Yocum*, 10 Oreg. 413, holding questions as to persons present unnecessary under facts; in *State v. Stewart*, 11 Oreg. 239; and in dissenting opinion in *Lightfoot v. People*, 16 Mich. 526, main opinion holding examination unnecessary where prior statements are contained in deposition; *People v. Blackwell*, 27 Cal. 68 (cited, *People v. Gillis*, 97 Cal. 544), holding proper question whether prosecutrix had employed associate counsel to assist district attorney; *National Bank v. Assurance Co.*, 33 Or. 51, holding foundation for impeachment insufficient; notes to *Allen v. State*, 73 Am. Dec. 763, 764, as to impeachment of witness for prior contradictory statements, and at p. 775, for acts of hostility or ill feeling.

Motion for Nonsuit.—No ground will be considered unless taken at trial, p. 180.

Cited to same effect in *Brown v. Warren*, 16 Nev. 239; and in *Tanderup v. Hansen*, 8 S. Dak. 378, where rule applied to motion to direct verdict, holding lack of demand not included under general objection of insufficiency of evidence. Distinguished *Daley v. Russ*, 86 Cal. 117, holding specification of grounds unnecessary where defects are not correctible.

New Trial for newly discovered evidence. Application regarded with distrust and disfavor, p. 180.

Cited to same effect in *Klockenbaum v. Pierson*, 22 Cal. 163, holding no diligence shown, and holding also no sufficient showing made on ground of surprise; *Arnold v. Skaggs*, 35 Cal. 687, where party himself did not swear as to his ignorance of facts; *People v. Sutton*, 73 Cal. 248, where affidavits held insufficient to show inability of defendant to produce testimony at trial, or that proposed evidence would have changed result; *Spottiswood v. Weir*, 80 Cal. 451, as to this last point, and holding also refusal to grant new trial reviewable only for abuse of discretion; *Heintz v. Cooper*, 104 Cal. 670, affirming on ground that no abuse shown, order granting new trial, when question raised as to diligence of applicant; *Hines v. Driver*, 100 Ind. 321, denying motion where granted once before for same reason; *Morrison v. Carey*, 129 Ind. 279, where no diligence shown, holding further as to general requirements for application; *East v. McKee*, 14 Ind. App. 49, holding denial proper where no diligence shown; *Broat v. Moor*, 44 Minn. 470, where parties not ignorant of facts, although attorney was; *Howard v. Winters*, 3 Nev. 543, where denial sustained because of lack of diligence, and holding further as to requirements for application; *Heyrock v. McKenzie*, 8 N. Dak. 602, sustaining denial of new trial; *Lander v. Miles*, 3 Oreg. 43, as to question of diligence, holding further affidavit must state facts showing "diligent inquiry"; *Longley v. Daly*, 1 S. Dak. 266, as to question of diligence, holding also matter discretionary and decision not reversed unless for abuse; *Gaines v. White*, 1 S. Dak. 443, applying rule as to discretion to application on ground of surprise; *Gleckler v. Slavens*, 5 S. Dak. 392, where proposed evidence was on question of breach of contract; *Templeton v. State*, 5 Tex. App. 418, where it was inadmissible and no diligence shown. Distinguished in *State v. Stowe*, 3 Wash. 210, holding rule as to new cumulative evidence inapplicable as to evidence of alibi.

16 Cal. 181-184. **ACKLEY v. CHAMBERLAIN.** 76 Am. Dec. 516.

Judgment Lien is purely creature of statute, p. 183.

Cited to same effect in note to *Ray v. Thompson*, 94 Am. Dec. 703.

Judgment Lien takes effect when judgment docketed, p. 183.

Cited to same effect in *Eby v. Foster*, 61 Cal. 287, holding further time must be shown by record, not parol; *In re Boyd*, 4 Sawy. 265 (cited in *Creighton v. Leeds*, 9 Oreg. 220); in notes to *Christy v. Dyer*, 81 Am. Dec. 497; *Barroilhet v. Hathaway*, 89 Am. Dec. 195; *Boyer's*

Estate, 91 Am. Dec. 131; *Savings etc. Co. v. Bear Valley etc. Co.* 89 Fed. 40, quoting *Eby v. Foster*, 61 Cal. 287; note to *Durham v. Heaton*, 81 Am. Dec. 281, as to extent of lien; and to *Witmer's Appeal*, 84 Am. Dec. 510, as to lien on real estate.

Homestead is not subject to judgment lien or sale on execution, p. 183.

Cited in *Lean v. Givens*, 146 Cal. 741, levy of execution on homestead as land creates lien to extent of any excess in value above homestead exemption, which by proper proceedings be determined to exist. Distinguished in *McDonald v. Badger*, 23 Cal. 400, 83 Am. Dec. 127, where property was over statutory limit; and cited as to remedies in such case in *Barrett v. Sims*, 59 Cal. 619. Cited also as to exemption from judgment lien or forced sale in notes to *McDonald v. Badger*, 83 Am. Dec. 129; *Bishop v. Hubbard*, 83 Am. Dec. 134; *Hoskins v. Litchfield*, 83 Am. Dec. 218; *Sears v. Hanks*, 84 Am. Dec. 382; *Keyes v. Rines*, 86 Am. Dec. 711; *Blue v. Blue*, 87 Am. Dec. 273, 278; *Filley v. Duncan*, 93 Am. Dec. 351; *Bunn v. Lindsay*, 6 Am. St. Rep. 64; *Vanstory v. Thornton*, 34 Am. St. Rep. 499; to *Pipkin v. Williams*, 38 Am. St. Rep. 247; and to *Central etc. Asylum v. Craven*, 56 Am. St. Rep. 326.

Homestead is not lost if dwelling-house is afterward used as hotel also, p. 183.

Cited in *Estate of Levy*, 141 Cal. 650, sustaining right to probate homestead, on building composed of flats of which one was occupied by the parties; *Skinner v. Hall*, 69 Cal. 199, where house rented, although claimant had only resided there one day; *Heathman v. Holmes*, 94 Cal. 294, 295, 296, where owner built addition and leased it for hotel purposes; *In re Ogburn*, 105 Cal. 98, where part of dwelling used for business purposes of spouses; and on like facts in *Hogan v. Manners*, 23 Kan. 560, 33 Am. Rep. 203, holding further homestead creatable on leasehold interest; and in *De Ford v. Painter*, 3 Okla. 90, where principal use of building was for business or renting purposes. Distinguished on criterion of principal use, in *Laughlin v. Wright*, 63 Cal. 117, where principally used as hotel; *In re Crowey*, 71 Cal. 302, where claimant never resided on property, but rented it; *Maloney v. Hefer*, 75 Cal. 424, 7 Am. St. Rep. 182 (cited in *In re Allen*, 78 Cal. 295), where owner of two houses rented one; *Garrett v. Jones*, 95 Ala. 100, where principal use was for barroom; and in *Kurz v. Brusch*, 13 Iowa, 373, 81 Am. Dec. 437, and note 438, where no actual occupancy by claimant and building leased for business purposes. Cited also upon general subject in notes to *Pryor v. Stone*, 70 Am. Dec. 348, 350; *Casselman v. Packard*, 82 Am. Dec. 712; *Cabeen v. Mulligan*, 87 Am. Dec. 249; *Blue v. Blue*, 87 Am. Dec. 280; and to *Tucker v. Kenniston*, 93 Am. Dec. 432.

16 Cal. 184-186. **MCCARTNEY v. FITZ HENRY.**

Evidence.—Errors as to admission will not be considered without exception in lower court, p. 185.

Cited to same effect in *Keeran v. Griffith*, 34 Cal. 585; and in *Lee v. Murphy*, 119 Cal. 367. In *re Young*, Fed. Cas. No. 18149.

16 Cal. 186-187. **PEOPLE v. RILEY.**

Special Term held on insufficient notice is invalid, p. 187.

Cited in *Klopper v. Keller*, 1 Colo. 412, affirming legislative power to create special terms.

16 Cal. 187-188. **PEOPLE v. CORNELL.**

Crimes.—Judgment may determine grade of, p. 188.

Cited in *People v. Gray*, 137 Cal. 268, as to seduction where treated as a misdemeanor.

Appeal in Felony Cases.—Right to does not apply when conviction was only of misdemeanor, p. 188.

Cited to same effect in *People v. Appgar*, 35 Cal. 390, 391; and in *State v. McCormick*, 14 Nev. 349, construing "offense charged" to relate to judgment. Cited also in *People v. Johnson*, 30 Cal. 101, on point that supreme court has no jurisdiction of appeals in misdemeanor cases; and in *Gandy v. State*, 10 Neb. 249, holding no disqualification for office where conviction was of misdemeanor, though charge was felony. Distinguished in *People v. War*, 20 Cal. 120, holding right of appeal from order sustaining demurrer to felony indictment; and in *United States v. Watkins*, 7 Sawy. 89, 90, 91, 6 Fed. Rep. 155, 157, holding nature of judgment immaterial upon question of "conviction" as regards qualifications to vote.

16 Cal. 189-195. **MONTGOMERY v. KASSON.**

Condition Precedent.—Legislative grant held to be upon, p. 193.

Cited in *People v. Center*, 66 Cal. 560, applying principle to swamp land grant and holding burden of showing performance to be on grantees.

Vested Rights under legislative grant are not affected by repeal of statute, p. 194.

Cited to same effect in *Nevada Bank v. Steinmiz*, 64 Cal. 316, as to issuance of railroad aid bonds; *Carr v. State*, 127 Ind. 207, 22 Am. St. Rep. 627, as to funding act and holding further as to remedies against state upon repudiation; *Ex parte Goodin*, 67 Mo. 639, as to certificate of exemption from jury duty; and in *Jumbo etc. Co. v. Bacon*, 79 Tex. 13, as to application for purchase of public land. Distinguished in *Allen v. Forrest*, 8 Wash. 704, holding preference of right to purchase given to prior improver repealable when right not exercised.

16 Cal. 195-200. **GUY v. DU UPREY.** 76 Am. Dec. 518.

Subrogation—Mortgage.—Stranger paying mortgage debt without

assignment cannot after its cancellation have it reinstated and himself subrogated, p. 198.

Cited in *Richards v. Griffith*, 92 Cal. 497, 27 Am. St. Rep. 158, on point that latent equity will not be kept alive by subrogation to prejudice of subsequent bona fide purchaser; *Heiney v. Lontz*, 147 Ind. 423, as to volunteer, where no fraud or imposition shown; *Darrough v. Bank*, 125 Cal. 275, but holding right to subrogation established under facts; *Brown v. Rouse*, 125 Cal. 651, denying right when payment made voluntarily. Distinguished in *Redington v. Cornwell*, 90 Cal. 58, allowing subrogation by stockholder to creditor's rights as against another, under facts stated. See note to *Garwood v. Eldridge*, 34 Am. Dec. 200, as to what constitutes discharge of mortgage.

Mechanic's Lien.—Guardian cannot by his contract burden ward's land with lien, p. 200.

Cited in *Morse v. Hinckley*, 124 Cal. 157, 159, holding contract with attorney void without order of court; *Fish v. McCarthy*, 96 Cal. 485, 31 Am. St. Rep. 238, holding contract void without order of court; and in note to *Loonie v. Hogan*, 61 Am. Dec. 692, as to creation of lien by executors, trustees, or guardians.

16 Cal. 200-202. LOGAN v. HILLEGASS.

Void Judgment—Remedy at Law.—Court can quash execution on such judgment and injunction will not lie to restrain its enforcement, p. 202.

Cited to same effect in *People v. Rains*, 23 Cal. 129; *Bell v. Thompson*, 19 Cal. 708; *Sanchez v. Carriaga*, 31 Cal. 172, where judgment and execution void upon face and one defendant insolvent; *Ketchum v. Crippen*, 37 Cal. 228, where subsequent mortgagee, party to foreclosure suit, brought separate action to enjoin sale and for his subrogation; *Murdock v. De Vries*, 37 Cal. 529, where plaintiff had obtained greater relief than prayed for; *California etc. Co. v. Central Pac. etc. Co.*, 47 Cal. 531, as to right to enjoin trespasses under alleged void order permitting entry by railroad company; *Gates v. Lane*, 49 Cal. 269, as to justice's judgment, although execution issued by county clerk on filing transcript of docket; *Cowley v. Northern Pacific etc. Co.*, 46 Fed. Rep. 331, as to judgment rendered on stipulation of attorney in contravention of client's directions. Cited also in notes to *Taylor v. Lewis*, 19 Am. Dec. 139; *Commonwealth v. Magee*, 49 Am. Dec. 514, and to *Little Rock etc. Co. v. Wells*, 54 Am. St. Rep. 249, upon general subject; *Ross v. Heathcock*, 57 Wis. 97, as to power to stay execution and annul judgment on motion because costs erroneously inserted; and in *Bell v. Thompson*, 19 Cal. 708, where remedy by motion held not to extend beyond term.

Default Judgment.—Application to set aside must show meritorious defense, p. 202.

Cited to same effect in *People v. Rains*, 23 Cal. 129; *Bell v. Thompson*, 19 Cal. 708, where technical defense held insufficient for granting motion; and in *Collins v. Scott*, 100 Cal. 452, applying rule to judgment obtained by fraud.

16 Cal. 202-207. **TOMLINSON v. RUBIO.**

Trespass.—Injunction will not restrain where no allegation of defendant's insolvency or of irreparable injury, p. 206.

Cited to same effect in *Gardner v. Stroeve*, 81 Cal. 151, as to preliminary mandatory injunction against obstruction of public road; and in *Tevis v. Ellis*, 25 Cal. 519, as to restraining sheriff from executing writ of restitution on property of stranger to suit; but disapproved in concurring opinion, p. 520.

16 Cal. 207. **CHAMBERLAIN v. REED.**

Dismissal of Appeal for want of prosecution operates as affirmation of judgment, p. 207.

Cited to same effect in *Chase v. Beraud*, 29 Cal. 138, as to liability of sureties on appeal bond. Distinguished as to last point in dissenting opinion in *State v. Biesman*, 12 Mont. 18, main opinion following *Chase v. Beraud*.

Dismissal of Appeal for want of prosecution destroys right to second appeal; only remedy is to vacate order of dismissal, p. 207.

Cited to same effect in *Casanova v. Kreusch*, 21 W. Va. 728, where dismissal was for failure to give proper bond (but see *Hax v. Lee*, 1 Colo. 190, where main case distinguished); and in *Perry v. Hora*, 21 W. Va. 736, where dismissed for failure to file, or make deposit for, transcript.

16 Cal. 208-213. **ROBINSON v. BOARD OF SUPERVISORS.**

Certiorari will lie to review act of supervisors in creating office and determining salaries, p. 209.

Cited in *Sullivan v. Gage*, 145 Cal. 767, holding mandamus does not lie to compel state board of examiners to allow claim for attorney's fees allowed by court in action by state to dissolve corporation wherein court made void order appointing receiver; *Eldorado v. Elstner*, 18 Cal. 149, holding certiorari proper as to allowance of claims against county; *Murray v. Supervisors*, 23 Cal. 495, as to granting of ferry license, and holding complaint sufficient; *Miller v. Board*, 25 Cal. 97, as to improper rejection of official bond; *Commissioners v. Griffin*, 134 Ill. 340, 341, as to enlargement of district by drainage commissioners; *State v. Washoe County*, 14 Nev. 70, as to allowance and auditing of claims of county clerk; and in *Gilbert v. Board*, 11 Utah, 387, as to removal of employee of fire department. Distinguished, holding writ improper, in *Pine Bluff etc. Co. v. Pine Bluff*, 62 Ark. 202, holding ordi-

nance in case legislative; In re Saline County Subscription, 45 Mo. 56, 57, 58, 100 Am. Dec. 340, 341, and 342, as to subscription by county to railroad stock and issuance of bonds therefor; State v. Osburn, 24 Nev. 194, but denying writ in matter of canvass of election returns; State v. County Commissioners, 7 Nev. 397, as to discharge of taxes, holding further mode or manner of action not reviewable if within jurisdiction. Cited also in Belser v. Hoffschneider, 104 Cal. 460, holding act of city council in vacating assessment judicial and therefore final; in note to Wulzen v. Board, 40 Am. St. Rep. 40, upon general subject, and to Duggen v. McGruder, 12 Am. Dec. 535, as to tribunals to which writ issuable. See also, Osterhout v. Rigney, 98 N. Y. 223.

Powers of board of supervisors when conferred by special act do not extend beyond that act, p. 211.

Cited to same effect in Sutro v. Pettit, 74 Cal. 337, 5 Am. St. Rep. 445, holding overissued bonds void, even when held by bona fide purchasers; Modoc County v. Spencer, 103 Cal. 501, as to employment of special counsel by supervisors. Distinguished in Lewis v. Colgan, 115 Cal. 537, granting board of examiners implied power to appoint expert.

16 Cal. 213-220. BOWMAN v. NORTON.

Mortgage on Homestead executed by husband alone, was not absolutely void under act of 1851; aliter under act of 1860, p. 216.

Cited, to same effect, in Himmelman v. Schmidt, 23 Cal. 121, holding mortgage enforceable when such homestead abandoned; McQuade v. Whaley, 31 Cal. 533, as to conveyance by husband alone; Godfrey v. Thornton, 46 Wis. 685, holding, however, wife's dower rights not barred. Distinguished, Inge v. Case, 65 Tex. 80, holding mortgage void under local act. Cited, also, in note to Poole v. Gerrard, 65 Am. Dec. 486, as to necessity of joinder of spouses on alienation of homestead; and Stewart v. Mackey, 67 Am. Dec. 612, as to foreclosure of mortgages invalid when made.

Homestead.—Nature of estate discussed and stated, p. 216.

Cited in McQuade v. Whaley, 31 Cal. 531 (cited in Smith v. Shrieves, 13 Nev. 310), holding estate not joint tenancy; Johnston v. Bush, 49 Cal. 201, to same effect, holding further property resumes original character after termination of homestead; and note to Poole v. Gerrard, 65 Am. Dec. 483, upon nature of homestead rights. Cited, also, in Riley v. Pehl, 23 Cal. 74, as to creation of homestead upon wife's separate estate.

Homestead is not subject to judgment lien, p. 219.

Cited to same effect in Eby v. Foster, 61 Cal. 287, Tyrrell v. Baldwin, 78 Cal. 475, holding estate not subject to debts of survivor after wife's death; Lean v. Givens, 146 Cal. 741, lvey of execution on homestead as land creates lien to extent of any excess in value above homestead exemption, which by proper proceedings be determined to exist; McDon-

ald v. Badger, 23 Cal. 400, but sustaining sale as to property not covered by homestead; Nevada Bank v. Treadway, 8 Sawy. 467, 17 Fed. Rep. 895, holding execution sale of homestead void; and notes on exemption of homestead from lien or sale; Hoyt v. Howe, 62 Am. Dec. 710; Blue v. Blue, 87 Am. Dec. 278; Currier v. Sutherland, 20 Am. Rep. 151, and Pipkin v. Williams, 38 Am. St. Rep. 247. Cited, also, In re Boyd, 4 Sawy. 265 (cited in Creighton v. Leeds, 9 Oreg. 220), on point that lien is statutory and depends on entry.

16 Cal. 220-248. **PAYNE v. TREADWELL.** S. C. 5 Cal. 310.

Alcalde.—Authority to make grant is presumed, p. 227.

Cited in Weisenberg v. Truman, 58 Cal. 69, sustaining deed by city of Los Angeles as successor to pueblo; Holladay v. San Francisco, 124 Cal. 356, discussing nature of pueblo title; De Castro v. Fellom, 135 Cal. 231, as to grant confirmed and patented; White v. Moses, 21 Cal. 41 (cited in Scott v. Dyer, 54 Cal. 434), holding proof of grant admissible without proof of order of town council; Scott v. Dyer, 54 Cal. 433, holding further that neither pueblo nor city could open street through land so granted, without making compensation; Latham v. Los Angeles, 87 Cal. 518, as to pueblo grant, holding evidence insufficient to show land to have been public plaza when granted; Galvin v. Palmer, 113 Cal. 53, applying rule of presumption to city deed under Black Point Reservation Act; and holding further presumption not attackable by stranger to title or one in hostility to it; Merryman v. Bourne, 9 Wall. 602, holding further as to confirmation by Van Ness Ordinance and Congressional Acts; and Crespin v. U. S., 168 U. S. 213, holding also presumption attaches that land granted was within pueblo.

Judicial Notice extends to existence, powers, rights, boundary and jurisdiction of pueblo; to matters of general public history and general public laws and acts, p. 231.

Cited to same effect, In re Choje, 112 Cal. 633, on point that certain places are incorporated cities; Bouldin v. Phelps, 12 Sawy. 306, 30 Fed. Rep. 556, as to Mexican laws in force in California when ceded; and note to Lanfear v. Mestier, 89 Am. Dec. 667, as to laws incorporating municipal corporations; at p. 668, as to jurisdiction of city, over its streets, etc.; p. 675, as to laws of mother state or country; p. 680, as to the situation, boundaries, powers, and jurisdiction of cities; and p. 681, as to historical facts.

Legislative Powers.—Municipal lands held in trust should be disposed of according to order of legislature, p. 233.

Cited in City v. Jacks, 139 Cal. 549 et seq., noted under Hart v. Burnett, 15 Cal. 530; People v. Coler, 166 N. Y. 32, on point that city is subject to legislative control in all respects except as expressly limited by constitution; San Francisco v. Beideman, 17 Cal. 462, as to conveyance by city to Fund Commissioners in trust for creditors; San Fran-

cisco v. Canavan, 42 Cal. 558, confirming power of legislature to order sale of city hall lots; *Board v. Martin*, 92 Cal. 217, upon question of reservation of schoolhouse sites under Van Ness Ordinance; *Wooster v. Plymouth*, 62 N. H. 208, 210, as to legislative control over municipal corporations and property and holding constitutional act which deprives town of right to jury trial in action for injury from defective highway; *State v. Rosenstock*, 11 Nev. 140, holding constitutional act appointing county officers *ex officio* city officers, and holding further as to powers of legislature to interfere with local self-government; and *United States v. Hare*, 4 Sawy. 665, 26 Fed. Cas. 145, as to conveyances through the sinking fund commissioners. Distinguished, *Grogan v. San Francisco*, 18 Cal. 614, denying legislative control over municipal property not held in trust for public municipal uses, as to sales of city slip property. Cited, also, note to *Mount Hope Cemetery v. Boston*, 35 Am. St. Rep. 538, as to legislative control over municipal property; and *Johnson v. Taylor*, 60 Tex. 369, as to legislative power to pass validating acts as to defective acknowledgments.

Complaint in ejectment held sufficient, as stating ultimate facts, p. 243.

Cited on the same point, holding complaints sufficient in *Haight v. Green*, 19 Cal. 117; *Haggin v. Kelly*, 136 Cal. 483, and *Jones v. Memmott*, 7 Utah, 343; *Salmon v. Symonds*, 24 Cal. 266, holding unnecessary the allegation of continuance of plaintiff's seisin; *Depuy v. Williams*, 26 Cal. 314, holding evidence of collusion admissible although not pleaded; *Caperton v. Schmidt*, 26 Cal. 512, 85 Am. Dec. 206—holding, further, judgment conclusive as to title put in issue; *Garwood v. Hastings*, 38 Cal. 218, 224, as to allegation of seisin; *McCarthy v. Yale*, 39 Cal. 586, holding system of such pleading completely established; *Ferrer v. Home etc. Co.*, 47 Cal. 431, as to plaintiff's ownership of property insured, in action on policy; *Keller v. Ocana*, 48 Cal. 638; *Kidder v. Stevens*, 60 Cal. 422—holding, further, that findings as to seisin is one of fact; *Rego v. Van Pelt*, 65 Cal. 256, as to allegation of ouster; *Gruell v. Spooner*, 71 Cal. 494, holding evidence of withholding sufficient; *Heeser v. Miller*, 77 Cal. 193, and *Johnson v. Vance*, 86 Cal. 130, as to allegation of ownership; and upon same point, *Souter v. Maguire*, 78 Cal. 544, and *Daly v. Sorocco*, 80 Cal. 368, in action to quiet title; in *Johnson v. Vance*, 86 Cal. 131, and *McCarthy v. Brown*, 113 Cal. 18, as to ouster, applying rule to findings; *Hihn v. Mangenberg*, 89 Cal. 269; in *County v. Budd*, 96 Cal. 50, as to ejectment for rooms in courthouse; *F. A. Hihn Co. v. Fleckner*, 106 Cal. 97, holding, further, that denial that withholding was wrongful or unlawful raises no issue; and, on same point, *McCauley v. Gilmer*, 2 Mont. 205 (cited in *Billings v. Sanderson*, 8 Mont. 204, and in *Mackay v. McDougal*, 19 Mont. 493, and see 492, 494, 495, 496), sustaining judgment on pleadings; *McCarthy v. Brown*, 113 Cal. 20, as to right of possession, applying rule to findings; and, on same point, *Gavin v. Swain*, 113 Cal. 326; *Davis v. Clark*,

2 Mont. 395, as to pleading of right to possession when seisin alleged; *Mauldin v. Ball*, 5 Mont. 103, in action for injunction depending on legal title; *Bank v. Roberts*, 9 Mont. 328, affirming denial of motion to make more specific; *Lewis v. St. Paul etc. Co.*, 5 S. Dak. 154; *Brady v. Kreuger*, 8 S. Dak. 467, 59 Am. St. Rep. 773, holding complaint good for ejectment but bad for forcible entry and detainer; *Beard v. Federy*, 3 Wall. 494, holding, further, as to particularity of description; *Ely v. New Mexico etc. Co.*, 129 U. S. 294 (cited in *Union etc. Co. v. Warren*, 82 Fed. Rep. 522), applying rule to action to quiet title, as to plaintiff's ownership and defendant's assertion of adverse claim. Distinguished in *Turner v. White*, 73 Cal. 300, holding allegation of ownership conclusion of law when stated as consequence of derangement which is alleged. Cited also in *Hedges v. Dam*, 72 Cal. 522, upon point that pleading of act as unlawful, wrongful, or illegal, without stating facts, is bad; *Meyer v. School District*, 4 S. Dak. 425, that pleading of acts as "duly" done, etc., is good; *Frazier v. Lynch*, 97 Cal. 371, upon point of necessity of alleging and proving withholding by defendant; *Rhoades v. Higbee*, 21 Colo. 92, as to sufficiency of decree in ejectment which provided also for correction of judgment in prior ejectment suit; *Meyendorf v. Frohner*, 3 Mont. 323, holding allegation that defendant entitled to possession, merely legal conclusion; *Dilley v. Sherman*, 2 Nev. 69, as to evidence necessary to sustain ejectment.

General Objection to Evidence is insufficient, p. 248.

Cited to same effect in *Keeran v. Griffith*, 34 Cal. 585, as to lack of preliminary proof for introduction of patent; *Brown v. Kentfield*, 50 Cal. 132, where rule applied to exception to instructions.

16 Cal. 248-255. **KOPPIKUS v. STATE CAPITOL COMMISSIONERS.**

Indebtedness Beyond Constitutional Limit.—Act does not create which makes appropriation in anticipation of receipt of revenue, p. 253.

Cited to same effect in *People v. Pacheco*, 27 Cal. 207, 208, 219, as to appropriation for semiannual payment of interest for twenty years; *McBean v. Fresno*, 112 Cal. 168, 53 Am. St. Rep. 197, upholding municipal contract otherwise fair and reasonable for future annual payments for sewer farm; *People v. May*, 9 Colo. 411, as to appropriation for current expenses, but holding that they can be made only by orders on incoming revenues, accepted as payment without recourse; *Springfield v. Edwards*, 84 Ill. 631 (cited in *Law v. People*, 87 Ill. 422, and in *Davenport v. Kleinschmidt*, 6 Mont. 540), restricting rule to cases where future tax actually levied and following principle in *People v. May*, *supra*; *Laporte v. Gamewell etc. Co.* 146 Ind. 472, 58 Am. St. Rep. 363, following *Springfield v. Edwards*, *supra*, but holding contract void where no money in treasury to pay either when contract made or work accepted, although otherwise when debt due under it; *Saleno v. Neosho*, 127 Mo. 641, 48 Am. St. Rep. 660, where city contracted to pay fixed

sum annually for twenty years for water, contingent on its being furnished; *Ash v. Parkinson*, 5 Nev. 26, as to act creating fund for expenses of legislature; *Little v. Portland*, 26 Oreg. 246, when contractors specially agreed to look alone to fund to be raised by assessment; In re State Warrants, 6 S. Dak. 522, 55 Am. St. Rep. 855, as to warrants on uncollected revenues to defray current expenses, holding immaterial the fact that warrants bore interest; *Western etc. Co. v. Lane*, 7, S. Dak. 9, holding warrant valid unless it affirmatively appears no tax was levied; and holding further that fund of any year could not be split so as to prejudice holder of warrant issued in preceding year; and in *State v. Hopkins*, 14 Wash. 63, on question of determining outstanding county indebtedness; *State v. Helena*, 24 Mont. 529, quoting *Springfield v. Edwards*, 84 Ill. 631. Distinguished in *Eaton v. Mimaugh*, 43 Or. 476, holding void act requiring election to be held for selection of county seat, and requiring county clerk to issue warrants to pay for erection of new courthouse if new location selected, and to levy tax to pay warrants; holding appropriation improper, in *Salem Water Co. v. Salem*, 5 Oreg. 32, 33, where appropriation made in advance of levy of tax; *Spilman v. Parkersburg*, 35 W. Va. 619, to same effect, holding also power of taxpayer to enjoin creation of indebtedness; and in *Hebard v. Ashland*, 55 Wis. 148, holding tax void when levied to pay excess indebtedness, and setting aside tax sales.

Trial by Jury.—Constitutional provision applies only to civil and criminal cases where issue of fact joined, p. 263.

Cited in *Cauhape v. Bank*, 127 Cal. 202, applying rule to action to determine adverse claim to personalty; *Bigelow v. Draper*, 6 N. Dak. 165, and In re Bradley, 108 Iowa, 478, as to all issues in condemnation suit except compensation, and see dissenting opinion in *Kohl v. United States*, 91 U. S. 379, discussing powers of government to condemn; *Heyneman v. Blake*, 19 Cal. 596, as to proceedings in eminent domain; *Cassidy v. Sullivan*, 64 Cal. 267, as to divorce suit; *Fish v. Benson*, 71 Cal. 435, as to equity case involving fraud, stating general rule as to right to jury on special issues; *Woods v. Varnum*, 85 Cal. 645, as to summary proceedings in trial of official for misdemeanor (Pen. Code, sec. 772); *Wiggins v. Williams*, 36 Fla. 651, as to act empowering courts of chancery to enjoin trespasses, but holding act void in so far as it gave such courts power to impose damages for trespass without jury; *Lake v. Tolles*, 8 Nev. 290, as to equitable action to quiet title, although answer raised question as to plaintiff's right of property; *Basey v. Gallagher*, 20 Wall. 681, a suit in equity, holding further as to advisory character of verdict of jury upon special issues. Cited also in note to *Flint etc. Co. v. Roberts*, 48 Am. Dec. 186, as to right to jury trial generally, and at page 190, with reference to eminent domain proceedings; in *People v. Powell*, 87 Cal. 356, holding void, act in derogation of common-law right to jury from vicinage; and in *Doe v. Waterloo etc. Co.*, 43 Fed. Rep. 221, on point of equitable jurisdiction of suit

brought upon filing adverse claim in land office on contest of right to patent to mine.

Special Proceeding.—Jury trial is not matter of right, p. 254.

Cited in *Dorsey v. Barry*, 24 Cal. 453, on point of power of court to continue special term in election contest, and in dissenting opinion in *Appeal of Houghton*, 42 Cal. 68, as to jurisdiction of supreme court in special proceedings.

General citation: *Barnard etc. Mnfg. Co. v. Monett Milling Co.*, 79 Mo. App. 155.

16 Cal. 255-284. **ARGENTI v. SAN FRANCISCO.**

Municipal Indebtedness.—Charter limitation held to be directory only and not limitation of powers of city, p. 263.

Cited to same effect in *People v. Lynch*, 51 Cal. 37, 21 Am. Rep. 694, denying power of legislature to interfere with municipal discretion as to manner of assessment for local street improvement; *Rauch v. Chapman*, 16 Wash. 579, 58 Am. St. Rep. 60, upon point that constitutional limitation of indebtedness does not include expenditures made mandatory by constitution.

Corporations—Ultra Vires.—Party having benefit of contract cannot question its validity, when sued upon, as being beyond capacity or authority to contract, p. 264.

Cited to same effect in *Pixley v. Western Pacific etc. Co.*, 33 Cal. 191, 199, 91 Am. Dec. 628, 634, applying also doctrine of ratification; *Hudepohl v. Liberty Hill etc. Co.*, 80 Cal. 559, as to note given under contract for working mine on shares; *Illinois etc. Bank v. Pacific etc. Co.*, 117 Cal. 347, as to corporate notes signed in contravention of by-laws; *Iron Mountain etc. Co. v. Stansell*, 43 Ark. 283, as to "change tickets" issued in violation of statute; *Denver etc. Co. v. McClelland*, 9 Colo. 27, 59 Am. Rep. 142, as to policy issued by fire insurance company; *Bradley v. Ballard*, 55 Ill. 419, 8 Am. Rep. 659, as to notes for borrowed money issued by company transacting business beyond proper limits; *State Board v. Citizens' etc. Co.*, 47 Ind. 413, 17 Am. Rep. 708, as to contract by street railway company to subscribe to state fair; note to *In re Assignment etc. Co.*, 70 Am. St. Rep. 170, on general subject. Distinguished in *Northport v. Northport Townsite Co.*, 27 Wash. 548, fact that abutting owner allowed city to improve street does not estop him, in action for assessment, from setting up illegality of contract; *Pancoast v. Travelers' etc. Co.*, 79 Ind. 178, holding mortgagor cannot defend foreclosure action by pleading ultra vires as to mortgage; *Turner v. Cruzen*, 70 Iowa, 204, on point that corporation will not be relieved from ultra vires contract without restoration of consideration received by it, when possible; and in *Union etc. Bank v. Hunt*, 7 Mo. App. 51, as to bank's purchase of own stock.

Municipal Corporation may become liable on implied contract, when charter does not prescribe form of contract, p. 265.

Cited in *Water Co. v. Breed*, 139 Cal. 436, 446, noted under *Gas Co. v. San Francisco*, 9 Cal. 453; *Center etc. Tp. v. State*, 150 Ind. 171, holding school township liable for fund misappropriated by it; *Lincoln etc. Co. v. Village*, 57 Neb. 77, holding defendant liable for use of hydrants under contract irregularly executed; *Monteith v. Parker*, 36 Or. 175, 78 Am. St. Rep. 770, on point that liability of such corporation is like that of private individual and granting interest on its warrants; *Livingston v. School Dist.*, 11 S. Dak. 152, sustaining right of holder of bond issued for schoolhouse in excess of amount allowed by law, entitled to recover value; *Geer v. School Dist.*, 111 Fed. 687, cited under *San Francisco Gas Co. v. City*, 9 Cal. 453. Denied in dissenting opinion, *Sacramento Co. v. S. P. Co.*, 127 Cal. 226, and cf. *Watterson v. Mayor*, 106 Tenn. 419, holding city not liable on contract not authorized by charter; to same effect in *Pimental v. San Francisco*, 21 Cal. 362 (cited in *State v. Dickerman*, 16 Mont. 290, *Clark v. Saline*, 9 Neb. 524), in *Chapman v. County*, 107 U. S. 357; and in *Detroit v. Detroit etc. Co.*, 56 Fed. Rep. 903, as to moneys paid city on illegal sales of city property; *Los Angeles v. Los Angeles*, 65 Cal. 480, as to fines paid to city treasurer which lawfully belonged to county; *Colusa County v. Glenn County*, 117 Cal. 438, as to taxes unlawfully received on formation of new county; *Higgins v. San Diego etc. Co.*, 118 Cal. 555, as to liability for use of water plant; *Allen v. Intendant*, 89 Ala. 648, as to money borrowed for legitimate purpose, distinguishing case, however, where borrowing is expressly prohibited; *Wren v. Indianapolis*, 96 Ind. 218, holding mandamus maintainable to compel city to issue estimate for street work done, although irregularities occurred in proceedings; and to same effect in *Portland etc. Co. v. East Portland*, 18 Or. 33; *Wapello County v. B. & M. etc. Co.*, 44 Iowa, 608, on point that county can recover back moneys paid by it under its void contract; *Leavenworth v. Mills*, 6 Kan. 298, *Fowler v. Superior*, 85 Wis. 420, and *Barber etc. Co. v. Denver*, 72 Fed. Rep. 340, on point that city is primarily liable for street work and can relieve itself only by levy and collection of tax; and see also *Baker v. Seattle*, 2 Wash. 582, on same point; *Brown v. Atchison*, 39 Kan. 51, 7 Am. St. Rep. 526, as to liability to warrant holders when refunding act declared void; *Hutchinson etc. Co. v. Commissioners*, 48 Kan. 78, 93, holding mandamus proper to compel issuance of railroad aid bonds, where road properly built, although election was alleged to be irregular; and see, to same effect, *Board v. Cornell*, 57 Fed. Rep. 153; *Paducah v. Calhoun*, 78 Ky. 328, as to liability to city clerk when labor of prisoners was taken instead of fines; *Agawam Nat. Bank v. South Hadley*, 128 Mass. 509, as to liability for money borrowed, on point that where positively prohibited, when both parties are at fault, it cannot be recovered back; *Taymouth v. Koehler*, 35 Mich. 27, holding liability imposed by ratification of unauthorized bridge

contract; *Davis v. School District*, 81 Mich. 220, as to services rendered by school superintendent, although having no teacher's license; but see *Goose River Bank v. Willow etc. Township*, 1 N. Dak. 29, 28 Am. St. Rep. 607, holding no liability to teacher who has no certificate; *Methodist etc. Church v. Mayor*, 50 Miss. 606, as to bricks taken and used by city; *Loring v. St. Louis*, 10 Mo. App. 421, as to liability of city for taxes illegally collected; *State v. Wilkinson*, 20 Neb. 618, as to estoppel of county of as to railroad aid and refunding bonds; *Grand Island etc. Co. v. West*, 28 Neb. 860 (and see *Turner v. Cruzen*, 70 Iowa, 204), as to liability for light furnished under contract before its annulment; *Stenberg v. State*, 50 Neb. 135, as to moneys paid city on unauthorized sale of lands; *Waitz v. Ormsby County*, 1 Nev. 378, as to money loaned to county when expended for its use and benefit and for purpose authorized by law; *Nelson v. Mayor*, 63 N. Y. 544 (cited in *McBrien v. Grand Rapids*, 56 Mich. 103), as to materials for construction of sewer received by city in excess of authorized amount; *Cincinnati v. Cameron*, 33 Ohio St. 365, as to waiver of written orders required by statute, in building hospitals; dissenting opinion in *Dowell v. Portland*, 13 Oreg. 270, main opinion denying right of purchaser at void tax sale, right to recover back purchase price under facts; *Nurnberger v. Barnwell*, 42 S. C. 162, as to illegal license tax paid under protest, there being, also, an express promise to repay if illegal; *Heidenheimer v. Galveston*, 2 Posey (Tex.), 158, as to filling in of ponds and abating nuisance, by order of town council; *Salt Lake v. Hollister*, 3 Utah, 207, as to license tax due United States, where city, although wrongfully, acts as distiller and receives profits of sales; *Eastern etc. Asylum v. Garrett*, 27 Gratt. 175, when supplies were forcibly taken by military officers for support of inmates of public lunatic asylum; *Tacoma v. Lillie*, 4 Wash. 806, as to contract with city councilman for extra services; *Goshorn's Exrs. v. County Court*, 42 W. Va. 740, 744, affirming liability for market value of hogs ordered for and delivered to poor farm, though not for agreed price; *Kneeland v. Gilman*, 24 Wis. 42, as to agreement to compromise and discharge taxes; *Hitchcock v. Galveston*, 96 U. S. 351, as to contract for street improvements; *Dorian v. Shreveport*, 28 Fed. Rep. 295, as to liability on bonds issued for work done, although city had no authority to issue bonds; *Gladstone v. Throop*, 71 Fed. Rep. 348, where city had borrowed money for street work and issued bonds therefor, to be repaid out of assessments, which were afterward collected. Distinguished in *Zottman v. San Francisco*, 20 Cal. 108, holding no liability for street work, as upon implied contract, under charter inhibitions; *McBrien v. Grand Rapids*, 56 Mich. 106, as to excavation, no acceptance by city being shown; *McDonald v. Mayor*, 68 N. Y. 28, 23 Am. Rep. 148, where statute required all contracts to be in writing, and criticising *Nelson v. Mayor*, 63 N. Y. 544, supra; *German etc. Co. v. Spokane*, 17 Wash. 328, holding no general liability for failure to raise special fund to pay for work; and *Boro v. Philipps County*, 4 Dill. 221, 3 Fed. Cas. 912, holding county at

large not liable for work affecting only a part. Cited also in *Pacific etc. Co. v. Joliffe*, 2 Wall. 457, as to nature of implied contract generally, and in *Lucas v. San Francisco*, 28 Cal. 593, upon its construction of same case at 7 Cal. 463.

Warrants drawn on particular fund cannot be sued on and are not negotiable instruments, p. 274.

Cited to same effect in *Martin v. San Francisco*, 16 Cal. 286, holding further that assignee cannot sue without assignment of original debt; *People v. Gray*, 23 Cal. 127, holding assignment of warrant necessary even when payable to X or bearer and commenting on Martin's case, *supra*; *Shakespear v. Smith*, 77 Cal. 640, 11 Am. St. Rep. 329, applying rule to order for requisition drawn on county school superintendent; *Iron Min. etc. Co. v. Stansell*, 43 Ark. 283, affirming right of equitable assignee of "change tickets" to sue on original claim, although they were issued in violation of statute; *People v. Board*, 11 Colo. App. 129, discussing rights of assignee.

Warrants not in statutory form are invalid and cannot be sued on, p. 276.

Approved in *Bingham Co. v. First Nat. Bank*, 122 Fed. 23, county warrants void on face because of omission of recitals made essential by statute cannot be validated by ratification of county board; *Traveler's etc. Co. v. Denver*, 11 Colo. 439, holding further as to nature of special fund warrants.

Contracts with City.—Bid and acceptance held to constitute, p. 279.

Distinguished in *Williams v. Bergin*, 129 Cal. 465, discussing form of bid for street work; *Kutchin v. Engelbret*, 129 Cal. 637, discussing form of contract for such work.

Municipal Corporations.—Contracts of can be made only in cases and form prescribed by charter, p. 282.

Cited in *Blanchard v. Hartwell*, 131 Cal. 266, applying principle to method of amendment of charter; *Auerbach v. Salt Lake Co.*, 23 Utah, 117, determining liability of county on county warrant issued in payment for furniture; *Hampton v. Commissioners*, 4 Idaho, 652, services rendered under void contract with county commissioners cannot be recovered for on quantum meruit; *Bellevue Water Co. v. Bellevue*, 3 Idaho, 753, where city makes contract for erection of waterworks and to supply water for city purposes upon payment of stipulated sum by city, and contract performed by both parties, validity of contract not impeachable by ordinance enacted after contract made; *Wallace v. Mayor*, 29 Cal. 186, denying power of common council to contract for future payment of attorney's fee; *Ex parte Frank*, 52 Cal. 608, 28 Am. Rep. 644, affirming municipal power to license occupations; *McCoy v. Briant*, 53 Cal. 250, holding municipal bonds void because not issued in mode directed by statute; *Aid Society v. Reis*, 71 Cal. 633, on point that reformation of minors was not expressly granted to San Fran-

disco or necessarily implied; *Fluty v. School District*, 49 Ark. 98, on point that executory contract made without authority cannot be enforced, and further that corporation cannot recover back moneys paid contractor under it; *Smith etc. Co. v. Denver*, 20 Colo. 87, as to necessity for appropriation prior to contract; *Laycock v. City*, 35 La. Ann. 477, holding ordinance necessary; but reversed on rehearing, holding further as to liability on assigned warrants; *Lincoln v. Stockton*, 75 Me. 147, as to debt contracted by selectmen to pay older debt, where no authorization or ratification; *Lebscher v. Commissioners*, 9 Mont. 320, as to contract for care of poor; *McCloud v. Columbus*, 54 Ohio St. 454, as to advertising for bids on street work. Distinguished in *Heidenheimer v. Galveston*, 2 Posey (Tex.), 156, on theory of liability on implied contracts. Cited also in note to *Lloyd v. Mayor*, 55 Am. Dec. 350, upon liability of city as to private ministerial powers; and to *Bailey v. Mayor*, 38 Am. Dec. 677, as to difference between public and private character of acts and property of municipal corporations and legislative control thereof; and in *Tacoma v. Tacoma etc. Co.*, 16 Wash. 294 (but see S. C. 17 Wash. 466), on general construction of municipal contracts and holding further as to liability for misrepresentation in such contracts.

General citation: *McClure v. Tipton School Dist.*, 79 Mo. App. 87.

16 Cal. 285-287. **MARTIN v. SAN FRANCISCO.**

County Warrants are not notes and payment depends on sufficiency of fund on which they are drawn, p. 286.

Cited to same effect in *People v. Gray*, 23 Cal. 126, holding warrant not transferable by delivery merely; and in *Shakespear v. Smith*, 77 Cal. 640, 11 Am. St. Rep. 329, holding order for requisition not to protect innocent holder.

Assignment of Warrant is insufficient without assignment of original indebtedness, p. 286.

Distinguished in *People v. Gray*, 23 Cal. 126, holding assignment of warrant equivalent to assignment of debt, but denying relief in absence of any assignment; and in *National Bank v. Herold*, 74 Cal. 607, 5 Am. St. Rep. 478, holding assignment of warrant the equitable assignment of debt.

Warrants not specifying fund and date of ordinance under which issued are void, p. 287.

Cited in *Raymond v. People*, 2 Colo. App. 341, applying rule to non-compliance with requirement as to purpose of issue; and in *Bore v. Phillips County*, 4 Dill. 223, 3 Fed. Cas. 913, where bonds did not state fund on which drawn. Distinguished in *Iron Mountain etc. Rd. v. Stansell*, 43 Ark. 283, holding suit on debt, covered by certificate proper, although certificate itself void for noncompliance with statutory form.

16 Cal. 287-291. HARRISON v. BROWN.

Married Woman's Mortgage of separate estate is invalid without husband's concurrence, although she is abandoned, p. 290.

Cited to same effect in *Cook v. Walling*, 117 Ind. 13, 10 Am. St. Rep. 21, holding wife not estopped, although married to second husband in belief of death of first, and second joins in mortgage; *Beckman v. Stanley*, 8 Nev. 262; note to *Morrison v. Wilson*, 73 Am. Dec. 599; note to *Buford v. Adair*, 64 Am. St. Rep. 869.

16 Cal. 295-332. DOLL v. MEADOR.

Act of 1841 granting five hundred thousand acres construed and held to operate as present grant, p. 314.

Cited and followed as to construction in *Van Valkenburg v. McCloud*, 21 Cal. 335, 336, 337; *Higgins v. Houghton*, 25 Cal. 255 (cited in *Sherman v. Buick*, 45 Cal. 668); *Bludworth v. Lake*, 33 Cal. 262, holding further as to rights under state location; *Wardwell v. Paige*, 9 Oreg. 521, construing further state action thereunder; and in *Patterson v. Tatum*, 3 Sawy. 166, 18 Fed. Cas. 1332 (cited in *Godwin v. Davis*, 74 Miss. 744; and see 745, 746). Cited, also, in *State v. Sioux City etc. Co.*, 7 Neb. 372, as to effect of grant as conveyance in praesenti, and holding further as to right to attack state patent for fraud; *Northern Pacific etc. Co. v. Barnes*, 2 N. Dak. 365, on same point, holding further as to effect of selection and location, and at p. 371, on nature of grantee's title; note to *GrosLouis v. Northeut*, 3 Oreg. 399, on point that grantee's estate under Donation Act is subject to judicial sale before patent; *Lamb v. Davenport*, 1 Sawy. 632, 14 Fed. Cas. 1005, also holding Donation Act a present grant, liable to be defeated by nonperformance of conditions subsequent; *Sanger v. Sargent*, 8 Sawy. 94, holding grant to Central Pacific Railroad under act of 1862, a present grant. Distinguished in *Kile v. Tubbs*, 23 Cal. 437, 441, as to Swamp and Overflowed Land Act; and in *Terry v. Megerle*, 24 Cal. 624, 85 Am. Dec. 88, holding title not to pass until survey and selection; and see on same point *McNee v. Donahue*, 142 U. S. 592, 595. Cited, also, in note to *McClintock v. Bryden*, 63 Am. Dec. 96, upon rights of settlers on public lands.

Town Sites are not subject to pre-emption, but are subject to sale otherwise, p. 322.

Cited to same effect in *Levison v. Ryan*, 75 Cal. 296, as to agricultural college grant under act of 1872.

State Patent cannot be attacked, if valid on its face, by one not in privity with common or paramount source, p. 331.

Cited in *Saunders v. La Purisima etc. Co.*, 125 Cal. 165, and *Standard etc. Co. v. Habishaw*, 132 Cal. 119, holding patent conclusive as to character of land included; *Phillips v. Carter*, 135 Cal. 606, as to such attack by trespasser; *Harrington v. Goldsmith*, 136 Cal. 169, as to

attack in partition suit; *Deweese v. Reinhard*, 61 Fed. 781, as to attack on ground that lands were not subject to selection by state; *Rhodes v. Craig*, 21 Cal. 423, as to defenses of invalidity of location and inefficacy of patent; *Pioche v. Paul*, 22 Cal. 111, as to invalidity of Mexican grant regularly confirmed and patented; *Kile v. Tubbs*, 23 Cal. 442, holding, however, that a bona fide occupant and pre-emptioner could attack state patent on ground that land was not within swamp land grant, and see same case, 32 Cal. 338; *Ah Yew v. Choate*, 24 Cal. 568, on point that state cannot tax as mineral, land patented as school land; *People v. Stratton*, 25 Cal. 251, holding further as to rights of real owners of patented land in equity; *Carder v. Baxter*, 28 Cal. 101, as to whether lands were swamp; *Hagar v. Lucas*, 29 Cal. 312, as to extent of patented Mexican grant; *Durfee v. Plaisted*, 38 Cal. 83, as to rights of patentee for Suscal Ranch under special act; *Cruz v. Martinez*, 53 Cal. 243, as to nonpublication of survey; *Churchill v. Anderson*, 56 Cal. 60, as to fraud practiced in obtaining patent, and on same point in *Chapman v. Quinn*, 56 Cal. 278, and *Kentfield v. Hayes*, 57 Cal. 410; *O'Connor v. Frashear*, 56 Cal. 501, as to errors of officers in listing land; *Montgomery v. Donnelly*, 57 Cal. 69, holding, however, patent attackable by homestead claimant; *Burling v. Thompkins*, 77 Cal. 261, holding patent not attackable by one whose offer to enter as homesteader had been refused by register, and who had not appealed from order, and under like facts in *Dreyfus v. Badger*, 108 Cal. 63; *Zumwalt v. Deckey*, 92 Cal. 158, as to nonlisting of land to state; *Galvin v. Palmer*, 113 Cal. 53, as to fraud in patent to San Francisco under Black Point Act of 1870; *Johnson v. Drew*, 34 Fla. 147, 43 Am. St. Rep. 184, as to point that land not subject to patent; *Pierce v. Sparks*, 4 Dak. 2, as to right to patent townsite; *Merrill v. Dixon*, 15 Nev. 405; dissenting opinion in *Doolan v. Carr*, 125 U. S. 639, main opinion holding patent attackable collaterally for want of authority for issuance; *Dodge v. Perez*, 2 Sawy. 654, 655, 7 Fed. Cas. 798, as to errors in confirmation of Mexican grant, when attacked by one who did not present claim under act of 1851; *Manning v. San Jacinto Tin Co.*, 7 Sawy. 426, 9 Fed. Rep. 732, as to land under confirmed Mexican grant, where party attacking patent for fraud had merely located mineral lands, but had not applied for patent; *Cowell v. Lammers*, 10 Sawy. 253, 21 Fed. Rep. 203, where lands patented as nonmineral were located on, as mineral, by trespasser; concurring opinion in *Lake Superior etc. Co. v. Cunningham*, 44 Fed. Rep. 839, where trespasser alleged land to have been forfeited to state. Distinguished in *Terry v. Megerle*, 24 Cal. 629, 85 Am. Dec. 92, holding patent attackable by pre-emptioner where state issues patent without having title to land; *Rondell v. Fay*, 32 Cal. 362, where patent void on its face, and holding further as to patent good in part only; *Carr v. Quigley*, 57 Cal. 395, where patent was held void, covering lands reserved from grant (but see *McLaughlin v. Heid*, 63 Cal. 214, 216, 217, 218, overruling *Carr v. Quigley*, *supra*); in *Edwards v. Rolley*, 96 Cal. 411, 31 Am. St. Rep. 235,

holding main case not followed, as to case of patent issued without authority, and citing Cucamonga etc. Co. v. Moir, 83 Cal. 101; and in White v. Allen, 3 Oreg. 114, holding patent attackable collaterally, by settler on government land under Donation Act before issuance of certificate to another. Cited, also, upon point that patent is conclusive against collateral attack, as to regularity of proceedings upon which it was issued, in Irvine v. Tarbat, 105 Cal. 243, as to whether land was open for homestead; Dreyfus v. Badger, 108 Cal. 65, as to whether suitable for cultivation; and in Le Roy v. Clayton, 2 Sawy. 501, 15 Fed. Cas. 361, as to whether legal notice given or proper survey made. Cited, also, upon subject of force of and collateral attack upon patent, in note to Alexander v. Greenup, 4 Am. Dec. 549; and to Stark v. Mather, 12 Am. Dec. 566, discussing remedies for annulment of patent.

16 Cal. 332-345. **PEOPLE v. SEYMOUR.** 76 Am. Dec. 521.

Taxation.—Legislature can prescribe mode and manner of levy, enforcement, and collection of taxes, p. 341.

Cited to same effect in People v. McEwen, 23 Cal. 58, as to assessment of lands of cotenants; Henderson v. State, 58 Ind. 248, holding constitutional act validating taxes; State v. C. P. R. R. Co., 21 Nev. 264, ruling similarly as to act refusing right to allege former recovery in defense to tax suit; Kneeland v. Milwaukee, 15 Wis. 463, as to act taxing railroad and other corporations; and in Cross v. Milwaukee, 19 Wis. 516, as to act making relevy and reassessment. Distinguished, Teralta etc. Co. v. Shaffer, 116 Cal. 523, 58 Am. St. Rep. 196, holding unconstitutional act imposing more onerous conditions as to redemption than those existing at time of sale. Cited, also, in dissenting opinion in Cooper v. Freeman etc. Co., 61 Ark. 48, as to requirements of valid tax, main opinion holding sale void because excessive tax levied. See Nottage v. Portland, 35 Or. 548, 557, citing note 76 Am. Dec. 527, as to statutes validating taxes. Cited, also, in note to Goshen v. Stonington, 10 Am. Dec. 133, as to legislative power to pass retrospective statutes; Hasbrouck v. Milwaukee, 80 Am. Dec. 735, as to power to validate invalid contracts or municipal acts; Hersey v. Board, 82 Am. Dec. 719, upon invalid assessments; Rison v. Farr, 87 Am. Dec. 64; In re Madera etc. Dist., 27 Am. St. Rep. 142, and Leep v. St. Louis etc. Co., 41 Am. St. Rep. 134, upon legislative powers generally; and to Applegate v. Ernst, 96 Am. Dec. 273, upon taxation of railroads.

Tax on Property is a debt and collectible by action by state, p. 342.

Cited to same effect in People v. Frisbie, 18 Cal. 403, holding, further, several judgment recoverable in action on joint assessment, where only one liable; Oakland v. Whipple, 39 Cal. 115, holding remedy not confined to seizure and sale nor to enforcement of lien by action; concurring opinion in S. F. Gas Co. v. Brickwedel, 62 Cal. 646, as to offset of amount due for taxes against demand against city; San Luis Obispo v. Hendricks, 71 Cal. 245, applying rule to license tax, as to bar by limita-

tion; *Dubuque v. Illinois etc. Co.*, 39 Iowa, 61, 74, holding right to collect by suit implied from right to levy; *State v. Georgia Co.*, 112 N. C. 37, holding right to collect by action, cumulative; dissenting opinion in *Henry v. Garden City Bank etc. Co.*, 145 Cal. 60, majority holding where prior mortgage foreclosed and purchased at sale and redeemed property from sale under taxes levied on second mortgage, he cannot recover amount so paid from second mortgagee. Distinguished in *Perry v. Washburn*, 20 Cal. 351, holding a tax not a "debt" under Legal Tender Act; *State v. Yellow Jacket etc. Co.*, 14 Nev. 242, 250, ruling similarly, upon point of joinder of several years' taxes in one complaint; *Hanson Co. v. Gray*, 12 S. Dak. 125, 126, 76 Am. St. Rep. 592, holding taxes not so collectible under local statutes. Cited, also, in note to *Johnson v. Howard*, 98 Am. Dec. 570, as to nature of tax as debt; and to *Richards v. Commissioners*, 42 Am. St. Rep. 656, on general subject.

Taxation.—Assessment may be made *prima facie* evidence of regularity of proceedings, p. 344.

Cited to same effect in *Guy v. Washburn*, 23 Cal. 116, holding also assessment roll not vitiated by failure to complete "alphabetical index"; dissenting opinion in *McCready v. Sexton*, 29 Iowa, 415, main opinion holding act unconstitutional making deed conclusive as to essential prerequisites; *aliter*, as to nonessential or directory provisions. Cited, also, in note to *Polk v. Rose*, 89 Am. Dec. 778, and to *Curl v. Watson*, 95 Am. Dec. 766, upon recitals in tax deeds as evidence.

Tax Suits.—Cost of advertising and percentage are recoverable, p. 344.

Cited to same effect in *People v. Todd*, 23 Cal. 184; note to *Dell v. Marvin*, 79 Am. St. Rep. 179, on attorney's fees.

16 Cal. 345-350. **DOWNER v. FORD.**

Declarations in recognition of another's title held to create estoppel, p. 350.

Cited in *Carson v. Broady*, 56 Neb. 651, 71 Am. St. Rep. 693, holding tenant estopped to deny landlord's title; *Carter v. Town*, 60 Tex. 638, on point that deceased husband's declarations as to character of his possession are admissible by wife claiming from him.

16 Cal. 350-357. **RUSS v. MEBIUS.**

Resulting Trust does not arise from purchase by parent in child's name, p. 355.

Cited in *Spitler v. Kaeding*, 133 Cal. 502, holding loan of money by father and taking note and mortgage in child's name, to be *prima facie* evidence of gift to child; *Faylor v. Faylor*, 136 Cal. 95, but holding presumption as to advancement rebutted under facts stated.

Resulting Trust for want of consideration cannot be established by parol evidence where deed states consideration, p. 356.

Cited to same effect in *Feeney v. Howard*, 79 Cal. 530, 12 Am. St. Rep. 166; *Acker v. Priest*, 92 Iowa, 617; *Morrall v. Waterson*, 7 Kan. 207, where rule applied to parol agreement by grantee to hold land in trust for grantor; and in *Moore v. Jordan*, 65 Miss. 234, 7 Am. St. Rep. 642, where nominal consideration recited and habendum declared use to grantor's children. Distinguished in *Bayles v. Baxter*, 22 Cal. 579, holding parol evidence admissible to prove trust where deed taken in name of other than real purchaser; *Brisson v. Brisson*, 75 Cal. 532, 7 Am. St. Rep. 195, where similar evidence admitted to show trust arising from fraud. Cited, also, in notes to *Neill v. Keese*, 51 Am. Dec. 758, 759, upon resulting trusts as in main case, and at 760, as to admissibility of parol evidence in reference thereto; note to *Jackson v. Cleveland*, 90 Am. Dec. 271, as to admissibility of such evidence to contradict recital as to consideration, to raise resulting trust; and in *Burt v. Wilson*, 28 Cal. 637, 87 Am. Dec. 144, holding no trust created expressly or by implication, under facts stated. Distinguished in *Brooks v. Union Trust etc. Co.*, 146 Cal. 137, parol evidence is admissible to establish resulting trust in realty arising under Civil Code section 853, though money consideration recited, which was not in fact paid by trustees.

16 Cal. 357-358. **PETERS v. FOSS.**

New Trial.—Ruling on motion not disturbed except for plain abuse of discretion, p. 358.

Cited to same effect in *Lestrade v. Barth*, 17 Cal. 289, where granted to allow defendant to amend answer; *Mange v. Heringhi*, 26 Cal. 581; *Pico v. Cohn*, 67 Cal. 260, and *Breckenridge v. Crocker*, 68 Cal. 404, where ground of motion was insufficiency of evidence; and *In re Car-riger*, 104 Cal. 84, and *Murray v. Heinze*, 17 Mont. 358, where motion granted on that ground. Distinguished in *Patterson v. Ely*, 19 Cal. 36, where motion made on ground of surprise.

Amendments of Pleadings should be allowed, to promote substantial justice, p. 358.

Cited to same effect in *Lestrade v. Barth*, 17 Cal. 289, where new trial granted for that purpose; *Farmers' etc. Bank v. Stover*, 60 Cal. 396, holding it error to refuse amendment to answer, alleging novation; *Burns v. Scooffy*, 98 Cal. 276, holding it error to strike out answer as insufficient where application to amend made; and in *McCausland v. Ralston*, 12 Nev. 203, where application to amend answer was made after testimony closed.

16 Cal. 358-366. **PEOPLE v. ABBOTT.**

Usurpation of Office.—Complaint need not establish right of relator to the office, p. 364.

Cited to same effect in *People v. Fleming*, 100 Cal. 541, 38 Am. St. Rep. 313; *People v. Reclamation Dist.*, 121 Cal. 526, sustaining complaint against reclamation district; *People v. Campbell*, 138 Cal. 17, holding interest of relator immaterial; dissenting opinion in *People v. Superior Court*, 114 Cal. 478, a mandamus proceeding; *Town v. State*, 29 Fla. 140, and in *People v. Cooper*, 139 Ill. 488, holding further as to form of information; *People v. McIntyre*, 10 Mont. 168; and *People v. Clayton*, 4 Utah, 432 and at 436 on point that defendant must establish his title.

Statutory Construction.—Title of act may be resorted to to determine meaning if doubtful, p. 365.

Cited to same effect in *State v. Conkling*, 19 Cal. 512; and in *People v. San Francisco*, 36 Cal. 602, holding, however, that body of act controls, and first section is governed by the succeeding ones.

General citation: *Petterson v. Board of Pilot Comm'rs*, 24 Tex. Civ. App. 42.

16 Cal. 367-368. **CORNELL v. GALLAGHER.**

Administrator.—Surviving partner cannot be appointed although decedent's brother, p. 367.

Cited in note to *Berry v. Hamilton*, 54 Am. Dec. 521, as to who may be administrator. Cited, also, in *Perrin v. Lepper*, 72 Mich. 556, upon subject of power of equity over trustees for violation of trusts.

16 Cal. 368. **MENDIOCA v. ORR.**

Appeals.—Service of notice may be shown by affidavit, p. 368.

Cited to same effect in *Dalzell v. Superior Court*, 67 Cal. 454, holding affidavit insufficient as to constructive service in attorney's absence.

16 Cal. 369-372. **PEOPLE v. STONE.**

Larceny.—Taking one's own property is, if done with intent to charge bailee, p. 371.

Cited to same effect in *People v. Thompson*, 34 Cal. 672, holding crime dependent on intent; *Jones v. Jones*, 71 Cal. 92, where applied to taking by son from mother's guardian; *People v. Raschke*, 73 Cal. 383, where accused had obtained possession of goods under contract by which title was to pass when note paid; *Bruley v. Rose*, 57 Iowa, 655, where pledgor had taken from pledgee; *Taylor v. State*, 7 Tex. App. 661, 662, a case of pledge, holding evidence admissible as to defendant's intent in the taking; and in note to *State v. Homes*, 57 Am. Dec. 278, upon larceny of one's own property.

16 Cal. 372-375. **STUART v. LANDER.** 76 Am. Dec. 538.

Pleadings in justices' court must be construed with great liberality, p. 374.

Cited to same effect in *Aucker v. McCoy*, 56 Cal. 526, holding further

defective complaint did not go to jurisdiction of court so as to invalidate execution sale; *Lataillade v. Santa Barbara etc. Co.*, 58 Cal. 6, as to complaint in action for rent; *Montgomery v. Superior Court*, 68 Cal. 410, an action for money borrowed, where defendant did not demur, and holding further complaint need not be subscribed.

Judgment is Contract and may be sued on as such, p. 375.

Cited to same effect in *Bean v. Loryea*, 81 Cal. 153, as to discharge in insolvency from judgment held by nonresident; *Dore v. Thornburgh*, 90 Cal. 66, 25 Am. St. Rep. 101, and in note 102, as to bar of statute of limitations; *Rowe v. Blake*, 99 Cal. 170, 37 Am. St. Rep. 46, allowing independent action on decree of foreclosure; *Simpson v. Cochran*, 23 Iowa, 83, 92 Am. Dec. 412, where period for execution on judgment on note had not expired; *Sheehan etc. Co. v. Sims*, 28 Mo. App. 67, holding, however, that all judgment debtors, if joint, must be made defendants in second suit, and further as to power of court to prevent vexatious and oppressive exercise of right; *Eldridge v. Aultman*, 35 Neb. 885, 37 Am. St. Rep. 477, holding remedy by execution on domestic judgment not exclusive; dissenting opinion in *McDonald v. Dickson*, 87 N. C. 410, main opinion, however, holding judgment not contract as to doctrine of part payment thereon to remove bar of statute of limitations; and in *Meyer v. Brooks*, 29 Oreg. 207, as to right to attachment in suit on foreign deficiency judgment in foreclosure. Distinguished in *Pinzel v. Russel*, 4 Oreg. 127, holding right to sue on judgment not absolute, unless particular circumstances of necessity for independent action shown; and denying right where power of levy lost by unexplained delay of creditor. Cited, also, on general subject in note to *Gutta Percha etc. Co. v. Mayor*, 2 Am. St. Rep. 414.

Amendment of Answer to permit plea of statute of limitations is not allowable after answer to merits, p. 375.

Cited in *Harney v. Corcoran*, 60 Cal. 316, and *Bank v. Heron*, 122 Cal. 110, sustaining refusal to allow amendment antagonistic to original answer; *Kraft v. Greathouse*, 1 Idaho, 258, on point that plea of statute cannot be raised for first time on appeal from default judgment.

16 Cal. 375-377. **KLOCKENBAUM v. PIERSON.**

Notice of Protest, if unsigned by notary or otherwise, is insufficient to charge indorser, p. 376.

Cited to same effect in *Bank v. Dibrell*, 91 Tenn. 302, holding, however, irregularity waived by promise to pay note after knowledge of discharge by reason thereof.

16 Cal. 377-378. **ELLIOTT v. SHAW.**

Judgment by Default.—Showing to set aside held insufficient, p. 377.

Cited in *People v. Rains*, 23 Cal. 129, holding insufficient excuse of miscalculation of time when pleading due; *Whiteside v. Logan*, 7 Mont. 383, ruling similarly and holding further matter entirely discretionary; dissenting opinion in *Horton v. New Pass etc. Co.*, 21 Nev. 193, main opinion, however, holding failure to file pleading through attorney's absence, excusable neglect. Distinguished in *Jansen v. Barbour*, 12 Mont. 575, holding no abuse of discretion to grant motion based on miscalculation, or to grant leave to renew it to show additional grounds therefor. Cited, also, in note to *Burnham v. Hays*, 58 Am. Dec. 398, as to surprise, inadvertence, and excusable neglect.

16 Cal. 378. **BARBER v. BARBER.**

Divorce Decree cannot prohibit remarriage in absence of statute, p. 378.

Cited to same effect in *Baughman v. Baughman*, 32 Kan. 544, where statute existed but was not violated; *Wiley v. Wiley*, 22 Wash. 119, 79 Am. St. Rep. 926, holding statute prohibiting remarriage to have no extraterritorial effect. Distinguished in *Musick v. Musick*, 88 Va. 17, holding valid, under statute, decree prohibiting marriage until further order of court, and holding statute constitutional. Cited, also, in note to *Boykin v. Rain*, 65 Am. Dec. 357, as to effect of divorce decree on right to remarry.

16 Cal. 379-380. **CASTRO v. WETMORE.**

Pleading.—Denial of date of execution and delivery of note raises no material issue, p. 380.

Cited to same effect in *Caulfield v. Stevens*, 17 Cal. 571, as to denial of time, amount, and work in action for services; *Landers v. Bolton*, 26 Cal. 418, where denial went to consideration, and not fact, of conveyance; and in *Doll v. Good*, 38 Cal. 290, where conjunctive form of denial used, and holding denial of mere literal truth of allegation insufficient.

16 Cal. 381-382. **KITTRIUGE v. STEVENS.** S. C. on second appeal, 23 Cal. 283.

16 Cal. 383-384. **ROACH v. GRAY.**

Mining Rules.—Evidence of held not improper under facts, p. 384.

Cited in note of *McClintock v. Bryden*, 63 Am. Dec. 93, on proof of mining customs, and at p. 104 as to effect on rights.

16 Cal. 385-386. **PEOPLE v. WOLF.**

Bail Bond.—Liability on, attaches when bond declared forfeited by proper court, p. 385.

Cited to same effect in *People v. Smith*, 18 Cal. 499, considering (as in main case) offer to appear by attorney; *People v. Penniman*, 37 Cal. 273,

holding liability not affected by failure to indorse approval of magistrate on bond; *State v. Biesman*, 12 Mont. 15, applying rule to recognizance on appeal after judgment for fine; holding liability to attach on defendant's release and that complaint need not allege demand on sureties; and in *United States v. Eldridge*, 5 Utah, 173, holding further as to waiver by sureties of rights arising from irregularities in proceedings.

16 Cal. 386-389. EDMONDSON v. MASON.

County Clerk must furnish certified copies when fees are tendered, p. 388.

Approved in *Potter v. Talkington*, 5 Idaho, 319, district court clerk need not certify transcript on appeal unless legal fees for copying and certification tendered to him.

Distinguished in *Lick v. Madden*, 25 Cal. 212, holding that where prepayment not demanded clerk cannot afterward refuse to issue attachment.

Service of Injunction.—Mode of, stated, p. 388.

Cited in *Golden Gate etc. Co. v. Superior Court*, 65 Cal. 190, on point that service can be made by any person competent to serve summons.

16 Cal. 389-392. FAGG v. CLEMENTS.

Justice's Court.—Jurisdiction of person is sufficiently shown against collateral attack by recitals in certificate of service, p. 392.

Cited to same effect in *Gregory v. Bovier*, 77 Cal. 123, and in *Fulkerson v. Davenport*, 70 Mo. 546, holding residence presumable from place of service; but distinguished as to this in *Jolley v. Foltz*, 34 Cal. 328, holding, however, parol evidence admissible to support the presumption and in aid of judgment; cited in *Miller v. Smith*, 115 Mich. 431, 69 Am. St. Rep. 587, quoting *Fulkerson v. Davenport*, 70 Mo. 546.

16 Cal. 392-398. McCLOUD v. O'NEALL.

New Trial.—Competency of witness cannot be considered when motion based on insufficiency of evidence, p. 397.

Cited in *Williams v. Hawley*, 144 Cal. 102, as to incompetent documentary evidence; to same effect in *Pierce v. Jackson*, 21 Cal. 641; *Janson v. Brooks*, 29 Cal. 223; and see *Ashton v. Dashaway Assn.*, 84 Cal. 70.

Incompetency of Evidence cannot be considered where no objection raised at trial, p. 397.

Cited to same effect in *Tebbs v. Weatherwax*, 23 Cal. 60, and in *Frauenthal v. Bridgeman*, 50 Ark. 350, as to admission of parol evidence to vary writing; *Janson v. Brooks*, 29 Cal. 223, as to evidence of entry; *Wright v. Roseberry*, 81 Cal. 91, upon question of best evidence; and in Notes Cal. Rep.—54

Watt v. Nevada etc. Co., 23 Nev. 163, as to sufficiency of evidence admitted, to sustain findings.

Where Party Seeking to Set Aside Verdict is not in position to take advantage of error, he cannot object to admission of evidence, p. 397.

Approved in Betz v. People's Bldg. etc. Assn., 23 Utah, 605, where plaintiff does not appeal he cannot have reviewed a ruling against him to which he objected.

16 Cal. 398-403. **COLLINS v. MONTGOMERY.**

Parties—Corporation.—Attachment in action against individual stockholders will not reach corporate property, p. 403.

Cited to same effect in Curtis v. Murry, 26 Cal. 635, applying rule to judgment where corporation not made defendant by corporate name.

16 Cal. 403-423. **CHAPIN v. BRODER.**

Costs are waived unless cost bill properly filed; and clerk has no authority otherwise to include them in judgment, p. 418.

Cited in Galindo v. Roach, 130 Cal. 390, disallowing amendment to cost bill after statutory period for filing, where excusable neglect not asserted; Emeric v. Alvarado, 64 Cal. 590, on point that under the statute, sale under judgment in which costs were added after entry, passed no title; Riddell v. Harrell, 71 Cal. 260, holding void a judgment for costs entered by clerk without filing or service of cost bill; Hotchkiss v. Smith, 108 Cal. 287, upon point that sheriff's fees on attachment are not recoverable on execution when not included in cost bill; Cantwell v. McPherson, 2 Idaho, 1047, on main proposition; to same effect in Orr v. Haskell, 2 Mont. 353, 354, where clerk did not fill blank in judgment within legal time therefor; concurring opinion in Howard v. Richards, 2 Nev. 135 (cited in 90 Am. Dec. 524), holding further as to proper remedy in case of such error. Distinguished in Antoine Co. v. Ridge Co., 23 Cal. 222, holding costs insertable within two days after taxation under amendment to statute.

Appeal.—Lien of judgment is not extended by, where undertaking insufficient, p. 420.

Cited in Savings etc. Co. v. Bear Valley etc. Co., 89 Fed. 39, holding lien not extended by appointment of receiver or by agreement.

Distinguished in Englund v. Lewis, 25 Cal. 352, holding lien extended where appeal properly taken.

Decree in Foreclosure may contain personal judgment against mortgagor, p. 422.

Cited to same effect in Hobbs v. Duff, 23 Cal. 623, and in Culver v. Rogers, 28 Cal. 524, holding further such judgment not lien on general property till deficiency judgment docketed; Englund v. Lewis, 25 Cal. 349 (cited in Blum v. Keyser, 8 Tex. Civ. App. 678), holding judgment

personal and to have become lien when docketed; *Hibberd v. Smith*, 50 Cal. 518, 519, holding further general lien attaches on return of deficiency, and that main case overruled by *Englund v. Lewis*, supra, as to opinion on rehearing; *Frost v. Meetz*, 52 Cal. 671, following *Hibberd v. Smith*, supra, holding further as to power to correct mistake in computation as to amount of deficiency; *Leviston v. Henninger*, 77 Cal. 463, on point that validity of execution on deficiency judgment depends on docketing of judgment and on sheriff's return; *Weil v. Howard*, 4 Nev. 389, following principle in *Hobbs v. Duff*, supra, and criticising *Englund v. Lewis*, supra; *Bell v. Gilmore*, 25 N. J. Eq. 107, also following *Hobbs v. Duff*, supra, holding further on point as to when decree has force of judgment. Distinguished in *Cormerais v. Genella*, 22 Cal. 125, as having no application to decree under then statute, but holding that personal judgment cannot be docketed or become general lien until after sale.

16 Cal. 423-431. **CORNWALL v. CULVER.**

Mexican Grant.—Ejectment will lie for land within boundaries of, though not surveyed, p. 429.

Cited to same effect in *Riley v. Heisch*, 18 Cal. 199, 201, as to Sutter grant; *Soto v. Kroder*, 19 Cal. 97, holding action not defeated by want of approval by departmental assembly or other circumstances; *Mahoney v. Van Winkle*, 21 Cal. 577, where grant was of specific tract known by particular name; and holding further (579) as to effect of noncompliance with conditions of grant; *Thornton v. Mahoney*, 24 Cal. 580, as to grant of specific quantity within area of larger tract; *Love v. Shartzer*, 31 Cal. 494, holding immaterial the question whether title was perfect or inchoate; *Rich v. Maples*, 33 Cal. 108, applying rule in action under Stat. 1858, p. 345; *Shanklin v. McNamara*, 87 Cal. 381, applying rule to patentee under act of Congress of July 23, 1866, and holding further as to conflict with Swamp Land Act; *Van Reynegan v. Bolton*, 95 U. S. 36 (cited in *Frasher v. O'Connor*, 115 U. S. 108) holding action maintainable by grantee as to entire tract before its segregation, even as against preemption; and in *Montgomery v. Bevans*, 1 Sawy. 682, as to effect of statute of limitations of 1863.

16 Cal. 432-434. **DOLL v. FELLER.**

Ejectment.—Description of premises in complaint held sufficient, p. 434.

Cited in *Beard v. Federy*, 3 Wall. 494, holding description of property by name sufficient, and holding further as to general requisites of complaint.

Judgment may be affirmed on remission of damages, p. 434.

Cited to same effect in *Muller v. Boggs*, 25 Cal. 187, as to judgment in ejectment for excessive share of rents and profits; and in *Tenny v. Mulvaney*, 9 Ore. 418, as to verdict for damages for breach of contract.

16 Cal. 435. PEOPLE v. WOOSTER.

Demurrer to Indictment.—Appeal from order sustaining held waived by failure to except, p. 435.

Distinguished in *People v. Lee*, 107 Cal. 478, holding no waiver by submission by court to another grand jury, exception being taken to order on demurrer.

16 Cal. 436-440. PEOPLE v. NORTON.

Substitution of Attorney held proper under facts, p. 440.

Cited in *Woodbury v. Nevada etc. Co.*, 121 Cal. 166, and *Gage v. Atwater*, 136 Cal. 172, on point that court must order substitution when requested under Code of Civil Procedure, 284; *Houghton v. Steele*, 58 Cal. 424, holding substitution of attorney and dismissal by him, to constitute prevention of performance, under facts.

Mandamus lies to compel substitution of attorney by court, p. 440.

Cited in *Courtwright v. Bear River etc. Co.*, 30 Cal. 579, as instance of original jurisdiction of supreme court in mandamus proceedings; and in *Rundberg v. Belcher*, 118 Cal. 590, holding, however, no facts shown sufficient to support application.

16 Cal. 451-461. BROWN v. SAN FRANCISCO.

Pueblo Lands.—Grants of could be made by governor and departmental assembly, p. 457.

Cited in *Steinbach v. Moore*, 30 Cal. 506, on point that such grants required presentation and confirmation by board of land commissioners; *Singleton v. Touchard*, 1 Black, 345, as to grants of common or pasture lands of pueblo; and in *San Francisco v. Canavan*, 42 Cal. 556, as to power of legislature over lands of city as successor of pueblo.

16 Cal. 461-473. GOODENOW v. EWER. 76 Am. Dec. 540.

Mortgage Creates Lien only and does not pass title either before or after condition broken, p. 467.

Cited in *Warner v. Freud*, 138 Cal. 655, noted under *McMillan v. Richards*, 9 Cal. 365; note on general subject to *Fields v. Clayton*, 67 Am. St. Rep. 193; *London etc. Bank v. Dexter, Horton & Co.*, 126 Fed. 607, in action by mortgagee who purchased property on foreclosure to cut off right of redemption of one not party to suit, but in privity with a defendant therein, decree of general foreclosure and resale may be made under prayer for general relief; *Lord v. Morris*, 18 Cal. 488, holding mortgage barred with note; *Dutton v. Warschauer*, 21 Cal. 621, 82 Am. Dec. 767 (and see note 775), as to mortgagee's interest after condition broken, holding rule to apply to mortgages prior to act of 1851; *Jackson v. Lodge*, 36 Cal. 39, applying rule to mortgage in form of absolute

deed, and holding parol evidence admissible to show fact; *Everett v. Buchanan*, 2 Dak. Ter. 264. Cited, also, in *Rice v. Kelso*, 57 Iowa, 119, as to attaching of mortgage on after-acquired title; note on general subject, to *Johnson v. Shuman*, 76 Am. Dec. 488; *Boggs v. Fowler*, 76 Am. Dec. 566; *Carroll v. Ballance*, 79 Am. Dec. 360; *Timms v. Shannon*, 81 Am. Dec. 639; *Bank v. Anderson*, 83 Am. Dec. 396; *Grether v. Clark*, 9 Am. St. Rep. 494; *Cranston v. Crane*, 93 Am. Dec. 112, as to nature of equity of redemption; *Taber v. Hamlin*, 93 Am. Dec. 117, as to mortgage of personalty.

Foreclosure Proceedings are necessary to divest mortgagor's title, p. 468.

Cited in *Stockton etc. Co. v. Harrold*, 127 Cal. 619, on point that foreclosure cannot be effected by mere answer.

Cited to same effect in *Boggs v. Hargrave*, 16 Cal. 563, 76 Am. Dec. 563, as to grantee of undivided interest; *San Francisco v. Lawton*, 18 Cal. 475, 79 Am. Dec. 189, holding further that adverse titles cannot be litigated in foreclosure suit; *Burton v. Lies*, 21 Cal. 91, applying rule to wife's interest in common property; *Heyman v. Lowell*, 23 Cal. 108, holding further as to right to bring in necessary defendants by supplemental complaint; *Alexander v. Greenwood*, 24 Cal. 512, applying rule to subsequent judgment creditor; *Harlan v. Rockerby*, 24 Cal. 562, holding writ of assistance improper against such grantee, if not made a party; *Carpentier v. Williamson*, 25 Cal. 161, where deed to grantee was unrecorded before decree; *Siter v. Jewett*, 33 Cal. 96, denying right of junior mortgagee to redeem from foreclosure sale under first mortgage, under facts; *Kreichbaum v. Melton*, 49 Cal. 56, applying rule to subsequent acquired title of vendee of mortgagor (as to which see also *Goodenough v. Warren*, 5 Sawy. 498, 10 Fed. Cas. 590), and holding further as to form of supplemental complaint to reach such title; *Aldrich v. Stephens*, 49 Cal. 679, upon point that grantee's title should be brought in by motion in original action, and not by new action (but see *Brckett v. Barnegas*, 116 Cal. 284, 58 Am. St. Rep. 166), and upon same point in *Jeffers v. Cook*, 58 Cal. 150, and *Barnard v. Wilson*, 66 Cal. 252, holding motion too late; dissenting opinion in *Bayley v. Muehe*, 65 Cal. 350; main opinion holding heirs of deceased mortgagor, not necessary defendants; *Siehler v. Look*, 93 Cal. 610, distinguishing, however, case of lienor after mortgage; *Jordan v. Sayre*, 24 Fla. 8, as to nature of foreclosure decree, distinguishing main case, however, as to effect of sale as satisfaction of debt, and as to right to bring new action where necessary parties were not included in first; *Terrell v. Allison*, 21 Wall. 293, as to purchaser before foreclosure suit, holding further decree not binding on his successors, although latter acquired after suit commenced. Distinguished in *Gutzeit v. Pennie*, 98 Cal. 329, holding administrator of deceased mortgagor not necessary defendant where property transferred. Cited, also, on general subject in note to *Stark v.*

Brown, 78 Am. Dec. 769; note to Street v. Beal, 85 Am. Dec. 506; Berlack v. Halle, 1 Am. St. Rep. 190; as to necessity of joinder of subsequent purchasers and encumbrancers; Turman v. Bell, 26 Am. St. Rep. 43, as to effect of decree on holders of equitable interests; O'Brien v. Moffitt, 36 Am. St. Rep. 574, as to defendants in foreclosure suits; and to Hokanson v. Gunderson, 40 Am. St. Rep. 357, as to rights of purchaser at foreclosure sale.

Mistake of Law.—Equity will not relieve from, unless accompanied by special circumstances of fraud, etc., p. 469.

Cited to same effect in Boggs v. Hargrave, 16 Cal. 565, 76 Am. Dec. 565, 566, as to purchaser's mistake at foreclosure sale, as to effect of decree; Kenyon v. Welty, 20 Cal. 641, 81 Am. Dec. 138, as to mutual supposition based on supreme court decision; Kopp v. Gunther, 95 Cal. 74, as to mistake by grantor of effect of his trust deed; Deseret etc. Bank v. Dinwoodey, 17 Utah, 60, denying reformation under facts stated; Kyle v. Fehley, 81 Wis. 71, 29 Am. St. Rep. 868, granting relief, however, in case of misrepresentation as to effect of deed; note to Storrs v. Barker, 10 Am. Dec. 327, and Alabama etc. Co. v. Jones, 55 Am. St. Rep. 519, as to relief based on ignorance of law; and to Kenyon v. Welty, 81 Am. Dec. 140, and to Martin v. Hamlin, 100 Am. Dec. 187, as to relief in equity from mistake of law.

Foreclosure Sale may be vacated for irregularity in proceedings, by court in which action is pending, p. 470.

Cited in Bernheim v. Cerf, 123 Cal. 171, holding relief grantable under Code of Civil Procedure, section 473, without new trial.

Tenant in Common in possession is liable to his cotenants for rents received from tenants of land, p. 471.

Cited to same effect in Abel v. Love, 17 Cal. 237, as to ditch property rented to others; Howard v. Throckmorton, 59 Cal. 87, distinguishing between liability for rents and profits made and for those received; Holloway v. Holloway, 97 Mo. 640, enforcing liability when tenant ousted, extending to share of moneys paid by him to discharge encumbrances; In re Tyler, 40 Mo. App. 384, holding tenant in possession liable for rents, when he is guardian for the cotenant; Shirley v. Goodnough, 15 Oreg. 643, as to liability of co-owners of horse to account with each other; and in Marx v. Goodnough, 16 Oreg. 32, as to like liability in favor of purchaser of partner's interest. Distinguished in McCord v. Oakland etc. Co., 64 Cal. 146, 49 Am. Rep. 696, holding tenant in common of mine not liable for extracting ore or for waste, where cotenant not excluded. Cited, also, in note to Chambers v. Chambers, 14 Am. Dec. 587; Flack v. Gosnell, 35 Am. St. Rep. 418, 421; Ward v. Ward, 52 Am. St. Rep. 926, on general subject; Robinson v. McDonald, 62 Am. Dec. 483, as to liability between cotenants for repairs; Pico v. Columbet, 73 Am. Dec. 555, Early v. Friend, 78 Am. Dec. 666; Israel v. Israel, 96 Am. Dec. 576, as to liability for rents and profits.

16 Cal. 473-504. **STUART v. ALLEN**. 76 Am. Dec. 551.

Administrator's Power to bind estate discussed, p. 498.

Cited in note to *Schlecker v. Hemenway*, 52 Am. St. Rep. 121, on same subject.

Probate Decree cannot be attacked collaterally for irregularities or defects, p. 499.

Cited in *Bank v. Ward*, 118 Mich. 100, applying rule to sale for taxes on petition of auditor general under local statutes; note to *Iverson v. Loberg*, 79 Am. Dec. 366, and to *Fitzgibbons v. Lake*, 81 Am. Dec. 304, on general subject.

Petition for Probate Sale—Jurisdictional Facts.—Substantial compliance with statute is sufficient, p. 500.

Cited to same effect, holding petition sufficient, in *Estate of Bentz*. 36 Cal. 689; Cited in *Estate of Heydenfeldt*, 127 Cal. 458, and in *Cotton v. Holloway*, 96 Ala. 353, as to insufficiency of personal estate to pay debts; *Richardson v. Butler*, 82 Cal. 176, 179, 16 Am. St. Rep. 103, 105, as to description of property; *Estate of Cook*, 137 Cal. 189, 191, but holding general reference to inventory insufficient; *Laurey v. Sterling*, 41 Or. 527, where administrator's petition to borrow money to pay debts states facts showing need of certain sum, objection that court records showed lack of necessity to borrow so large a sum not considered on collateral attack. *Byrnes v. Douglass*, 23 Nev. 87, applying principle to petition in condemnation proceedings; *Silverman v. Guldenfinger*, 82 Cal. 549, on collateral attack, as to value of property; *In re Arguello*, 85 Cal. 152, as to allegations of separate or community property, holding further omission cured by recital in order; *Burris v. Adams*, 96 Cal. 667, and *Nichols v. Lee*, 16 Colo. 157, where considered on collateral attack; *Cotton v. Holloway*, 96 Ala. 547, discussing general rules of construction of statutes; and *Sprigg v. Stump*, 7 Sawy. 293, 294, 8 Fed. Rep. 218, guardian's sale, as to ward's income and personal property, distinguishing, however, between guardian's and probate sale. Distinguished in *Wright v. Edwards*, 10 Oreg. 303, holding petition insufficient, and further that jurisdiction must affirmatively appear in petition. Cited, also, in note to *Long v. Burnett*, 81 Am. Dec. 427, and to *Lyne v. Sanford*, 27 Am. St. Rep. 859, as to power of probate court to sell realty; *Morris v. Hoyle*, 87 Am. Dec. 246, as to contents of petition for sale; in *Townsend v. Gordon*, 19 Cal. 206, as to addition of irrelevant or redundant matter, and in *Fitch v. Miller*, 20 Cal. 383, guardian's sale, as to mistake in stating amount of ward's estate.

Petition for Probate Sale.—Description by reference to inventory is sufficient, p. 500.

Cited to same effect in *Estate of Boland*, 55 Cal. 313, holding petition insufficient, however, because not stating condition of property; *Richardson v. Butler*, 82 Cal. 179, 16 Am. St. Rep. 105. Distinguished in *Townsend v. Gordon*, 19 Cal. 207, holding petition insufficient where ref-

erence to inventory not made for description; *Gregory v. Tabor*, 19 Cal. 409, where petition itself did not make express reference; and *Wilson v. Hastings*, 66 Cal. 244, 246, where reference merely made "for greater certainty" no description etc. appearing in petition.

Minors.—Order to show cause on probate sale may be served on guardian ad litem, p. 503.

Cited in note to *Smith v. Race*, 81 Am. Dec. 239, on point that minor heir must be made party to probate sale proceedings; and to *Townsend v. Tallant*, 91 Am. Dec. 623, as to necessity for appointment of guardian ad litem therein.

16 Cal. 505-514. **DE RUTTE v. MULDROW.**

Power of Attorney construed and held to embrace making of lease with right to purchase, p. 512.

Cited in *Jones v. Marks*, 47 Cal. 247, construing same power to embrace executory contract of sale, and holding further as to recording thereof; *Hunter v. Sacramento etc. Co.*, 7 Sawy. 500, 11 Fed. Rep. 16, holding same power not to extend to sale of land, and that no ratification of sale shown; and in note to *Billings v. Morrow*, 68 Am. Dec. 237, collecting cases in which power construed.

Contract to Make Contract is valid. Rule applied to lease with privilege of purchase, p. 512.

Cited to same effect in *Hall v. Center*, 40 Cal. 68, as to such lease, and holding such clause specifically enforceable; *Smith v. Phoenix etc. Co.*, 91 Cal. 330, 25 Am. St. Rep. 194, holding, further, equitable title in vendee under lease, and following *Hall v. Center*, supra; *Black v. Maddox*, 104 Ga. 162, as to specific performance of option, though signed by vendor only; *Hayes v. O'Brien*, 149 Ill. 419, affirming specific performance of such clause, where lessor had sold to another without notice lessee; *Ide v. Leiser*, 10 Mont. 12, 14, 24 Am. St. Rep. 20, 21, as to specific performance of extended option; *Schroeder v. Gemeinder*, 10 Nev. 365, following *Hall v. Center*, supra; and in *Clarno v. Grayson*, 30 Oreg. 120, holding option to purchase mine irrevocable.

16 Cal. 514-533. **STATE v. POULTERER.**

Auctioneers.—Act licensing construed, p. 521.

Cited in *State v. Conkling*, 19 Cal. 509, construing same and amendatory acts.

License Tax is collectible by action although statute gives other means of enforcing obligation, p. 524.

Cited in *San Francisco v. Heynemann*, 71 Cal. 155, as to liability of sureties on bond of tax collector. Distinguished in *Santa Cruz v. Santa Cruz etc. Co.*, 56 Cal. 150, holding carrier not liable in suit for license tax where no license issued.

Statutory Remedy held cumulative and not exclusive, p. 530.

Cited in note to *Benedict v. Brown*, 56 Am. Dec. 332, on same subject.

16 Cal. 533-559. MOTT v. SMITH.

Patent to Mexican Grant is conclusive as to validity of prior proceedings against United States and claimants under it and against collateral attack, p. 548.

Cited to same effect in *Pioche v. Paul*, 22 Cal. 111, as to collateral attack on validity of grant; *Semple v. Hagar*, 27 Cal. 170, denying right of state court to question collaterally decree of confirmation by federal courts.

Mexican Grant.—Validity is established by voluntary dismissal of appeal by United States from decree of land commission, p. 551.

Cited to same effect in *Mahoney v. Van Winkle*, 21 Cal. 576, as to refusal of government to appeal.

Acknowledgment.—"Consul" as used in statute relative to, embraces vice-consuls and consuls-general, p. 552.

Cited in *Morris v. Linton*, 61 Neb. 539, as to acknowledgment before consul-general.

Certificate of Acknowledgment is prima facie evidence of official character of officer making it, p. 552.

Cited to same effect in *Galvin v. Palmer*, 113 Cal. 55, applying rule to certificate to map by officer of war department; *Sargent v. Collins*, 3 Nev. 273, as to certificate of notary (distinguished in dissenting opinion 285); *Evans v. Lee*, 11 Nev. 197, as to certificate of vice consul-general.

Identity of Person is presumed from identity of name in absence of special circumstances, p. 554.

Cited to same effect in *People v. Thompson*, 28 Cal. 218, as to identity of houses named in two counts of indictment; *Carleton v. Townsend*, 28 Cal. 221, as to grantee and grantor in successive deeds although residence different (as to which see, also, *Mackey v. Easton*, 19 Wall. 631), holding, further, question one of fact for jury; *Lee v. Murphy*, 119 Cal. 368, as to identity of certifying notary and mortgagee; *Summer v. Mitchell*, 29 Fla. 208, 30 Am. St. Rep. 116, as to identity of witness to deed and certifying officer; and in *Stapleton v. Pease*, 2 Mont. 553 as to signature to jurat.

Married Woman's Property cannot be conveyed under her power of attorney, p. 556.

Cited to same effect in *Dentzel v. Waldie*, 30 Cal. 142, holding further invalidity of power cured by subsequent act, and as to husband's concurrence in deed; *Dow v. Gould etc. Co.*, 31 Cal. 645, 646, 647 and 654, following *Dentzel v. Waldie*, supra, and holding deed void for want of

husband's concurrence; *Wambole v. Foote*, 2 Dak. Ter. 18, as to private examination on acknowledgment; *Holland v. Moon*, 39 Ark. 124; *Halladay v. Daily*, 19 Wall. 609, holding valid, however, conveyance of husband's interest under general power signed by both spouses; and *Elliot v. Teal*, 5 Sawy. 250, 8 Fed. Cas. 546. Cited, also, in *Dodge v. Hollinshead*, 6 Minn. 52, 90 Am. Dec. 439, as to necessity for, and requisites of, acknowledgment by wife.

Power of Attorney to sell does not authorize transfer for love and affection, p. 557.

Cited in *Frink v. Roe*, 70 Cal. 313, holding void a conveyance under like power, when made in trust for payment of agent's debts to grantee with notice of terms of agency; *Palmer v. Texas etc. Co.*, 3 Tex. Civ. App. 474, where deed was given as indemnity against agent's pre-existing obligation, holding, further, as to when such deed is void or voidable; *Anderson v. Bigelow*, 16 Wash. 200, holding such power not to extend to dedication of part of land for street purposes; *Mead v. Brothers*, 28 Wis. 693, holding gift of land void under like facts. Cited, also, *Duff v. Duff*, 71 Cal. 533, on point of equitable jurisdiction to set aside deed made in violation of power.

Property acquired after marriage is presumed to be community property, unless contrary clearly shown, p. 557.

Cited to same effect in *Charauleau v. Woffenden*, 1 Ariz. Ter. 273, holding presumption not rebutted by evidence; and in notes to *Meyer v. Kinzer*, 73 Am. Dec. 543; *Cooke v. Bremond*, 86 Am. Dec. 637, 638; and to *Shaw v. Hill*, 96 Am. Dec. 423, upon general subject.

Community Property.—Ejectment for, should be brought by husband alone, p. 557.

Cited to same effect in *Crow v. Van Sickle*, 6 Nev. 149, as to foreclosure suit, although note was given to wife.

16 Cal. 559-566. **BOGGS v. HARGRAVE.** 76 Am. Dec. 561; *Fowler v. Harbin*, 23 Cal. 630.

Mortgage is mere security and passe no estate in the land, p. 563.

Cited to same effect in *Lord v. Morris*, 18 Cal. 488, as to bar of mortgage when note barred; note to *Provident etc. Co. v. Marks*, 68 Am. St. Rep. 354, on foreclosure suits.

Foreclosure Decree does not affect grantee of mortgagor, when not made a party, p. 563.

Cited to same effect in *San Francisco v. Lawton*, 18 Cal. 475, 79 Am. Dec. 188, holding, further, sale under decree passes only interest at time of mortgage, except where after-acquired title affected on principle of estoppel; *Burton v. Lies*, 21 Cal. 92, applying rule to widow's interest in community property; *Harlan v. Rackerby*, 24 Cal. 562, as to vendee pending foreclosure sale, without actual or constructive notice thereof;

Carpentier v. Williamson, 25 Cal. 161, where deed made after mortgage but not recorded until after decree and before sale; dissenting opinion in *Bayly v. Muehe*, 65 Cal. 350, main opinion holding heirs of deceased mortgagor not necessary parties; *Barrett v. Blackman*, 47 Iowa, 570, holding, further, as to redemption by grantees. Cited, also, in *Jeffers v. Cook*, 58 Cal. 150, as to bringing in of necessary defendants by supplemental complaint, holding application too late; and see *Barnard v. Wilson*, 66 Cal. 252, as to similar application by purchaser. Cited, also, in notes to *Street v. Beal*, 85 Am. Dec. 506, *Berlack v. Halle*, 1 Am. St. Rep. 190, and to *Turman v. Bell*, 26 Am. St. Rep. 43, as to necessary defendants in foreclosure suits.

Caveat Emptor.—Purchaser at foreclosure sale acquires only title of mortgagor at time of mortgage, p. 564.

Cited in *Jordan v. Myers*, 126 Cal. 570, as to sale on mechanic's lien foreclosure; *Copeland v. Bank*, 13 Colo. App. 491, but holding rule inapplicable to sale under void levy; *Breeze v. Brooks*, 71 Cal. 181, as to execution sale; *Zabriskie v. Meade*, 2 Nev. 289, 90 Am. Dec. 545 (and note 546), as to execution sale, holding further purchaser bound by recitals in deed as to date of judgment; *Bryant v. Witcher*, 52 N. H. 161, as to execution sale of personal property of stranger, holding law of market overt not to apply; and in *Goodenough v. Warren*, 5 Sawy. 498, 10 Fed. Cas. 590. Cited, also, in notes to *Friedly v. Schutz*, 11 Am. Dec. 699; *McGhee v. Ellis*, 14 Am. Dec. 131; *Burns v. Hamilton's Admr.*, 70 Am. Dec. 572; *Bartholomew v. Warner*, 85 Am. Dec. 255; *Neal v. Gillaspay*, 26 Am. Rep. 39; and to *Barnett v. Vincent*, 5 Am. St. Rep. 102, as to caveat emptor at judicial sales; notes to *Veslian v. Lewis*, 3 Am. St. Rep. 203, and to *Hokanson v. Gunderson*, 40 Am. St. Rep. 357, as to title and right of purchase; *Harris v. Harris*, 64 Cal. 110, upon point that subsequent purchaser gets no title to personal property when sale to his vendor void for owner's insanity; and in note to *Christy v. Dyer*, 81 Am. Dec. 497, as to nature and extent of judgment liens.

Mistake of Law.—Purchaser at foreclosure sale cannot bring independent action to recover back bid where decree void, there being remedy by motion and supplemental complaint in original suit, p. 566.

Cited to same effect in *Branham v. Mayor*, 24 Cal. 608, following rule; *van Loben Sels v. Bunnell*, 131 Cal. 492, on point that court may on motion vacate sale for irregularities; *Dunn v. Dunn*, 137 Cal. 57, quoting *Hammond v. Gailleaud*, 111 Cal. 206; *Ketchum v. Crippen*, 37 Cal. 228, applying rule to application for subrogation by junior mortgagee, there being a remedy by motion in original suit. Cited, also, in *Barnard v. Wilson*, 66 Cal. 252, as to application by purchaser for supplemental complaint, where decree defective for want of proper parties, holding delay unreasonable; *Hammand v. Cailleaud*, 111 Cal. 214, 52 Am. St. Rep. 170, as to remedy by purchaser at partition sale where title alleged to be defective. Distinguished in *Brackett v. Banegas*, 116 Cal. 284, 58 Am. St. Rep. 168, sustaining original action in second fore-

closure suit, where mistake was one of fact as to existence of homestead; *Jordan v. Sayre*, 24 Fla. 14, 15, 17, as to second foreclosure action by mortgagee bringing in necessary parties, although he purchased at first sale; and in *Dutcher v. Hobby*, 86 Ga. 201, as to right of purchaser under void decree, to subrogation and institution of new foreclosure suit. Criticised in *Abadie v. Lobero*, 36 Cal. 399, as to right of purchaser to have resale on supplemental bill filed and conducted by original plaintiffs. Cited, also, in notes to *Burns v. Hamilton's Admr.*, 70 Am. Dec. 575, as to purchaser's relief for defective title or outstanding equities, and p. 578, for defect in parties; and to *Goodenow v. Ewer*, 76 Am. Dec. 550, on same subject; to *Jordan v. Stevens*, 81 Am. Dec. 562; *Martin v. Hamlin*, 100 Am. Dec. 187; *Champion v. Woods*, 12 Am. St. Rep. 130; and to *Alabama etc. Co. v. Jones*, 55 Am. St. Rep. 500, as to relief in equity from mistakes of law; and to *Stout v. City etc. Co.*, 79 Am. Dec. 547, as to correction of insurance policy, for mistake.

16 Cal. 567-574. **CORYELL v. CAIN.**

Complaint.—Matters of evidence should not be alleged, p. 571.

Cited to same effect in *Willson v. Cleaveland*, 30 Cal. 200, affirming order striking out; *Larco v. Casaneuva*, 30 Cal. 565, affirming like order as to derangement of title; *Racouillat v. Rene*, 32 Cal. 456, holding further such allegations need not be denied; *Jones v. Petaluma*, 36 Cal. 233, holding no issue raised thereby; *Morgan v. Tillottson*, 73 Cal. 521, as to allegations of ownership by plaintiff's grantors; *Bowen v. Emmerson*, 3 Oreg. 455, as to allegations of breach of contract.

Public Lands.—Ejectment will lie for lands belonging to government, when based on priority of possession, p. 572.

Cited to same effect in *Hubbard v. Barry*, 21 Cal. 324, applying rule to land owned by private third person; *Moore v. Tice*, 22 Cal. 516, holding, however, that as to private land plaintiff must affirmatively show title or right of possession, where ownership alleged (and see as to last point, *Dyson v. Bradshaw*, 23 Cal. 536, distinguishing principal case, and *Tarpey v. Salt Co.*, 5 Utah, 214); *Rush v. French*, 1 Ariz. Ter. 154, as to ejectment for mining claim; *McFeters v. Pierson*, 15 Colo. 206, 22 Am. St. Rep. 391, as to trespass on mining claim, holding, further, complaint sufficient; *Deemer v. Falkenberg*, 4 N. Mex. 59, and *New Mexico etc. Co. v. Crouch*, 4 N. Mex. 143, applying principle to ejectment based on deed from private person; *Gimmy v. Culverson*, 5 Sawy. 607, 10 Fed. Cas. 434, as to rights of pre-emptioners.

Consent Order will not be reviewed on appeal, p. 572.

Cited in *Estate of Lorenz*, 124 Cal. 498, applying rule to decree of distribution entered on stipulation; *Mecham v. McKay*, 37 Cal. 158, as to order on motion for new trial; *San Francisco v. Certain Real Estate*, 42 Cal. 518, holding, however, facts not to show entry of order by consent.

Actual Possession sufficient to support ejectment when title not involved, defined, and described, p. 573.

Cited in *Hanson v. Stinehoff*, 139 Cal. 173, and *Smith v. Hicks*, 139 Cal. 219, holding plaintiff's possession sufficient for ejectment; *Wiseman v. Eastman*, 21 Wash. 185, holding actual settlement unnecessary, construing local statutes; *Andrus v. Smith*, 133 Cal. 80, and *Valcalda v. Mines*, 86 Fed. 94, 56 U. S. App. 674, holding such possession of mill-site shown; *Hess v. Winder*, 30 Cal. 355, holding no actual possession of mining claim shown under facts; *Polack v. McGrath*, 32 Cal. 20, and *Forbes v. Driscoll*, 4 Dak. Ter. 344, holding constructive possession insufficient to maintain action; *Brumagin v. Bradshaw*, 39 Cal. 44, holding actual possession shown by evidence; *Webber v. Clarke*, 74 Cal. 15, 17 (cited in *Gildehaus v. Whiting*, 39 Kan. 713), holding use of land as pasture sufficient under statute of limitations; *Stevenson v. Anderson*, 57 Ala. 232, holding, however, no such possession shown to constitute adverse possession as between cotenants; *Feirbaugh v. Masterson*, 1 Idaho, 139, holding such possession of mining claim shown; *Schnaepel v. Mellen*, 3 Mont. 134, holding possession not shown, under town site act; *Staininger v. Andrews*, 4 Nev. 67, 69, holding actual possession of public lands shown; *Robinson v. Imperial etc. Co.*, 5 Nev. 67, holding no actual possession shown of millsite and water right; *Courtney v. Turner*, 12 Nev. 354, holding fencing of agricultural land unnecessary for actual possession; and *State v. Central Pacific etc. Co.*, 21 Nev. 258, on question of taxation of possessory rights.

16 Cal. 574-580. **HALLECK v. MIXER.**

Pleading.—Complaint must state facts directly, and not by way of recital, p. 577.

Cited to same effect in *Denver v. Burton*, 28 Cal. 550, as to averment of debt; *Swift v. James*, 50 Wis. 543, holding good, however, complaint for cutting timber.

Waiver of Tort.—Plaintiff may waive tort and sue in assumpsit when goods converted have been sold, p. 578.

Cited to same effect in *Wall v. Williams*, 91 N. C. 482, as to timber cut down; cited in *Phelps v. Church*, 99 Fed. 684, 685, 58 U. S. App. 567, as to stone quarried and removed, citing main case on next point also; dissenting opinion in *Railroad Co. v. Hutchins*, 37 Ohio St. 297, as to remedies and measure of damage for cutting of timber; and in note to *Webster v. Drinkwater*, 17 Am. Dec. 242, 244, upon general subject.

Owner of land is entitled to timber where no other person in adverse possession, p. 579.

Cited to same effect in *Grewell v. Walden*, 23 Cal. 170, holding further as to pleading and proof of ownership; *Herriter v. Porter*, 23 Cal. 387, as to posts cut from such timber, and holding further as to splitting

of actions by bringing successive suits for portions thereof; *Kimball v. Lohmas*, 31 Cal. 157, 159, defining adverse possession necessary to defeat action by owner for wood cut by defendant; cited in *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 477, prohibition lies to prevent trial of action involving damages for trespass on ledge in another state, by mining under dip thereof on ground in possession of defendants, as action is local; *Thornton v. St. Louis etc. Co.*, 69 Ark. 427, sustaining action by holder of tax title and holding no adverse possession shown; *Johnson v. Sand etc. Co.*, 86 Fed. 271, denying right of owner to bring trespass for removal of sand and gravel against one in adverse possession; *Phelps v. Church*, 99 Fed. 685, cited under last syllabus; *United States v. Loughrey*, 172 U. S. 216, 219, but denying right of action for trover therefor when plaintiff not in possession nor entitled thereto at time of conversion; *McFeters v. Pierson*, 15 Colo. 106, 22 Am. St. Rep. 392, applying rule to right of mineral locator in possession, although no patent issued; *McGonigle v. Atchison*, 33 Kan. 737, 738, discussing remedies of owner for sand removed, and holding further on question whether action transitory; *Busch v. Nester*, 70 Mich. 529, holding, however, that where deeds under which plaintiff claims are invalid, action will not lie even against trespasser, the land being unoccupied. Cited, also, holding action not maintainable because of defendant's adverse possession, and of refusal to try title indirectly, in *Page v. Fowler*, 28 Cal. 610, 611; S. C. 37 Cal. 107-109; and 39 Cal. 417, 418, 2 Am. Rep. 464, 465, criticising *Kimball v. Lohmas*, *supra*; *Martin v. Thompson*, 62 Cal. 619-622, 45 Am. Rep. 663-666, as to grain sown and harvested by defendant; also distinguishing and criticising *Kimball v. Lohmas*; *Lehigh etc. Co. v. New Jersey etc. Co.*, 55 N. J. L. 358, as to ore taken from mine, on point that defendant can show adverse possession under claim of right; and in *McConaughy v. Wiley*, 13 Sawy. 154, 33 Fed. Rep. 453, as to hay cut, even when land was unpatented public land. Cited also in *Beckwith v. Philleo*, 15 Wis. 228, as to right to cut timber under facts; *Northern Pacific Rd. v. Paine*, 119 U. S. 565, on point that mere equitable claim will not support such action; and in notes to *Harlan v. Harlan*, 53 Am. Dec. 618, and to *King v. Mason*, 89 Am. Dec. 428, 429, 431, as to trial of title to land by actions as to severance of timber thereon.

Complaints in Actions by Executors.—Essentials stated, p. 579.

Distinguished in *Dambmann v. White*, 48 Cal. 450, as to complaints by assignees. Cited in *McLeran v. Benton*, 73 Cal. 342, 2 Am. St. Rep. 821 (cited in *Patchett v. Pacific Coast etc. Co.*, 100 Cal. 510), on point that right to maintain ejectment vests exclusively in executors and not in devisees; and in *Knight v. Le Bean*, 19 Mont. 225, as to form of such complaints, and at 226, on point that capacity of executor to sue cannot be raised on general demurrer. Approved in *Jenkins v. Jensen*, 24 Utah, 123, where administrator neglected to bring action to recover

reality within statutory period, heir also barred, though he was a minor at accrual of action in favor of administrator.

General citation: *Rees v. Higgins*, 9 Kans. App. 834.

16 Cal. 580-590. McDERMOTT v. BURKE.

Foreclosure.—Lessees of mortgagor are not necessary defendants, and their rights terminate upon foreclosure, p. 589.

Cited in *Summerville v. Stockton M. Co.*, 142 Cal. 538, on point that leasehold interest is not subject to the lien of judgment upon the realty; *W. U. Tel. Co. v. Ann Arbor etc. Co.*, 90 Fed. 384, 61 U. S. App. 751, construing local (Michigan) statute as to fact of foreclosure on lease or easement; *Tyler v. Hamilton*, 62 Fed. Rep. 190, applying rule to assignees of leasees; and in dissenting opinion in *Lockhart v. Ward*, 45 Tex. 233, main opinion holding otherwise, however, as to tenant for years, he having right to redeem.

16 Cal. 591-641. McCRACKEN v. SAN FRANCISCO.

When majority of board is required to pass ordinance, this refers to number established by law, although vacancy exists, p. 618.

Cited to same effect in *Satterlee v. San Francisco*, 23 Cal. 318, 319, re-examining same ordinance; *Pennsylvania Co. v. Cole*, 132 Fed. 679, where statute provides that majority of members of city council shall constitute a quorum, less than quorum cannot adjourn regular meeting to a later date.

Municipal Acts are invalid when not done in conformity with express charter requirements where such exist, p. 619.

Cited to same effect in *McCoy v. Bisant*, 53 Cal. 250, holding bonds invalid for want of passage or prescribed resolution; *Pacific Electric Co. v. City of Los Angeles*, 118 Fed. 753, under act of California, March 11, 1901, authority of city council on failure of accepted bidder on sale of franchises to deposit amount of bid was limited to granting or refusing of franchise to next highest bidder; *Aurora v. West*, 22 Ind. 95, 85 Am. Dec. 418, upon similar facts, holding further owners not bona fide where the special authority (which was not followed) was referred to on face of bonds; *Petz v. Detroit*, 95 Mich. 180, as to creation of tenancy from city by holding over and payment of rent; *Gutta Percha etc. Co. v. Ogakalla*, 40 Neb. 779, 42 Am. St. Rep. 698, where charter provisions held mandatory; and in *Nichols v. State*, 11 Tex. Civ. App. 333, where provision violated as to letting contract to lowest bidder; dissenting opinion in *Rogers v. Burlington*, 3 Wall. 669, main opinion affirming right to issue railway aid bonds; *Merrill v. Monticello*, 138 U. S. 687, as to power to issue and sell negotiable paper in open market; and in *Louisville etc. Co. v. Cincinnati*, 73 Fed. Rep. 732, as to consent to change of motive power by street railroad. Cited also in *New York etc. Co. v. Ely*, 13 Am. Dec. 108, as to estoppel to plead ultra vires.

Municipal Property held in trust for public can be sold only as legislature directs, p. 621.

Cited to same effect in *San Francisco v. Canavan*, 42 Cal. 557, as to sale of city hall lots, and affirming power of legislature to authorize sale. Distinguished in *San Francisco v. Calderwood*, 31 Cal. 590, 91 Am. Dec. 544, holding easement grantable on city slip property, although no power of sale existed.

Ratification by municipal corporation is invalid unless made in form required in original act, p. 623.

Cited to same effect in *Grogan v. San Francisco*, 18 Cal. 608, 610, 614, and *Pimental v. San Francisco*, 21 Cal. 362, 363 (cited in *Loring v. St. Louis*, 10 Mo. App. 422), holding no ratification of sale of city slip properly by receipt and appropriation of proceeds; *Zottman v. San Francisco*, 20 Cal. 102, 103, 81 Am. Dec. 101, ruling similarly as to ratification by approval of individual members of common council, where charter provided work was to be given to lowest bidder; *Durango v. Pennington*, 8 Colo. 260, as to contract for street work; *Merritt v. Kewanee*, 175 Ill. 549, on point that party ratifying should be able to do ratified act at time of ratification as well as at time of its original doing; *Murray v. Beal*, 23 Utah, 561, from ratification of claim by user of money by corporation with knowledge of facts it constituted an equitable lien on corporate realty included in deed given to secure it; *Newman v. Emporia*, 32 Kan. 464, as to tax levy originally void; *Highway Commrs. v. Van Dersan*, 40 Mich. 431, holding no ratification shown by part payment for sewer, where its building was beyond jurisdiction of commissioners; *Loring v. St. Louis*, 80 Mo. 468, where taxes were illegally collected, court holding it a case where principal could not have lawfully acted; *State v. Ward*, 9 Heisk. 130 (cited in *Mayor v. Hagan*, 9 Baxt. 505), as to invalid clause in contract for convict labor; *Nichols v. State*, 11 Tex. Civ. App. 335, holding no ratification shown by use and occupation of public building, where requirements as to letting to lowest bidder were not followed; *German etc. Co. v. Spokane*, 17 Wash. 329, *Marsh v. Fulton Co.*, 10 Wall. 684, as to ratification of bond issue by supervisors, without vote of county; *Norton v. Shelby County*, 118 U. S. 452, following *Marsh v. Fulton Co.*, *supra*, as to like ratification by county court. Distinguished in *People v. Swift*, 31 Cal. 28, holding ratification shown by board of trustees within their powers. Cited also in *Frink v. Roe*, 70 Cal. 311, applying rule to agency to sell land; *Whiting v. Massachusetts etc. Co.*, 129 Mass. 241, denying right to ratify insurance policy by payment of premiums after death of insured; *In re Kansas City etc. Co.*, 9 Bank. Reg. 81, as to ratification of deed of trust made by corporate officer which corporation itself could not have made, and holding further, question of validity to be considered as at time of ratification and not of original act; and in *Cook v. Tullis* 18 Wall. 338, 9 Bank. Reg. 437, to same effect, holding further that intervening rights cannot be affected.

Agency.—Ratification cannot relate back so as to impair intervening rights of third parties, p. 624.

Cited in *Graham v. Williams*, 114 Ga. 719, applying rule to ratification of deed after suit brought.

Estoppel in Pais cannot exist unless acts or declarations brought to notice of other party, and made with fraud or intent to deceive, p. 626.

Cited to same effect in *Martin v. Zellerbach*, 38 Cal. 315, 99 Am. Dec. 379, stating requirements of estoppel, and holding none shown; also in note to *New York etc. Co. v. Ely*, 13 Am. Dec. 108, as to estoppel to plead *ultra vires*.

Municipal Indebtedness.—Charter limitation is merely directory, p. 628.

Cited to same effect in *Heidenheimer v. Galveston*, 2 Posey (Tex.), 158, and in *Laughlin v. County Commrs.*, 3 N. Mex. 303. Distinguished in *State v. Mayor*, 32 La. Ann. 713, holding tax levy to pay judgments for mob riots, within charter limitation. Cited also in *Cook v. Ansonia*, 66 Conn. 423, on point that damages done real estate by grading are not to be included among "expenditures."

Void Sale.—Municipal corporation is liable for purchase money paid, even without offer to restore property, p. 633.

Cited to same effect in *Herzo v. San Francisco*, 33 Cal. 140-148, restricting rule, however, to cases where money has been appropriated to municipal purposes; *Douglas Co. v. Keller*, 43 Neb. 648, sustaining right to recovery of money paid under mistake of fact, even where purchaser at sale did not avail himself of all means of information at his command; and see *Stenberg v. State*, 50 Neb. 135; and in *Higham v. Harris*, 108 Ind. 254, on point that no restitution or replacing of other party in statu quo is necessary where nothing surrendered and no rights acquired.

Adverse Possession Under Color of Title.—Essentials of stated, p. 636.

Cited in *Kile v. Tubbs*, 23 Cal. 437, on point that such possession is coextensive with deed, although actual possession not taken of whole tract; *Garrison v. McGlockley*, 38 Cal. 80, as to what constitutes adverse possession, refusing to disturb verdict where evidence conflicting; *Pulliam v. Bennett*, 55 Cal. 373, on point that successive holdings cannot be "tacked"; *Pacific etc. Co. v. Stroup*, 63 Cal. 154, on point that possession is broken by offer to buy real title during necessary five years; *Wilson v. Atkinson*, 77 Cal. 492, 11 Am. St. Rep. 305, as to essentials where entry made under tax deed void on its face; *Townsend v. Edwards*, 25 Fla. 588, as to interruption of running of statute by re-entry; *Colvin v. Republican etc. Co.*, 23 Neb. 80, 8 Am. St. Rep. 118, holding possession not adverse where held in subserviency to rights of owner; *Northern Pacific etc. Co. v. Kranich*, 52 Fed. Rep. 911, holding

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that possession may be adverse to all others though in subordination to United States; and in *Hewitt v. Story*, 64 Fed. Rep. 530, holding no adverse possession shown of ditch and water rights.

Deed of Municipal Corporation.—Seal is prima facie evidence of authority to make valid conveyance, p. 638.

Cited to same effect in *Vaca Valley etc. Co. v. Mansfield*, 84 Cal. 566, as to deed by private corporation, holding, however, presumption rebuttable; *Burnett v. Lyford*, 93 Cal. 117, applying rule to signature of corporation, and holding objection as to want of authority could not be first raised on appeal; and in note to *Leggett v. New Jersey etc. Co.*, 23 Am. Dec. 745, on effect of seal as evidence of corporate authority.

General citation: *Kolkmeier v. Jefferson*, 75 Mo. App. 664.

VOLUME XVII.

By JOSEPH A. JOYCE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

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Cited, **Cohen v. Wright**, 22 Cal. 319, to the point that "the legislature may deny to one man a privilege extended to another without infringing upon the constitution" in a case where the right to practice law was held a statutory privilege subject to legislative control.

17 Cal. 23-37. **HOBART v. SUPERVISORS OF BUTTE CO.**

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Cited **Cohen v. Wright**, 22 Cal. 308, to substantially the same effect; **Bourland v. Hildreth**, 26 Cal. 229; **Stockton etc. R. R. Co. v. City of Stockton**, 41 Cal. 160, 186; and **People v. City of Butte**, 4 Mont. 210, 47 Am. Rep. 350, all quoting from the principal case; **Talcott v. Pine Grove**, 1 Flipp, 136, 23 Fed. Cas. 658, discussing power to authorize municipal aid for railroads; **Hess v. Pegg**, 7 Nev. 30, to the point that unless restricted by the constitution the legislature has complete control of the subject of counties and county seats.

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Cited, *Robinson v. Bidwell*, 22 Cal. 387, 391, following the principal case; *People v. McFadden*, 81 Cal. 494; 15 Am. St. Rep. 70, applying the principle to an act submitting to vote of the people the question of the creation of a new county; *Territory ex rel. v. Scott*, 3 Dak. Ter. 413, quoting from the principal case (pp. 32, 36), and applied to an act for the selection by commissioners of a suitable location for the seat of government and for the erection thereon of necessary buildings and improvements; *Commrs. of Leavenworth Co. v. Miller*, 7 Kan. 506; 12 Am. Rep. 440, citing authorities from twenty-seven states and holding that the legislature may authorize municipal aid to railroads by subscriptions to stock and issuing bonds therefor; *Harcourt v. Good*, 39 Tex. 472, in an exhaustive opinion citing authorities from twenty-six states to the same point as the principal case; note 47 Am. Dec. 500; note 59 Am. Dec. 514, to the same effect, that is, that such conditional legislation is valid.

17 Cal. 37-44; 76 Am. Dec. 567. **ATTWOOD v. FRICOT.**

Evidence—Mining Law.—Book of records is admissible as evidence of a compliance with the rules of the mining district, p. 42.

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Mining Claim may be held either by actual occupancy or under local custom; *possessio pedis* is not necessary as against a trespasser, p. 43.

Cited, *English v. Johnson*, 17 Cal. 115, 76 Am. Dec. 575, affirming generally this and other rules as to the possession of such claims; *Patterson v. Keystone M. Co.*, 23 Cal. 576, in affirmance; extended note 63 Am. Dec. 105.

Possession of Part of a Mining Claim defined as to limits is possession of the whole, and if a party enter bona fide under color of right, as a deed or lease, he has possession of the entire claim against any one but the true owner or prior occupant, and such possession cannot be invaded unless entry is made in pursuance of mining rules, p. 43.

Cited, *English v. Johnson*, 17 Cal. 115, 116, 76 Am. Dec. 575, 576, to the same effect; *Cosmos etc. Co. v. Oil Co.*, 112 Fed. 15, noted under *English v. Johnson*, 17 Cal. 107; *Patterson v. Keystone Mining Co.*, 23 Cal. 576, approving the rules of law as to possession laid down in the principal case; *Walsh v. Hill*, 38 Cal. 487, declaring the doctrines above stated to be settled; *Garthe v. Hart*, 73 Cal. 543, to the point that possession is good against mere intruders and noting the distinction between such intruders and one who has complied with the mining laws; *Neuehaumer v. Woodman*, 89 Cal. 315, approving the rule of constructive possession of the whole tract as against a mere intruder; *Roberts v. Wilson*, 1 Utah, 295, in approval, quoting from the principal case (p. 43); *Campbell v. Rankin*, 99 U. S. 262, to the point that actual prior possession is sufficient as against a trespasser; *Harris v. Equator etc. Co.* 8 Fed. Rep. 366; 3 *McCrary*, 18, holding that in general the rules applicable to real property govern in case of mines on public lands and a purchaser in possession under a conveyance regular in form is in by color of title which may be perfected into a right under the statute of limitations; note 76 Am. Dec. 579.

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17 Cal. 44-57. **ELDRIDGE v. SEE YUP CO.**

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Cited, *Faivre v. Daley*, 93 Cal. 671, so holding; see *Irwin v. Kilburn*, 104 Ind. 117, noted third heading below.

Deed.—Covenant or Reservation in favor of a third person without declaring a trust or limiting a remainder is void; a mere limitation upon the use is not binding, pp. 52, 53.

Cited, *Pellisier v. Corker*, 103 Cal. 518, substantially as so holding, but declared not an analogous case to that one, as it presented no such conditions and no estate in fee ever passed to the grantee therein; *Phillpotts v. Blasdell*, 8 Nev. 78, so holding, but also deciding that a trust in equity is created which in conscience ought to be performed.

Equity.—If a deed is not so drawn as to represent the real facts a different proceeding than one in ejectment must be taken, p. 55.

Cited, *Hathaway v. Brady*, 23 Cal. 124, as supporting the points that equity may correct mistakes in written contracts, and parol evidence is admissible to prove the mistake.

Deed of Bargain and Sale may be upon Trust if such intent be unequivocally expressed and no formal words are necessary if such intent is apparent, p. 55.

Cited, *Faivre v. Daley*, 93 Cal. 671, in discussing that rule of construction which effectuates the parties' intentions; *Irwin v. Kilburn*, 104 Ind. 117, to the point that contracts will be construed so as to carry out the parties' intentions, and repugnant and irreconcilable words will be rejected as surplusage.

Mistake in Form of Deed.—The effect of open and notorious possession considered, p. 56.

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17 Cal. 57-58. **SEVERANCE v. LOMBARDO.**

Evidence.—Book of original entries is admissible to prove delivery of goods, being part of the *res gestae*, p. 58.

Cited, *Reid v. Reid*, 73 Cal. 209, where it was said that an unfiled transcript stood on the footing of a private memorandum and "having been written up, we do not know when, it was not admissible as a part of the *res gestae*"; *White v. Whitney*, 82 Cal. 166, where a book of original entries was held *prima facie* proof of an account in his favor if supported by the tradesman's oath and no objection is made to the manner in which the book was kept.

17 Cal. 58-61. **MOTT v. HAWTHORN.**

Settler Upon Public Lands intending to locate must take the necessary steps under the law to acquire the title, p. 61.

Cited, *McLaughlin v. Menotti*, 89 Cal. 365, affirming the rule.

17 Cal. 61-63. **ROWE v. YUBA CO.**

Attorney at Law appointed to defend a pauper in criminal case cannot charge county for services, p. 63.

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17 Cal. 63-66. PEOPLE v. HOWARD.

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Cited, *Jordan v. State*, 142 Ind. 427, holding that a part owner of a building is a party injured by the offense of arson.

17 Cal. 67-70. CULLEN v. LANGRIDGE.

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Cited, *Henderson v. Allen*, 23 Cal. 520, applying the rule to a case of an action against tenant for unlawfully holding over.

17 Cal. 70-75. GRIFFIN v. BLANCHARD.

Bona fide Purchaser without notice of trust takes the property discharged thereof, p. 74.

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Vendors' Lien is presumptively lost or waived by taking personal or mortgage security, p. 74.

Cited, *Stevens v. Rainwater*, 4 Mo. App. 298, to the point that when the note or other instrument of a third party is given and received in payment of the purchase money the vendor so far waives his equitable lien; *Cordova v. Hood*, 17 Wall. 6, to the same effect as the principal case, also holding that such presumption is open to rebuttal; note, 41 Am. Dec. 198.

17 Cal. 76-80. PEOPLE v. LEE. S. C., 14 Cal. 510.

Verdict.—Recommendation to mercy is no part thereof and the court may direct it not to be recorded, p. 79.

Cited, *People v. Biles*, 2 Idaho, 106, holding that the substitution by direction of the court of the word "murder" for "kill" in a verdict upon a charge for assault with intent to murder was not error, such amended verdict having been read and assented to by the jury; *State v. Stewart*, 9 Nev. 134, in affirmance.

New Trial.—Verdict will not be set aside for momentary separation of jurors by reason of the fainting of a witness, p. 79.

Cited, *People v. Bonney*, 19 Cal. 445, applying the same rule to a separation from necessity where during their absence there was no communication with any one nor with each other; *State v. Bailey*, 32 Kan. 94, where it was held misconduct for a bailiff to enter the jury room while the jury was in session. So also for the jury to separate before the rendition of their verdict, after retiring to consider it, but the state having shown by the jury, bailiff, and others that nothing adverse to accused's interests transpired, it was decided that there was no ground for

a new trial. Extended notes 35 Am. Dec. 259, 43 Am. Dec. 85, considering the authorities at length.

Homicide.—Dying declarations of deceased made under a sense of impending death are admissible, p. 79.

Cited, *People v. Vernon*, 35 Cal. 52, 95 Am. Dec. 51, so holding, even though the wounds were received early in the morning and death did not occur until the middle of the afternoon of that day; also holding that although the written statement of such declarations was read in evidence, other and independent evidence of such declarations was also admissible: *State v. Garrand*, 5 Oregon, 218, 219, in affirmance.

Criminal Law.—Leave to Withdraw Plea of not guilty and interpose motion to set aside indictment may be refused in the court's discretion, no abuse of that discretion being shown, p. 80.

Cited, *People v. Scott*, 59 Cal. 342, where leave to withdraw a plea of guilty and to plead not guilty was refused and the ruling sustained, there being a doubt as to the prisoner's sanity; *Territory v. Barrett*, 8 N. Mex. 74, as to permission to substitute motion to quash for prior plea of not guilty; *State v. Shanley*, 38 W. Va. 520, holding that granting leave to withdraw a plea of guilty was a matter of sound discretion.

Criminal Law—Impanelling Trial Jury.—It is no ground of objection that some jurors of original panel were excused without defendant's consent, p. 80.

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17 Cal. 80-85. SULLIVAN v. CARY.

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Forcible Entry and Detainer.—Notice to quit should be given tenant, p. 85.

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Cited, *Sanford v. Duluth etc. Co.*, 2 N. Dak. 11, where substantially the same rule is applied with the exception that a refusal to direct a verdict is considered analogous to refusing a nonsuit and the remedy by motion for new trial is held not exclusive, but concurrent with appeal.

17 Cal. 87-91; 76 Am. Dec. 571. **CHAPMAN v. THORNBURGH.**

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Cited, note 81 Am. Dec. 148; extended note 95 Am. Dec. 434, where the duty of sheriffs to serve process and their liability for want of diligence, etc., is exhaustively considered; note 96 Am. Dec. 218.

17 Cal. 92. **WALTON v. MAGUIRE.**

Court, in Refusing New Trial, acts in the exercise of a sound legal discretion, where the ground relied upon for reversal is insufficiency of the evidence, p. 92.

Cited in *Series v. Series*, 35 Or. 295, holding rule as to conflict of evidence not binding in trial court; *Hall v. Bark "Emily Banning,"* 33 Cal. 525, Affirming the rule where the evidence is conflicting.

17 Cal. 93-97. **BROWN v. LATTIMORE.**

Sureties on Official Bonds may stand upon the precise terms thereof, and the legislature cannot extend their liability by extending the term of office, pp. 96, 97.

Cited, *Hubert v. Mendheim*, 64 Cal. 223, to the same point in affirmance; *Treweek v. Howard*, 105 Cal. 444, also in affirmance; *People v. Backus*, 117 N. Y. 203, but holding that sureties were not discharged by the extension by act of congress of the existence of a banking corporation; *King Co. v. Ferry*, 5 Wash. St. 554, 556, 34 Am. St. Rep. 895, 896, following the rule of the principal case; and although it was contended that said case was overruled by *Placer Co. v. Dickerson*, 45 Cal. 12, and *Fresno Enterprise Co. v. Allen*, 67 Cal. 505, yet the court held that the principal case was still law and also that the rule was not changed by *Priet v. De La Montanya*, 85 Cal. 148; extended note 93 Am. Dec. 527, as to the "effect of legislative alternation of duties of officer to discharge sureties upon his bond"; note 7 Am. Rep. 522.

17 Cal. 97, 98. **TODD v. COCHELL.**

Negligence.—Owner of reservoir or dam is bound to ordinary care, but is not liable for accident which a prudent man could not avoid. The measure of care required is only that which a discreet person would use if whole risk were his own, p. 98.

Cited, *Losee v. Buchanan*, 51 N. Y. 487, 10 Am. Rep. 632, to the point that in such case there must be some fault or negligence, and this rule was applied to the case of damages caused by the explosion of a steam boiler in connection with the owners' liability; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 153, to the point that there must be proof of some fault or negligence, but the principle was applied in case of the appro-

priation of water to the damage or detriment of those below; Nitro Glycerine case, 15 Wall. 538, substantially following the principal case, extended note, 56 Am. Rep. 97.

17 Cal. 98-101. **WILLS v. KEMPT.**

Pleading.—If Sealed Instrument is set out in *haec verba* consideration need not be averred, p. 101.

Cited, *Lambert v. Haskell*, 80 Cal. 613, holding that although an instrument may properly be set out in full, yet the rule does not apply to preliminary and collateral matters of substance which must be alleged, for the recitals in the instrument are insufficient allegations thereof; *Henke v. Eureka Endowment Assn.*, 100 Cal. 432, where the presumption of consideration of a written instrument duly pleaded was held to arise, even though such contract was not set out in *haec verba*; *Northern Kan. Town Co. v. Oswald*, 18 Kan. 339, holding that in an action on a title bond, consideration need not be alleged.

17 Cal. 102-107. **SLADE v. SULLIVAN.**

Granting Injunction rests in sound discretion of the court, p. 106.

Cited, *Lux v. Haggin*, 69 Cal. 275, as bearing upon the right of courts to grant such relief in connection with laches operating as an estoppel; *Washington etc. Co. v. Coeur D' Alene etc. Co.* 2 Idaho, 407, to exactly the same point as the principal case.

17 Cal. 107-119; 76 Am. Dec. 574. **ENGLISH v. JOHNSON.**

Possession taken of mining claim without reference to mining rules is sufficient against a trespasser, if ground is included within distinct visible and notorious boundaries and the necessary work is done; nor need the miner reside on his claim, build on it, cultivate, or inclose it, nor is a *pedis possessio* required, pp. 115, 116.

Cited in *Dwinwell v. Dyer*, 145 Cal. 19, work done after repeal of state law of 1897, under prior location otherwise valid and properly maintained under Revised Statutes constituted actual possession of claim to extent of boundaries; *Miller v. Chrisman*, 140 Cal. 448 (quoted in *Weed v. Snook*, 144 Cal. 443), on point that discovery need not precede nor coexist with posting of notice or marking of claim; *Deemer v. Falkenburg*, 4 N. Mex. 59, sustaining ejectment based on prior possession as against stranger to real title; *Table Mt. Tunnel Co. v. Stranahan*, 20 Cal. 209, in affirmance, so also to the same effect in *Patterson v. Keystone M. Co.*, 23 Cal. 576; *Hess v. Winder*, 30 Cal. 355, holding that such claim may be held by actual occupancy or by the exercise of control over it by working boundaries, but that if the right depends on prior possession alone without reference to mining customs there must be distinct physical marks or monuments showing the boundary; *Lux v. Haggin*, 69 Cal. 383, to the point that where no special mining laws have

been proven, "the courts have said the same common-law principles are to be relied upon as those which regulate the rights to the possession of agricultural lands, although the indicia of possession are not necessarily the same"; also noting how possession may be proved; *Garthe v. Hart*, 73 Cal. 542, 543, holding that possession is good as against a subsequent locator who has not complied with the mining laws; *Strepey v. Stark*, 7 Colo. 622, to much the same effect as the principal case; *McFeters v. Pierson*, 15 Colo. 206; 22 Am. St. Rep. 392, holding substantially the same as the principal case; *Duggan v. Davey*, 4 Dak. 123, to the point that actual possession is sufficient as against a mere intruder; *Lincoln v. Rodgers*, 1 Mont. 223, in connection with the point as to defining the boundaries of grounds for tailings; *Rogers v. Cooney*, 7 Nev. 219, as deciding as stated in the heading in connection with the question of possession of land for tailings; *Eilers v. Boatman*, 3 Utah, 166, to the point that there is a distinction between the acts essential to indicate the possession and occupancy of agricultural and mining lands; *Campbell v. Rankin*, 99 U. S. 262, holding that possession *prima facie* evidences title as against a trespasser; *North Noonday M. Co. v. Orient M. Co.*, 11 Fed. Rep. 128, 6 Sawy. 507, also so holding even though the claim may not have been taken up and held in all particulars in the mode required by law; extended note 63 Am. Dec. 93, 105, notes 76 Am. Dec. 571, 7 Am. St. Rep. 254.

Same.—Working of lead or work done in proximity and direct relation to claim is possession thereof, p. 116.

Cited, *Rogers v. Cooney*, 7 Nev. 219, as so deciding in connection with the consideration of the question of possession of ground for tailings; *Harrington v. Chambers*, 3 Utah, 110, to the point that a general system of work for the purpose of developing three contiguous claims is work on all the claims and will hold them though done outside of one of said claims.

Same.—One entering bona fide under color of right has constructive possession of entire claim described in his deed though possession be only of part, p. 116.

Cited, *Hess v. Winder*, 30 Cal. 355, holding that in such case the deed must contain definite and certain boundaries which can be located, marked out, and made known therefrom: *Walsh v. Hill*, 38 Cal. 487, affirming the rule as applied to entry of land under a deed, provided the land is not in the adverse possession of another at the time of entry; *Webber v. Clarke*, 74 Cal. 18, applying the principle to entry on uncultivated grazing land under a sheriff's deed, and holding such possession sufficient; *Neuebaumer v. Woodman*, 89 Cal. 315, in affirmance in a case where the entry was made by a successor of the locator.

Same.—Possession of part of claim distinctly defined by physical marks is possession of the whole though the entry is not in accordance with mining rules or under a paper title, p. 116.

Cited, *Hess v. Winder*, 30 Cal. 355, quoting from the principal case on this point and substantially following the principle; *Table Mt. Tunnel Co. v. Stranahan*, 31 Cal. 390, quoting also on this point; also noting that "no location can be so extended as to amount to a monopoly" in connection with the question as to usage as to the size of claims; *Cosmos etc. Co. v. Oil Co.*, 112 Fed. 15, defining "vacant" land as used in Forest Reservation Act.

Mining Claim—Possession.—Rules as to agricultural land do not apply to mining land, p. 110.

Cited in *Katz v. Walkinshaw*, 141 Cal. 123, discussing application of common-law rules as to water rights under local conditions.

Same.—In absence of mining rules avoiding claim for failure to record same, actual possession may be taken, though requirements as to registry under local laws are not observed, but possession is not good as to excess as against one claiming under the rules, pp. 117, 118.

Cited, *Rush v. French*, 1 Ariz. Ter. 146, to the point that a failure to comply with a mining rule or regulation cannot work a forfeiture unless the rule itself so provides; so also in *Johnson v. McLaughlin*, 1 Ariz. Ter. 501; *Armstrong v. Lower*, 6 Colo. 583, substantially following the principal case, but saying as to it that the court "limits the views expressed to cases where no abandonment results from a failure to comply with the mining rules or location statutes"; *Roberts v. Wilson*, 1 Utah, 296, to substantially the same effect as the principal case.

Miners may Prescribe Rules as to this class of claims, subject only to the general laws of the state, and boundaries must be marked in accordance therewith, but if there are no rules there should be physical marks showing the precise ground claimed, p. 118.

Cited, *Prosser v. Parks*, 18 Cal. 48, holding that the quantity of ground claimed may be limited by the district mining rules; *Hess v. Winter*, 30 Cal. 355, as so deciding; *Lincoln v. Rodgers*, 1 Mont. 223, so declaring and applying the principle to the custom of free tailings and the boundaries of ground for tailings; extended note 63 Am. Dec. 104, as to customs and rules of miners; note 90 Am. Dec. 497.

Evidence.—When mining rules are offered, the whole should be put in evidence, p. 119.

Cited, *Roberts v. Wilson*, 1 Utah, 294, to substantially the same effect.

Technical Exceptions will be disregarded unless the court is compelled to give them effect, if the judgment is right upon the merits, p. 119.

Cited, *King v. Blood*, 41 Cal. 317, applying the principle to a defect or error claimed to exist in a summons; notes 81 Am. Dec. 213, as to nonprejudicial errors, etc., not being ground for reversal; 85 Am. Dec. 308.

congress did not depend upon the nature of the issue or insufficient denial in the answer.

17 Cal. 128-132. **SELDEN v. MEEKS.**

Notice of Mechanic's Lien.—General description of demand is sufficient; account need not be itemized, p. 131.

Cited in *McClain v. Hutton*, 131 Cal. 136, holding claim for materials sufficiently definite; *Hicks v. Murray*, 43 Cal. 522, in dissenting opinion, in connection with the assertion, "that the contract being that the whole were to be paid for by a gross sum it is unnecessary to apportion the amount between the two"; *Jewell v. McKay*, 82 Cal. 150, in affirmance; also followed in *Leftwich etc. Co. v. Florence etc. Assn.*, 104 Ala. 594, and in *Nichols v. Culver*, 51 Conn. 179. Cited, *Skyrme v. Occidental etc. Co.*, 8 Nev. 237, holding that while a notice should have stated more clearly the character of the work, by whom and for whom done, yet it was sufficient under the statute; followed in *Lonkey v. Wells*, 16 Nev. 274; cited note 76 Am. Dec. 508.

17 Cal. 132-136. **EX PARTE SPRING VALLEY WATER WORKS.**

Certificate of Incorporation.—Mere technical error therein does not invalidate charter, p. 136.

Cited, *Spring Valley W. W. v. San Francisco*, 22 Cal. 441, holding that slight defects or omissions do not invalidate proceeding for incorporating under the general law, since a strict compliance with all the statutory requirements is not essential; *People v. Stockton etc. R. R. Co.*, 45 Cal. 313, to the same effect; so, also, in *People v. Montecito W. Co.*, 97 Cal. 278; 33 Am. St. Rep. 174; *State v. Inhabitants etc.*, 2 Idaho, 913, to the point that a town is legally incorporated though the order of the board of commissioners declaring said town incorporated failed to designate the metes and bounds thereof, it appearing that the order referred to the petition on which it was based, said petition stating the bounds; extended note, 19 Am. Dec. 67.

Mandamus lies to compel county judge to hear and determine a petition to appoint commissioners to appraise lands, p. 136.

Cited, *Tilden v. Sacramento Co.*, 41 Cal. 77, in dissenting opinion, but the case holds that mandamus does not lie to reverse or review the judgment of a board of supervisors in allowing or disallowing a claim.

General Citation.—Appeal of Houghton, 42 Cal. 68, in dissenting opinion, as being a case where the statute granted an appeal.

17 Cal. 142-148. **PEOPLE v. WILLIAMS.**

Jury—Challenge in Criminal Cases.—Hypothetical opinion qualified upon truth of a report or rumor does not disqualify, pp. 143, 146.

Cited, *People v. King*, 27 Cal. 512, 87 Am. Dec. 98, holding that to re-

der a juror incompetent for implied bias he must entertain a fixed and settled conviction of defendant's guilt or innocence, or he must have expressed such a conviction; *People v. Brown*, 59 Cal. 354, in affirmance.

Criminal Law—Evidence.—All the facts explaining accused's conduct should be admitted as a general rule, p. 146.

Cited, *People v. Scoggins*, 37 Cal. 687, in connection with the admissibility of threats of deceased.

Instructions should not directly or indirectly assume guilt or employ equivocal phrases which may leave such impression, p. 147.

Cited in *People v. Matthai*, 135 Cal. 448, holding instructions prejudicial; *State v. Taylor*, 7 Idaho, 138, holding prejudicial certain remarks by court on ruling on admissibility of evidence in prosecution for murder; *State v. Barry*, 11 N. Dak. 449, holding instructions in prosecution for murder where only defense was insanity, expressed judge's views as to weight and effect of evidence, and were prejudicial; *People v. Strong*, 30 Cal. 158, holding that instructions should not assume that defendant has confessed the crime when he has not; *People v. Buster*, 53 Cal. 613, in affirmance, where the instruction assumed that defendant intentionally shot deceased; *People v. Ramirez*, 56 Cal. 537. In this case the words "where deceased was slain" were used, but they were held not an assumption of the corpus delicti; *People v. Lanagan*, 81 Cal. 144, where an instruction which assumed guilt was held erroneous; *People v. Gordon*, 88 Cal. 426, holding that the court should not state his impression of the substance and effect of the testimony of the prosecuting witness without stating its contents; *People v. Choynsky*, 95 Cal. 643, quoting from the principal case (p. 147) and holding that a charge should not be argumentative nor consist of a résumé of the evidence nor pass upon facts; *People v. Hertz*, 105 Cal. 665, also quoting (p. 147); also holding that instructions should not be argumentative so as to reveal the opinion of the court; *People v. Stanton*, 106 Cal. 142, holding that a charge should be so fair, impartial, and well balanced as not to disclose the court's opinion; but also deciding that although argumentative, yet, if not prejudicial to accused in this respect, judgment will not be reversed; *State v. Lee*, 91 Iowa, 505, holding that the charge should not assume that a controverted fact is established; *Olive v. State*, 11 Neb. 29, to the same effect as the principal case; *State v. Kelly*, 1 Nev. 228, but distinguished, as in that case the language—"a ruffian, out of mere wantonness, firing into a crowd upon a sudden motion is as guilty as if he had lain in wait for his victim"—was used only in a hypothetical case and had no reference to accused; *State v. Duffy*, 6 Nev. 140, holding that instructions should not assume any controverted material fact to be proven; *State v. Addy*, 28 S. C. 16, holding that the jury should be left unbiased by any indication or expression of opinion of the court; extended note, 14 Am. St. Rep. 40, as to "Jury trial—Invasion by the court of the province of the jury."

If Instruction is Refused on the ground that an equivalent one has been given this reason must be assigned at the time, p. 148.

Followed, *State v. Ferguson*, 9 Nev. 118. Cited, *State v. O'Connor*, 11 Nev. 428, and the doctrine declared to have been ignored by the later California cases, and that case is substantially contra; *State v. Freidrich*, 4 Wash. 213, where the court says of the principal case: "This decision must presuppose that the requests to charge were read in the presence of the jury, a practice which does not prevail in this state." See *People v. Ramirez*, 56 Cal. 538, holding that the omission to mark instructions refused because already given is an immaterial error.

Instruction should be given in very words asked where they present the law correctly, p. 148.

Cited, *State v. Freidrich*, 4 Wash. 213, but not followed where the instruction given covered every material point in plainer language.

17 Cal. 149-152. HEAD v. FORDYCE.

Action to Quiet Title embraces every description of adverse claim or pretention, or outstanding title, inchoate or contingent, which would deprive plaintiff of his property, cast a cloud on title, depreciate value, or which might produce litigation or loss, though it be neither a legal nor equitable title, p. 151.

Cited and the principle affirmed or applied in *Horn v. Jones*, 28 Cal. 204; *Joyce v. McAvoy*, 31 Cal. 287; 89 Am. Dec. 184; *Arrington v. Liscom*, 34 Cal. 389; 94 Am. Dec. 740; *Pralus v. Pacific etc. Co.*, 35 Cal. 34; *Withers v. Jacks*, 79 Cal. 300; 12 Am. St. Rep. 144; *Castro v. Barry*, 79 Cal. 446; *California etc. Co. v. Miller*, 96 Fed. 20, quoting *Castro v. Barry*, 79 Cal. 446; *Fulkerson v. Chisna Min. etc. Co.*, 122 Fed. 786, under Alaska Code, section 475, one in possession of mining claim under valid location has title sufficient to sue to quiet title; *McLeod v. Lloyd*, 43 Or. 274, upholding B. & C. Comp., section 516, giving to any person claiming interest in realty not in possession of another a right to sue in equity to determine respective claims; *Kittle v. Bellegarde*, 86 Cal. 565, affirming the right to maintain the action, although the adverse claim rests upon proceedings void upon their face; *Blasdel v. Williams*, 9 Nev. 169, where it is said a mere asserted claim is not an adverse claim, but that it must be prejudicial within the rule of the principal case.

Notice of *Lis Pendens* must be filed or appear of record to give constructive notice of suit affecting title, p. 151.

Cited, *Sampson v. Ohleyer*, 22 Cal. 211, to the point that the Practice Act, section 27, only abrogates the rule of constructive notice from the mere pendency of an action, but does not change the rules of law as to the effect of actual notice which may be equivalent to filing a *lis pendens*; *Warnock v. Harlow*, 96 Cal. 304, 31 Am. St. Rep. 212, to the

same point as the principal case, also to the same effect as the last citing case herein; *Pitt v. Rodgers*, 104 Fed. 390, further holding no presumption to exist that notice was recorded.

To set aside decree claimed to be a cloud on title, plaintiff must show affirmatively that the defendant had no claim on the property, p. 152.

Cited and followed in *Blasdel v. Williams*, 9 Nev. 171; also cited, *Id.* 173, in dissenting opinion; *Union etc. Co. v. Warren*, 82 Fed. 521, sustaining complaint under local (Nevada) statutes.

17 Cal. 152-162. **SELIGMAN v. KALKMAN.**

Judgment for Dissolution of partnership and a distribution is not a personal judgment, which is necessary to maintain debt on judgment by creditors, p. 162.

Cited, *Peck v. Vandenburg*, 30 Cal. 21, holding that an interlocutory judgment in partition, adjudging that one of the parties has no interest in the property, is not a final appealable judgment as to him; *White v. Conway*, 66 Cal. 386, holding that an interlocutory judgment against a partnership ordering a sale for the amount found due upon accounting is not a final judgment, but that the balance must be ascertained and judgment rendered therefor, before the statute of limitation runs.

17 Cal. 163-165. **BENSON v. AITKEN.**

Homestead may be alienated or encumbered by husband's deed after death of wife, pp. 164, 165.

Cited, *Himmelmann v. Schmidt*, 23 Cal. 120, to this point in connection with the discussion of the construction of the Homestead Act of 1860.

Same.—There must be occupation by the family as a home to create homestead. The residence of the husband alone is insufficient, p. 164.

Cited, *Gambette v. Brock*, 41 Cal. 83, noting that the Homestead Act was materially modified under the statute of 1860, providing that either husband or wife, or other head of the family might select and dedicate the homestead by a declaration in writing.

General Citation.—Extended note, 60 Am. Dec. 613, where numerous points relating to homestead law are considered.

17 Cal. 166-172. **PEOPLE v. YBARRA.**

Dying Declarations of Deceased made under a sense of impending death are admissible, pp. 168-170.

Cited, *People v. Yokum*, 118 Cal. 440, holding that it is not essential that the statement be made in writing, or that it should show that it was made under the sense of impending death, but that it is enough that the fact be made to appear in any lawful mode.

Notes Cal. Rep.—56

Criminal Law.—Testimony of witness may be stated by the court at jury's request on their return into court, p. 169.

Cited, *State v. Smith*, 10 Nev. 115, to substantially the same effect.

Indictment for Murder is sufficient if every element of the crime is stated in ordinary language, though not embracing the usual technical language, p. 169.

Cited, *People v. Ah Woo*, 28 Cal. 211, holding an indictment sufficient which answered "all the calls of the statute," even though the instrument alleged to be forged was not set out in the foreign language in which written; *People v. Ah Choy*, 1 Idaho, 319, to the point that an indictment is sufficient if it charges killing with malice aforethought or charges the offense in the language of the statute; *State v. Harkin*, 7 Nev. 384, where, relying upon the authority of the principal case, a good indictment was held to remain after rejecting certain words as surplusage.

Criminal Law.—Instructions should not invade the province of the jury, usurp its powers, nor assume the existence of facts necessary to convict, nor in any manner take away their exclusive right to weigh the evidence and determine the facts, although the court may state the testimony and declare the law, pp. 170, 171.

Cited in *People v. Compton*, 123 Cal. 409, holding improper an instruction as to corroboration when invading province of jury as to credibility; *People v. Messersmith*, 61 Cal. 249, holding that instructions should not assume the existence of a fact not in evidence nor where there is a conflict of evidence, nor one which is to be determined by the jury on evidence however slight; *People v. Chew Sing Wing*, 88 Cal. 270, quoting from page 171 in affirmance, the charge in that case assuming a fact invading the province of the jury in a murder trial; *State v. Millain*, 3 Nev. 447, where the constitution contained the same language as that of California (Art. VI, sec. 17), substantially the same rule as that of the principal case is also stated, but the charge, although upon the facts, was so subsequently qualified that it was held error not injurious to the prisoner; also cited in same case on rehearing, *Id.* 482, which was denied.

Judgment will not be reversed where error in instructions could not possibly have injured the accused, nor where there is an abstract or immaterial error. But error being shown in a criminal case, injury will be presumed except the contrary conclusively appears, p. 171.

Cited as authority, *People v. Ramirez*, 56 Cal. 538, to the point that a judgment will not be reversed for mere abstract and immaterial errors; *Ex parte Bernert*, 62 Cal. 523, to the point that the defendant must have been prejudiced to warrant a reversal, even though when error is shown injury will be presumed; *People v. Eppinger*, 109 Cal. 297, to the point that, error being shown, injury will be presumed unless the contrary clearly appears.

17 Cal. 172-178. UNDERHILL v. TRUSTEES CITY OF SONORA.

Action on Municipal Bonds.—Averment of the vote on election proceedings, provided as preliminary to issuance of said bonds, is unnecessary, p. 176.

Cited, extended note 64 Am. Dec. 644, to the same point.

Municipal Bond.—When payment is provided for in particular way the debtor cannot plead statute of limitations without showing that particular fund has been provided or method pursued, p. 177.

Cited in *State v. Commissioners*, 23 Nev. 267, holding statute not to begin to run until moneys shown to be in designated fund.

City Bonds are withdrawn from statute limitations by statute recognizing debt and providing for payment, pp. 177, 178.

Cited, *May v. School District*, 22 Neb. 206, 3 Am. St. Rep. 267, as supporting the point that the statute of limitations runs for or against school districts or other municipal corporations; so, also, in *State v. School District*, 30 Neb. 526; 27 Am. St. Rep. 424; *Lincoln Co. v. Luning*, 133 U. S. 533, quoting from the principal case (pp. 177, 178) in affirmance of the rule under a provision by the legislature for the creation of a special fund by the debtor for payment it not being shown by the debtor that the fund has been provided; *Robertson v. Blaine Co.*, 90 Fed. 71, 61 U. S. App. 257, quoting *Lincoln Co. v. Luning*, 133 U. S. 533; *School Dist. v. Bank*, 63 Kan. 671, discussing effect of statute requiring registration of warrants; examined and distinguished, *Robertson v. Blaine County*, 85 Fed. Rep. 737; extended note 64 Am. Dec. 445.

General Citation.—*Sawyer v. Colgan*, 102 Cal. 292, holding that it is a general rule that when payment is provided for in a particular way the debtor cannot plead the statute of limitations without showing that the particular fund has been provided or the method pursued.

17 Cal. 178-182. SMITH v. FAGAN.

Accounting may be had by one cotenant in resuming property from his cotenants, p. 181.

Cited, extended note 83 Am. Dec. 109, considering the questions of accounting, payment of debts, liens; note 69 Am. St. Rep. 411, on partnership, dissolution and accounting.

17 Cal. 182-194. DE LA GUERRA v. PACKARD.

Mexican Law.—Heirs succeeded immediately to estate and Probate Act of 1850 was not retroactive, pp. 193, 194.

Cited, *Ord v. De La Guerra*, 18 Cal. 74, to the point that prior to the Probate Act there was no necessity for taking out administration on the mother's estate; also that the husband holds really as survivor; *People v. Senter*, 28 Cal. 505, holding that the act was retroactive; *Coppinger*

v. Rice, 33 Cal. 423, quoting from and affirming the principal case; Ryder v. Cohn, 37 Cal. 89; criticising the same and holding that proceedings of the civil courts, between the acquisition of California by the United States and time when the laws of 1850 went into effect, are not to be tested by the strict rules of either the civil or common law; also cited in dissenting opinion, Id. 91; McNeil v. Congregational Soc., 66 Cal. 108, 112, following the principal case; Lataillade v. Orena, 91 Cal. 579; 25 Am. St. Rep. 225 with approval; Seaverns v. Gerke, 3 Sawy. 363, holding that the act was not retroactive; also that an administrator's sale under authority of the alcalde was void, no judicial record of the proceeding being shown.

17 Cal. 199-226; 79 Am. Dec. 123. **MOORE v. SMAW.**

United States Patent conveys everything embraced within the term "land," p. 224.

Cited, Fremont v. Seals, 18 Cal. 435, so holding; Ah Hee v. Crippen, 19 Cal. 497, stating the same rule; United States v. San Pedro etc. Co., 4 N. Mex. 292, 293, 294, 295, discussing nature of title of Mexican and Spanish governments to precious metals and holding act of Congress confirming Mexican colonization grant to pass no title to such minerals.

Mines in the lands of private citizens do not belong to the United States by virtue of her sovereignty; she only occupies with reference to her real property within a state the position of a private proprietor, pp. 218, 224.

Cited, extended note 63 Am. Dec. 93, 95, 96, 102, 103, exhaustively reviewing the rights of settlers and miners as to public lands and minerals therein; also the question of sovereignty respecting the public land in California; note 91 Am. Dec. 694.

Patent—Construction.—Same general rules apply as in conveyances of private individuals, p. 224.

Cited, notes 85 Am. Dec. 367, 24 Am. St. Rep. 737.

17 Cal. 226-231. **FRIEDMAN v. MACY.**

Void Lease may be Confirmed by owner so as to allow removal of buildings, p. 230.

Cited, Jungerman v. Bovee, 19 Cal. 363, but declared not the same principle, as in the citing case there was a new lease the construction of which prevented a removal of the buildings.

17 Cal. 233-238. **ABEL v. LOVE.**

Tenant in Common of Water Ditch may recover his share of rents and profits from cotenant in possession, and shareholders in water

ditches are entitled to participate in profits, such operations being regarded as partnerships to this extent, pp. 237, 238.

Cited, *McConnell v. Denver*, 35 Cal. 369, 95 Am. Dec. 108, where the relations of such shareholders are held to have some of the incidents of partnerships but to be more in the nature of tenancies in common; *McCord v. Oakland etc. Co.*, 64 Cal. 146, 149, 49 Am. Rep. 696, 699, and referring to the rule of the principal case as to partnership in the profits as "dictum," and declaring that the parties in the citing case were not mining partners between whom an accounting was sought, and also that "the present is not an action to recover rent of the defendant as successor to the tenants previously in occupation," the case was one of tenancy in common of a mine; *Winton Coal Co. v. Pancoast Coal Co.*, 170 Pa. St. 442, as to right of tenant in common of water ditch to recover rent, affirming the principle and substantially following the same; notes 73 Am. Dec. 555; 76 Am. Dec. 550; extended note 83 Am. Dec. 110.

Jurisdiction.—In petition for letters of administration the words "late a resident" of a county, etc., are sufficient, p. 238.

Cited, note 68 Am. Dec. 257, to this point.

17 Cal. 239-246. **COFFEE v. TEVIS.**

Contribution.—Joint debtor paying judgment without intending to discharge it may enforce contribution, p. 245.

Cited in *Williams v. Riehl*, 127 Cal. 370, 78 Am. St. Rep. 63, on point that such payment does not operate as accord and satisfaction as to codebtors unless so intended; *Merchants' etc. Bank v. Great Falls etc. Co.*, 23 Mont. 38, 39, 75 Am. St. Rep. 502, 503, applying rule to payment of judgment by cosurety, who takes its assignment; *Campbell v. Pope*, 96 Mo. 476, as so deciding and holding that a payment of a joint judgment for assignment to keep it alive is not a satisfaction thereof; note, 80 Am. Dec. 228, to the point that such payment need not operate as a satisfaction when not so intended.

17 Cal. 250-260. **ELY v. FRISBIE.**

Patent takes effect as deed at date of presentation of claim to land commissioners, p. 250.

Cited, *Teschemacher v. Thompson*, 18 Cal. 26, 79 Am. Dec. 158, in approval, but also holding that as a record of the government of the existence and validity of the grant, it establishes the patentee's title for the date of the grant; *Leese v. Clark*, 18 Cal. 571, holding that a patent takes effect as a deed by relation to the first act; *Touchard v. Crow*, 20 Cal. 160, 81 Am. Dec. 114, in affirmance; also approved in *Kahn v. Old Telegraph etc. Co.*, 2 Utah, 188.

Appeal.—"Party Aggrieved" is one against whom an appealable order or judgment has been entered, p. 260.

Cited, *Central Pac. R. R. Co. v. Creed*, 70 Cal. 499, holding that one in whose favor a valid judgment has been entered is not a "party aggrieved."

General Citation.—*Randol v. Garoutte*, 78 Mo. App. 613.

17 Cal. 260-262. **PEOPLE v. SKIDMORE.**

General Citation.—This case in 27 Cal. 291, 292, considers the effect of the words "judgment affirmed" in the principal case, and holds the latter a bar to another suit for the same cause of action.

17 Cal. 262-270. **DUPUY v. LEAVENWORTH.**

Real Estate Partnership acquired with its funds is to be treated in equity as personal property and is first subject to partnership debts before distribution among copartners or application to their debts. The possessor of the legal title is a trustee and a surviving partner may dispose of the equitable interest to pay debts and purchaser may compel a conveyance, pp. 267, 268.

Cited, *Burpee v. Bunn*, 22 Cal. 199, holding that partnership debts must first be paid before partnership property can be subjected to individual debts; so, also, without regard to priority of attachment liens, *Bullock v. Hubbard*, 23 Cal. 501; 83 Am. Dec. 131; *McCauley v. Fulton*, 44 Cal. 362; to the point that a purchaser under execution sale acquires the legal interest in such property; *Riley v. Carter*, 76 Md. 603, 35 Am. St. Rep. 453, quoting from the principal case (p. 268) upon the point of trusteeship and rights of the surviving partner and a purchaser; *Easton v. Courtwright*, 84 Mo. 37, quoting on the points stated in the above headnote (pp. 267, 268), and declaring that partnership property is to be treated as assets in the hands of the surviving partner administering as such for the payment of debts; *Hirbour v. Reeding*, 3 Mont. 22, to the point of legal title and trusteeship; so, also, in *Sullivan v. Smith*, 15 Neb. 482, 48 Am. Rep. 357, considering the principal case and quoting therefrom (p. 268); *Batty v. Adams Co.* 16 Neb. 50, restating in the opinion the same rule that real property acquired with partnership funds is regarded as personal estate of the partnership; and applying the principle to land of owners in severalty who formed a joint stock company for its sale; *Shanks v. Klein*, 104 U. S. 23, quoting from the principal case (p. 268) in approval as to a sale vesting the equitable ownership and the right of the purchaser to compel a conveyance of the legal title; *Kleine v. Shanks*, Fed. Cas. No. 7870; so also, in *Megibben's Admr. v. Perrin*, 49 Fed. Rep. 185; *State v. Neal*, 29 Wash. 393, under *Ballinger's Code*, section 6190, surviving partner may treat partnership realty as personalty and dispose of it to adjust firm rights without making showing required of administrator on sale of realty; extended notes, 65 Am. Dec. 301, as to surviving partner's power as to partnership real estate; 98 Am. Dec. 198, as to the character of real estate so purchased and its applica-

tion first to partnership debts; so, also, in note 27 Am. Rep. 270; note, 54 Am. Rep. 798, as to respective rights of firm and individual creditors and Id. 799 as to sale by the surviving partner and its effect; so, also, in extended note 48 Am. St. Rep. 75.

Bona Fide Purchaser of Partnership Property takes the title freed from equitable claims of others, p. 269.

Cited, *McMillan v. Hadley*, 78 Ind. 594, quoting from pp. 268, 269, and applying the principle against partnership creditors to the extent of the moiety purchased at a sheriff's sale of a partner's interest in land; *Easton v. Courtwright*, 84 Mo. 37, quoting from the principal case on this point and applying the doctrine to a sale of realty by surviving partner.

17 Cal. 271-274. LENTZ v. VICTOR.

Possession of Public mineral land is good against all the world except the government. If the land is taken up for other purposes a right of entry may attach for mining, p. 274.

Cited, extended note 63 Am. Dec. 97, 103, as to settlers' and miners' rights, also as to private ownership of land in relation to ownership of minerals; note 91 Am. Dec. 694, as to respective rights of miners and others on public lands.

17 Cal. 275. KINKEAD v. SHREVE.

Vendee suing on bond for deed must show demand therefor before suit, p. 276.

Cited in *Raudabaugh v. Hart*, 61 Ohio, 88, 76 Am. St. Rep. 366 (erroneously as *People v. Mills*), holding complaint of vendee insufficient.

17 Cal. 276-278. PEOPLE v. MILLS.

Indictment for Rape Need not Aver force or violence if child is under ten years, p. 278.

Cited *People v. Rangod*, 112 Cal. 672, in affirmance, followed in *Murphy v. State*, 120 Ind. 118; extended note 80 Am. Dec. 374, as to carnal knowledge of children.

Grand Jury.—Presumptions are in favor of regularity of proceedings, p. 278.

Followed, *United States v. Cannon*, 4 Utah, 125.

17 Cal. 279-282. CONNOR v. HUTCHINSON.

Bill of Particulars.—Order for exclusion of evidence for insufficient bill must be obtained before trial, p. 282.

Followed, *McCarthy v. Tecarte L. & W. Co.*, 110 Cal. 693, and in *Isham v. Parker*, 3 Wash. 774.

17 Cal. 283-285. PEOPLE v. GIBSON.

Criminal Law.—Instructions should not presume degree of guilt; the question is for the jury, pp. 284, 285.

Cited, *People v. Hunt*, 59 Cal. 433, in affirmance; so, also, in *People v. Ah Lee*, 60 Cal. 86. Distinguished in *People v. Bawden*, 90 Cal. 197, since in that case the court charged that a certain result would follow if the defendant murdered the deceased willfully, deliberately, and with premeditation; cited, *People v. Walter*, 1 Idaho, 393, with approval.

Instructions in Capital Cases should, as a general rule, be confined to plain principles of law when charges are not asked, p. 285.

Cited, *People v. Byrnes*, 30 Cal. 208, where the charge was held not too general under this rule.

17 Cal. 285-289. LESTRADE v. BARTH.

New Trial.—Amendments should be liberally allowed in order to secure a fair and speedy trial on the merits, p. 289.

Cited in *Frost v. Witter*, 132 Cal. 424, 84 Am. St. Rep. 56, allowing amendment of complaint on note by pleading of mortgage securing it, and asking its foreclosure; *Patterson v. Ely*, 19 Cal. 36, as not in conflict with the view that the surprise alleged in that case did not entitle the defendants to a new trial, since the object of the decision in principal case was to secure a fair and speedy trial on the merits; *Coubrough v. Adams*, 70 Cal. 378, affirming the power to grant amendments at any stage of the trial, when necessary for the purposes of justice; *McCausland v. Ralston*, 12 Nev. 203, to the point that amendments will be liberally allowed; so, also, in *Watts v. Womack*, 44 Ala. 608.

17 Cal. 294-297. LAFONTAINE v. GREENE.

Constable may Serve Execution Outside of township under sections 601, and 602 of Practice Act, p. 297.

Cited, *Allen v. Napa County*, 82 Cal. 188, so holding with regard to a justice's warrant properly indorsed.

17 Cal. 297-298. PEOPLE v. ROACH.

Declarations of persons at time of making first assault are part of the *res gestae* and admissible for defendant, p. 298.

Cited, *People v. Marble*, 38 Mich. 124, holding that evidence of the whole transaction both before and after the killing were admissible where the entire affair lasted about two minutes.

17 Cal. 298-305. WOODSON v. McCUNE.

Possession as Notice of Title applies not only to unrecorded deeds, but also to any other title consistent with the possession, p. 304.

Cited, notes 68 Am. Dec. 345; 73 Am. Dec. 549.

17 Cal. 306. PEOPLE v. JOHNSON.

Officers.—Mandamus does not lie to compel supervisors to fix official salary at any particular amount in absence of statute so fixing it, p. 306.

Cited in *State v. City*, 156 Ind. 591, denying writ to compel increase of salary, though grossly inadequate.

17 Cal. 308-310. COMERFORD v. DUPUY.

Fences to Turn Cattle Must be of character prescribed by statute or the equivalent thereof, to maintain action for injuries by them, p. 310.

Cited, *Logan v. Gedney*, 38 Cal. 581, to the point that the act of 1859 concerning fences in certain counties was then (1869) in force, and that the common law of England did not prevail in California; *Hahn v. Garrett*, 69 Cal. 147, recognizing the rule, but holding that the owner of land in Santa Clara county is not required to fence it against cattle under act of 1863 as amended 1872; *Merritt v. Hill*, 104 Cal. 185, affirming the rule of the principal case except as to those cases governed by local laws and also deciding that the common-law rule as to liability for trespassing animals has never obtained in California; *Chase v. Chase*, 15 Nev. 262, in affirmance; *Gregg v. Gregg*, 55 Pa. St. 230, substantially so holding; *Bufourd v. Horitz*, 133 U. S. 331, but the principle was held not applicable to public lands of the United States where cattle by a then custom of over a hundred years had run at large; extended note 49 Am. Dec. 251, as to liability for trespass of animals, how affected by statute etc. as to fences.

17 Cal. 310-313. PEOPLE v. PRICE.

Affidavits on motion for new trial are no part of the record if not embodied or referred to in any statement or bill of exceptions, p. 313.

Cited, *People v. Mahoney*, 77 Cal. 532, in affirmance; so, also, in *People v. Louie Foo*, 112 Cal. 21. In this case, the affidavit was in addition not identified as having been read upon the hearing of the motion; *People v. McMahon*, 124 Cal. 437, as to affidavit on misconduct, not identified as read upon hearing of motion, and not included in bill.

17 Cal. 316-320. PEOPLE v. LOMBARD.

Homicide—Justification.—Threats of deceased not followed by overt acts do not justify killing; there must be something more than a mere apprehension of danger, p. 320.

Cited, *State v. Stewart*, 9 Nev. 131, in affirmance.

General Citation.—*People v. Stewart*, 28 Cal. 396, which holds that the character of defendant for peace and quiet may be shown and also that the principal case, so far as it "seems to hold a contrary doctrine," is not law.

17 Cal. 320-322. **PEOPLE v. CHUNG LIT.**

Objection that a Juror was not qualified cannot be taken upon motion for new trial, whether known before or not, p. 322.

Cited, *People v. Coffman*, 24 Cal. 234, in affirmance; so, also, in *People v. Henderson*, 28 Cal. 469, and in *People v. Mortier*, 58 Cal. 267; *People v. Evans*, 124 Cal. 210, as to objection of non-citizenship; *Territory v. Duffield*, 1 Ariz. Ter. 74, in dissenting opinion to the point that exceptions to instructions cannot be availed of when made too late; also that after they have been delivered and the jury has retired; *Dakota v. O'Hare*, 1 N. Dak. 41, in affirmance.

Charge to Jury is presumed to have been in writing and need not affirmatively appear in record of criminal trial, p. 322.

Followed, *People v. Garcia*, 25 Cal. 535, also in *People v. Shuler*, 28 Cal. 496; cited, *Territory v. Duffield*, 1 Ariz. Ter. 74, as authority. This case turned upon the point of the failure to charge in writing.

17 Cal. 323-324. **PEOPLE v. LAMB.**

Killing is Unjustifiable unless defendant was without fault in causing the necessity relied on as a justification, p. 324.

Cited, *People v. Westlake*, 62 Cal. 307, where the same instruction as in the principal case was given and the rule approved. This case considers also *People v. Simons*, 60 Cal. 72, and decides that it is not an authoritative overruling of the principal case; *People v. Conkling*, 111 Cal. 627, where the doctrine is denied; *People v. Simons*, 60 Cal. 72, *People v. Wong Ah Leak*, 63 Cal. 544, *People v. Bush*, 65 Cal. 129, and *People v. Gonzales*, 71 Cal. 569, are declared to state the true rule, and *People v. Button*, 106 Cal. 628, 46 Am. St. Rep. 259, as cited as discussing the entire question.

17 Cal. 327-332. **PURKITT v. POLACK.**

In Bill to Set Aside Conveyance for fraud positive proof of fraud can seldom be obtained but fraudulent intent must be gathered from the circumstances, p. 332.

Cited, *Sonnenschein v. Bartels*, 37 Neb. 602, where eight lengthy instructions were held to have stated the law correctly upon the authority of the principal case and other cases; *Weber v. Rothchild*, 15 Oreg. 392, 3 Am. St. Rep. 168, stating what it is necessary for a grantee to show to prove himself a bona fide purchaser where a deed is attacked for fraud; so, also, in extended note 90 Am. Dec. 299.

17 Cal. 332-336. **PEOPLE v. McNEALY.**

Criminal Law.—Acquittal for material variance, the proof showing a misnomer of the party injured, is no bar to second indictment, p. 335.

Followed substantially in *People v. Oreleus*, 79 Cal. 180, but at p. 181 the court says that the principal case holds sections 1021 and 1165 of the Penal Code not to be in conflict with the constitution; *People v. Frank*, 1 Idaho, 203, as authority, but the variance was however held fatal where in an indictment for larceny the property was alleged as that of W. and it was proven to belong to W. & Co.; *State v. Sullivan*, 9 Mont. 496, in affirmance. In this case the surnames in the indictment and as proven were not alike in sound or spelling. Extended note, 58 Am. Dec. 538, as to "what facts sustain plea for former acquittal or conviction."

General Citation.—*People v. Potter*, 35 Cal. 114, as being of a class of "cases where the description of the act will be insufficient on the score of identity unless the true name is given." The citing case was one of misnomer of a municipal corporation in an indictment, the variance not being fatal.

17 Cal. 336-339. ESMOND v. CHEW.

Allowance for Costs may be discretionary in certain classes of cases, p. 339.

Cited, note 22 Am. Dec. 484, considering the question generally as to allowance of costs.

17 Cal. 339-344. HALLECK v. MOSS. S. C. 22 Cal. 274, on appeal from new trial had and judgment for plaintiff.

Sale of Personal Property of Estate is invalid upon publication in a newspaper unless court directs such publication and in the absence of such order the notice must be by posting. Such sale is voidable if not void, p. 344.

Cited, *Scarf v. Aldrich*, 97 Cal. 366, 33 Am. St. Rep. 194, but only generally in discussion in connection with the discussion of the effect of a defective description in a guardian's petition for sale and also in an order to show cause; extended note 44 Am. Dec. 238, as to failure to advertise execution or judicial sale; note 70 Am. Dec. 710.

17 Cal. 344-352. WEATHERWAX v. COSUMNES VALLEY MILL CO.

Statute of Limitations.—**Payments on an Open Account** do not make the account mutual. To constitute such account the demands must be reciprocal on matters of setoff. The fact that gold bullion is sent for carriage does not make the account mutual within the statute, pp. 351, 352.

Cited, *Norton v. Larco*, 30 Cal. 131, 134, 89 Am. Dec. 72, fully considering the principal case upon the points decided in connection with the question of proof of mutual account, the acceptance of personal property and striking a balance; *Auzerais v. Naglee*, 74 Cal. 80, to the

point that assent to an account stated does not take it out of the operation of the statute; *McNeil v. Garland*, 27 Ark. 346, holding that when payments have been made by one party for which credits are given by the other it is an account without reciprocity and only upon one side; *Warren v. Sweeney*, 4 Nev. 103, to a like effect as the principal case; *Id.* 111, in dissenting opinion; *Anthony & Co. v. Savage*, 2 Utah, 470, to the point that the entering of credits does not make the account mutual and the statute will not run from the last item; extended note 89 Am. Dec. 81, 83, 85, fully considering the questions of mutual accounts and the statute of limitations as connected therewith.

Same.—Oral acknowledgment of correctness of account will not take it out of the statute of limitations, p. 351.

Cited, *Reed v. Smith*, 1 Idaho, 535, to the point that the promise must be in writing, whether the action was barred or not at the time of the promise; *Floyd v. Pearce*, 57 Miss. 144, in affirmance.

17 Cal.352-354. **GIRD v. RAY.**

Possessory Act of 1852 required actual residence to obtain its benefit, p. 354.

Followed, *Wolfskill v. Malajowich*, 39 Cal. 279.

17 Cal. 354-362. **PEOPLE v. CONNOR.**

Indictment may be entitled of city and county of San Francisco, p. 361.

Cited, *People v. Robinson*, 17 Cal. 370, in affirmance.

Indictment.—Same offense may be charged in different forms, p. 361.

Cited, *Cooper v. State*, 79 Ind. 203, in affirmance.

Court of Sessions.—Proceedings are presumed to be regular and legal until the contrary is shown, p. 362.

Cited, *People v. Robinson*, 17 Cal. 371, holding district courts to be courts of general jurisdiction, the regularity of its proceedings being presumed, and that the party seeking to impeach them must show affirmatively the irregularity; *People v. Hobson*, 17 Cal. 429, in affirmance; *People v. Blackwell*, 27 Cal. 67, applying the rule to county courts of general criminal jurisdiction; *People v. Henderson*, 28 Cal. 475, applying the principle to the point that it would be presumed that the court acted properly in changing justices during a criminal trial.

Though Record Does not Show Instructions were filed or made part thereof, presumption exists that court acted regularly and the contrary must be shown, p. 362.

Cited, *People v. Richmond*, 29 Cal. 415, to the point that the record must show error.

17 Cal. 363-371. PEOPLE v. ROBINSON.

Judicial Notice will be taken of the existence of a certain district in a county, p. 371.

Cited, *Pitts v. Lewis*, 81 Iowa, 56, holding that judicial notice will be taken of the organization of counties; *United States v. Williams*, 6 Mont. 389, as so deciding and holding that judicial notice will be taken of the regulations of the secretary of the interior as to cutting timber upon public lands; extended note, 89 Am. Dec. 687.

District Courts.—Regularity of proceeding will be presumed, p. 371.

Cited, *People v. Blackwell*, 27 Cal. 67, applying the rule to county courts of general criminal jurisdiction.

17 Cal. 374-377. BRENNAN v. GASTON.

Contempt.—Disobedience of an invalid order is not, p. 377.

Cited, *People ex rel. District Court*, 6 Col. 537, holding that power to punish for contempt does not exist where want of jurisdiction appears in the petition.

17 Cal. 377-379. PEOPLE v. AH FUNG. S. C. 16 Cal. 137.

Instructions.—Motive is a question for the jury, p. 378.

Cited in *State v. Foley*, 144 Mo. 621, holding erroneous the refusal of instructions that absence of probable motive is circumstance in defendant's favor; *State v. Lucey*, 24 Mont. 299, on point that evidence to show defendant's motive is admissible on behalf of prosecution; *State v. David*, 131 Mo. 398, as authority on the point that there was no error in charging the jury that if defendant committed the murder he was guilty, whether the motive was apparent or not.

Instructions in criminal cases should be confined to a few plain principles of law, rather than a long elaborate charge, p. 379.

Cited, *People v. Byrnes*, 30 Cal. 208, holding that the charge there was not too general within the rule of the principal case.

17 Cal. 380-385. FRATT v. FISKE & LORING.

Party Seeking Rescission of Contract for fraud must act promptly and give notice of intention to rescind, or he waives the fraud; he must also place the other party in statu quo, p. 384.

Cited, *Bailey v. Fox*, 78 Cal. 396, in affirmance; *Loaiza v. Superior Court*, 85 Cal. 31; 20 Am. St. Rep. 208, holding that upon a compliance with this rule, the court had jurisdiction to afford relief; *Maddock v. Russell*, 109 Cal. 426, to the point that certain grantees not having offered to redeliver possession nor account for profits of the land received had not taken the requisite steps to entitle them to rescind, and that a mere offer in the answer to reconvey was insufficient; *Brown v. Brown*, 142 Ill. 429, to the point that the offer to rescind must be made

within a reasonable time after knowledge of the fraud, and an offer was held too late when made by an amendment to a bill filed four years after settlement of the complainant's claim.

17 Cal. 389-401. **PEOPLE v. BEALOA.**

Murder in First Degree consists of a willful, premeditated, and unlawful killing. The intent, however, may instantaneously precede the killing or unlawful act. If the killing is done in the perpetration of or attempt to perpetrate a felony, specific intent to kill is not necessary to constitute such murder, p. 399.

Cited, *People v. Foren*, 25 Cal. 365, in substantial affirmance; *People v. Doyell*, 48 Cal. 95, 97, approving the rule as a test of what constitutes murder in the second degree; *State v. Keith*, 9 Nev. 19, to the point that the use of a deadly weapon in a manner likely to produce death presumes an intent to murder in the absence of mitigating or justifying facts; *State v. Garrand*, 5 Oreg. 226, quoting from the principal case in affirmance; *State v. Ellsworth*, 30 Oreg. 156, holding that homicide by poisoning, to constitute murder in the first degree, must be committed by giving the poison or waylaying; also that premeditation or deliberation must exist; *State v. Morgan*, 22 Utah, 170, sustaining conviction under facts stated; *People v. Calton*, 5 Utah, 459, as authority on the point that "homicide is murder in the first degree when the person killing had the opportunity and capacity to deliberate upon the act and to form a specific and distinct intention from such deliberation;" extended note 18 Am. Dec. 778, 786.

Criminal Law.—Error must affirmatively appear from the record; a general statement that a prisoner was absent during a portion of the trial is not sufficient, pp. 399, 400.

Cited, *People v. Holmes*, 118 Cal. 449, holding that the fact that not all the defendants were present should affirmatively appear of record; *State v. Harris*, 34 La. Ann. 121, so holding as to the point of the temporary absence of accused not being a ground for reversal; *Felliar v. State*, 5 Neb. 354, to the point that error must appear of record; extended note 68 Am. Dec. 228.

General Citation.—*People v. Ah Fung*, 17 Cal. 379, as to what is proper in charges to the jury in capital cases.

17 Cal. 403-406. **WILLIAMS v. YOUNG.**

Homestead.—Judgment is no lien thereon, nor can it be sold on execution, and the homestead may be set up as defense to ejectment based on a sheriff's deed, p. 406.

Cited, *McDonald v. Badger*, 23 Cal. 400, 83 Am. Dec. 128, affirming the rule as lien and sale on execution; so, also, in *Deffeliz v. Pico*, 46 Cal. 292; extended note, 84 Am. Dec. 571, as to defenses available to execution defendant in ejectment by purchaser thereunder.

Vendor's Lien.—Homestead may be sold for purchase money, but only by decree in equity, p. 406.

Cited, *Ross v. Heintzen*, 36 Cal. 319, where the interest of certain joint owners or tenants in common of mining property being sold on execution was held not to convey the interest of parties who had, prior thereto, disposed of the same by deed; extended notes 87 Am. Dec. 273; 99 Am. Dec. 574; 45 Am. St. Rep. 385.

17 Cal. 407-411. **WHITING v. CLARK.**

Guarantor.—Creditor who has fixed liability of guarantor is not bound to sue principal debtor unless requested, and the statute of limitations is no bar against the guarantor. He should pay the debt and then sue the principal or file a bill to compel creditor to sue, p. 411.

Cited, *Hayes v. Joseph*, 26 Cal. 543, to the point that a surety may pay the debt and at once proceed against the principal; *Sichel v. Carrillo*, 42 Cal. 500, 507, to the point that the surety could pay the claim and present the demand, and the nonaction of the holder of the note, by which the claim became barred, would not discharge the surety; Cited in *Mulvane v. Sedgley*, 63 Kan. 126, quoting *Bull v. Coe*, 77 Cal. 60, 11 Am. St. Rep. 239, as well settled that the mere delay of the creditor to proceed against the principal will not discharge the surety; *Carver v. Steele*, 116 Cal. 119, 58 Am. St. Rep. 157, holding that sureties and indorsers are not released by the failure of a creditor to enforce a mortgage or other lien which he has taken to secure the payment of his debt; *Esberg-Bachman etc. Co. v. Heid*, 62 Fed. Rep. 963, but only generally; holding that on an agreement to pay another's debt it need not be alleged by plaintiff that he has exhausted his legal remedies against the principal; *Nelson v. First Nat. Bank*, 69 Fed. Rep. 907, to the point that mere forbearance or delay in enforcing the obligation of the principal does not release the surety.

General Citation.—*Wilkinson Goddis Co. v. Van Riper*, 63 N. J. L. 398.

17 Cal. 415-416. **MAHER v. RILEY.**

Measure of Damages Where Purchase Money is paid on contract is the purchase money with interest, p. 416.

Cited, *Rose v. Foord*, 96 Cal. 154, in affirmance, where purchase money was paid for stock which never had existence nor market value.

17 Cal. 418-420. **HUNTER v. HOOLE.**

Remedy for Erroneous Judgment in justice's court on default is by mandamus and not by a bill in equity to set it aside and enjoin execution, p. 420.

Cited, *Hogue v. Fanning*, 73 Cal. 57, as conclusive of the views

of the court therein, though not "precisely in point." The judgment in that case was regular in form, and there was jurisdiction, but the judgment, though not void, was erroneous for want of a specific finding of value, and it was held that mandamus would lie.

17 Cal. 421-424. LAWRENCE v. SPEAR.

Abandonment of Wife by husband operates as a consent to contract as feme sole, pp. 423, 424.

Cited, extended note, 84 Am. Dec. 675, as to business conducted by and in name of wife and admissions from acts.

17 Cal. 424-431. PEOPLE v. HOBSON.

New Trial.—Change of judge on motion for, if not objected to, is not ground for reversal, p. 429.

Cited, *People v. Henderson*, 28 Cal. 475, affirming the principle as applied to a change of judges before sentence is pronounced; *Territory v. Bryson*, 9 Mont. 42, in affirmance under the statute of that state.

Court of Sessions.—Regularity of proceedings is presumed, p. 429.

Followed, *People v. Blackwell*, 27 Cal. 67, as applied to county courts of general criminal jurisdiction.

Refusal to Give Instructions already given in substance to constitute ground for reversal necessitates that the instructions asked should be clear and explicit, p. 430.

Cited, *People v. Ramirez*, 56 Cal. 538, to the same effect, also adding that the "court is not bound to repeat itself in its charge at the request of the counsel."

Instructions.—Admissions of accused may be assumed by the court to be true, p. 431.

Cited, *People v. Garcia*, 25 Cal. 535, where the court says: "An admission of fact made at the trial in open court by the prisoner or his counsel may be properly considered by the jury."

17 Cal. 431-433. TURNER v. CARUTHERS.

Authority of Attorney at Law is presumed, and want thereof may be questioned on motion upon affidavits to dismiss the suit, p. 433.

Cited in *Ventura Co. v. Clay*, 119 Cal. 215, as to action brought by district attorney in name of county further holding motion to dismiss renewable under circumstances; *Pacific Pav. Co. v. Vizelich*, 141 Cal. 8, holding dismissal erroneous where party served had appeared by an attorney; *Clark v. Willett*, 35 Cal. 540, in affirmance; also holding that the party represented may by direct application raise the question; *Williams v. Uncompahgre C. Co.*, 13 Colo. 475, affirming the point that an attorney's authority is presumed, and holding that a rule of court should be

obtained against the attorney to show his authority; *State v. Thompson*, 64 Tex. 693, holding that the authority of the attorney general to bring suit for canceling a claim to title to school lands is presumed, also that the proper mode to question the authority is to file some sworn pleading or motion denying it; *State v. Luce*, 62 Fed. Rep. 419, holding that the want of authority of an attorney to sue for the state in regard to school lands may be shown; *Bonnefield v. Thorp*, 71 Fed. Rep. 928, deciding that proceedings by motion to vacate the appearance, to dismiss the action, or for an order requiring authority to be shown are proper, and in cases involving the validity of an order, decree, or judgment depending for jurisdiction solely on the attorney's appearance, the attorney's authority may be attacked upon a motion to vacate such order, decree, or judgment.

17 Cal. 433. **HEYNEMANN v. EDER.**

Attachment—Indemnity Bond.—Sureties on are liable though judgment is rendered against only one of the defendants, p. 436.

Cited in *McCormick v. Surety Co.*, 134 Cal. 512, applying rule to bond on release of attachment though judgment was recovered only against defendant not owning the attached property; *Waldrop v. Wolff*, 114 Ga. 616, applying rule to bond in trover suit under local statutes.

17 Cal. 436-443; 79 Am. Dec. 139. **BUFFANDEAU v. EDMONDSON.**

Sheriff is Liable under sale on execution made in defiance of an injunction served upon him, and this whether the injunction was regularly granted or not, p. 441.

Cited, *McComb v. Reed*, 28 Cal. 286, 87 Am. Dec. 119, quoting from the principal case (p. 441), affirming and applying the principle to a case of the sheriff receiving an attachment regular on its face, and denying his right to raise the question of sufficiency of the complaint.

17 Cal. 443-464. **CITY AND COUNTY OF S. F. v. BEIDEMAN.**

Quieting Title.—Action does not lie under Practice Act as a substitute for ejectment when plaintiff is not in possession, p. 461.

Cited, *Pralus v. Jefferson etc. Co.*, 34 Cal. 559, holding that an allegation of possession was essential; *Brusie v. Gates*, 80 Cal. 465, holding that the code does not require possession as a basis of the right to have title quieted; note 67 Am. Dec. 112; see next heading herein.

Injunction against sale of real estate is not a bill to remove or prevent a cloud on title where no cloud exists under the averments, and the party is not in possession, p. 461.

Cited and followed, *Archbishop of S. F. v. Shipman*, 69 Cal. 591; see, also, preceding heading herein.

Injunction will not lie to restrain a sale to prevent multiplicity of suits when whole title can be determined in one action of ejectment and including all parties defendant, p. 461.

Cited and followed in *Northern Pac. R. Co. v. Cannon*, 46 Fed. Rep. 232. Cited, *Northern Pac. R. Co. v. Amacker*, 46 Fed. Rep. 235; 49 Fed. Rep. 538, to the same effect.

Van Ness Ordinance—Trust.—City lands are held in trust for public use and cannot be sold on execution, nor could the city enjoin a sale by the grantee nor interfere with his use or possession, except when necessary to enforce the trust. The claimant under the Van Ness Ordinance need only show his actual possession prior to January 1, 1855, and is thereby entitled to protection without limit as to quantity, pp. 461-464.

Cited in *City v. Jacks*, 139 Cal. 554, noted under *Hart v. Burnett*, 15 Cal. 530; *Hubbard v. Sullivan*, 18 Cal. 525, in regard to the grantee's title of a lot under the Van Ness Ordinance holding that ejectment would not lie for the lot on which the United States Marine Hospital stands; *Wolf v. Baldwin*, 19 Cal. 319, quoting at length from the principal case (pp. 463-465) commenting thereon, and declaring it not in conflict with that decision, and considering also the question of actual possession; *Davis v. Perley*, 30 Cal. 637, 643, considering said ordinance and the possession required thereunder to give title, also the limitation as to quantity passed or donated; *San Francisco v. Canavan*, 42 Cal. 556, as authority, together with other cases, as to the title of San Francisco to pueblo lands, the fiduciary nature of the tenure by which held, the power of the state over the city as to said lands, and their nonliability to sale under execution.

General Citation.—*Sullivan v. Triunfo etc. Co.*, 33 Cal. 393, as sustaining the right to appeal from an ex parte injunction order.

17 Cal. 464-466. **CALDWELL v. McDERMIT.**

Evidence.—Altered books of account coupled with suspicious circumstances as to entries are inadmissible unless explained by disinterested testimony, p. 466.

Cited, *White v. Whitney*, 82 Cal. 166, as not expressly declaring the rule, but as authority on the point that tradesmen's books of original entries supported by his oath are admissible.

17 Cal. 471-476. **BOWMAN v. HOVIOUS.**

Judgment Lien is not destroyed by division of county, p. 475.

Followed, *Garvin v. Garvin*, 34 S. C. 395, provided act creating the new county does not provide contra; note 37 Am. Dec. 414, as quoting from *Davidson v. Root*, 11 Ohio, 98; 37 Am. Dec. 411, on this point.

17 Cal. 476-486. **SEALE v. DOANE.**

Redemption.—Source of funds tendered or motive therefor is immaterial, p. 485.

Cited in *Bennett v. Wilson*, 122 Cal. 516, 68 Am. St. Rep. 66, but holding that tender must be made by lawful redemptioner; note to *Flanders v. Aumack*, 67 Am. St. Rep. 516, on redemption.

General Citation.—*San Francisco v. Canavan*, 42 Cal. 557, as authority, together with other cases, as to the title of San Francisco to pueblo lands; the fiduciary character by which held; the power of the state over the city as to said lands and their nonliability to sale under execution.

17 Cal. 487-499; 79 Am. Dec. 142. **JONES v. STEAMSHIP CORTES.**

Carriers of Passengers.—Damages for breach of contract is ordinarily limited to pecuniary loss but may be exemplary in case of fraud and hardship producing great bodily and mental suffering, pp. 495, 496, 499.

Cited, *Western Union Tel. Co. v. Rogers*, 68 Miss. 754, 24 Am. St. Rep. 302, 303, holding that in an action against a telegraph company, damages for mental suffering disconnected from physical injury are not recoverable in an action for negligence; *G. C. & Santa Fe Ry. Co. v. Levy*, 59 Tex. 547, 46 Am. Rep. 273, where exemplary damages were allowed for negligent failure to deliver telegram; note 44 Am. St. Rep. 488, to the same point as the principal case.

Pleadings.—But one form of action exists under our system. All matters arising out of the same transaction may be litigated in one action. Tort may be united with contract; so also injuries to person and character, pp. 495-499.

Pfister v. Dascey, 65 Cal. 405, holding that an action to set aside conveyances alleged to be fraudulent and to recover possession of the land could be joined; *Rogers v. Duhart*, 97 Cal. 504, to the point that forms of action are set aside and every action is now in effect a special action on the case; *Sloane v. Southern Ry Co.* 111 Cal. 677, holding that an action for the company's breach of contract for carrying a passenger could be brought for said breach or for the tort for violation of its duty as common carrier; *Houghtaling v. Ellis*, 1 Ariz. Ter. 387, to the effect that forms of action are abolished, and holding that an equitable defense may be had to an action at law; *Walters v. Stevenson*, 13 Nev. 164, a case of damages for extracting ore from mines, and the court declared that the form of action was immaterial. "It is brought upon the whole case and all the facts constituting plaintiff's cause of action as to each mine are stated in one count"; *Zeile v. Moritz*, 1 Utah, 286, to the point that there is no distinction as to the form of actions, although the distinctions between law and equity are still the

same; note 67 Am. St. Rep. 657; note 83 Am. Dec. 82, to the point that tort and contract may be joined.

17 Cal. 500-502. **PEOPLE v. JENKINS.**

Principal and Sureties are estopped by their bond to deny the official character of officer, or to question the regularity of his election or his responsibility for official acts, p. 503.

Cited, *People v. Huson*, 78 Cal. 157; *Moore v. Earl*, 91 Cal. 636; *People v. Hammond*, 109 Cal. 391; *State v. Rhoades*, 6 Nev. 370; and *Price v. Scott*, 13 Wash. 576, all affirming and following the principle; *Holt Co. v. Scott*, 53 Neb. 196, as to defense that possession of office during second term was unauthorized; *Bank v. Byrum*, 68 Ark. 74, as to defense that bond was given beyond statutory time therefor.

Surety is not Discharged by delay of creditor in proceeding against the principal, p. 503.

Followed in *Bull v. Coe*, 77 Cal. 60, 11 Am. St. Rep. 239; *Mulvane v. Sedgley*, 63 Kan. 126, quoting *Bull v. Coe*, 77 Cal. 54.

Sureties on Official Bond are proper defendants in action thereon without joinder of representative of deceased principal, p. 503.

Cited in *Slater v. McAvoy*, 123 Cal. 440, as to action for accounting against sureties on administrator's bond on sale of real estate.

17 Cal. 504-510. **PEOPLE v. BREYFOGLE.**

Construction.—Official bonds are joint and several, but principal is bound for whole amount where the sureties appeared to name of each and the amount for which he is jointly and severally bound as surety, p. 509.

Cited, *Hanna v. Savage*, 8 Wash. 436, where the court says: "Inasmuch as each surety in this case has limited his liability to the amount set opposite his name, it conclusively follows that the joint liability cannot be with the other sureties but must therefore of necessity be with the principal."

Sureties.—The rule that they may stand upon precise terms of bond means that a strained construction is not to be given their obligation, but only a fair meaning to the terms of the contract, pp. 508, 509.

Cited in *Oakland v. Snow*, 145 Cal. 428, though charter describes office as auditor and assessor and provides that auditor shall be ex-officio assessor, and incumbent elected and gave bond under latter description, bond is valid; *Pierce v. Whiting*, 63 Cal. 543, to the point that sureties may stand upon precise terms of bond; *Heinlen v. Beans*, 71 Cal. 300, construing the terms of a bond in accordance with the doctrine of the principal case; *Ogden v. Davis*, 116 Cal. 36, to the point that sureties may stand on precise terms of bond.

Bond of County Treasurer is to be approved by supervisors and not by county judge, pp. 509, 510.

Cited, *People v. Evans*, 29 Cal. 435, holding that the county judge could not discharge sureties on such bond nor approve a new bond.

17 Cal. 510-512. **GARFIELD v. KNIGHTS F. & T. M. WATER CO.**

Findings of fact are in the nature of a special verdict, p. 512.

Cited, *Murphy v. Bennett*, 69 Cal. 536, to the same point; see next heading.

Special Verdict must show of itself a legal conclusion of liability, p. 512.

Cited, *Kahn v. Central S. Co.*, 2 Utah, 382, to the point that to support a judgment the findings should state all the facts necessary "to constitute a basis for a judgment."

17 Cal. 513-514. **STONE v. STONE.**

Appeal—Orders, How Brought up.—Affidavits in transcript must be identified as those on which orders were made, and statement must show so much of the affidavits or evidence on which ruling was made as to explain and point the exceptions taken, p. 514.

Cited, *Everett v. Buchanan*, 2 Dak. Ter. 253, holding that an affidavit on motion for continuance must be made a part of the record in a duly settled statement to warrant a review; *Howard v. Quinn*, 2 Mont. 340, where the court says: "The complaint, affidavits, and undertakings which have been copied into the transcript by the clerk of the court below are not properly certified and cannot be considered by us"; *Reinhart v. Company*, 23 Nev. 372, as to affidavits on motion to vacate default; *Mining v. Weinstein*, 7 Mont. 331, where an order granting costs made after judgment was held sufficiently authenticated by the certificate of the clerk.

17 Cal. 515-516. **COGHLIN v. MAY.**

Payee of Accommodation Note cannot transfer any rights thereto after maturity when note has served the purpose for which given, p. 516.

Cited, *McPherson v. Weston*, 85 Cal. 96, as sustaining the point that an indorsement after maturity is subject to equities; *Cottrell v. Watkins*, 89 Va. 814, 37 Am. St. Rep. 904, stating that there is a conflict of authorities on the point, and holding that such paper transferred after maturity is subject to the same defenses as if given for value.

17 Cal. 517. **HOPPER v. KALKMAN.**

Appealable Orders.—Order refusing to transfer cause is not one, p. 517.

Cited, *Rader v. Nottingham*, 2 Mont. 159, so holding as to an order taxing costs; also deciding that consent will not give jurisdiction in such case. Followed, *State v. Curler*, 4 Nev. 446.

17 Cal. 518-522. **HANSCOM v. TOWER.**

Appeal—Judgment-Roll.—Error may be assigned thereon on appeal from new trial order, even though there is no appeal from final judgment, p. 521.

Cited, *Walden v. Murdock*, 23 Cal. 549, 83 Am. Dec. 139, in affirmance; *Bornheimer v. Baldwin*, 42 Cal. 31, but declared not applicable that case holding that appeal from a judgment, if too late, is not saved by appeal from new trial order.

In Pleading a Judgment of court of special jurisdiction, it is sufficient to state that such judgment was duly given or made, p. 521.

Cited, extended note 27 Am. Dec. 148, noting also numerous statutes in relation to the same.

17 Cal. 525-541. **PACKARD v. ARELLANES.**

Husband and Wife—Property Rights.—System is borrowed from civil and Spanish law, and makes community like a partnership subject to priority of claim of community debts which are regarded as debts of both husband and wife. The wife's interest is subject to payment thereof on debts of the husband. On her death, such portion as passes to descendants vests without administration subject to payment of community debts, although the husband had exclusive right to administer on the estate but only as survivor, pp. 537-541.

Cited in *Plass v. Plass*, 121 Cal. 135, denying right of son as heir of deceased mother to litigate claims against estate of deceased father in probate court; *Mayberry v. Whittier*, 144 Cal. 325; noted under *Panand v. Jones*, 1 Cal. 488; *Gilland v. U. P. Ry. Co.*, 6 Wyo. 196, but holding no cotenancy established under facts stated; dissenting opinion in *Manchester etc. Co. v. Abrams*, 89 Fed. 939, 61 U. S. App. 287, discussing "unconditional ownership," as applied to interest of such cotenant; *Johnson v. San Francisco Sav. Union*, 75 Cal. 142-145, 7 Am. St. Rep. 134-136, affirming these points and holding that the surviving husband under act of 1850 had power to keep alive a community debt existing at death of the wife; *Frankel v. Boyd*, 106 Cal. 613, to the point that the estate consisted in law of the residue after the debts were paid, and that the whole property was liable therefor; also quoting at length from the principal case in affirmance upon the points relating to the derivation of the system, its partnership nature and liability for debts; In re *Burdick*, 112 Cal. 393, 398, as to the wife's interest in such property, holding, also, that it is not any species of estate, upon her death, known to the law. Considering also the questions of administration

thereon, distribution to the wife, and succession; *Spreckels v. Spreckels*, 116 Cal. 346, 347, 58 Am. St. Rep. 175, 176, as to the nature of the husband's interest, and also that of the wife during his lifetime, and upon the question of administration upon the wife's interest and the succession of her heirs; *Yancy v. Butte*, 48 Tex. 77, in dissenting opinion, but only generally to the point of the right of the husband in community property under nearly analogous laws; *Powell v. Pugh*, 13 Wash. 580, in dissenting opinion, where it is said that the interest of the wife is something more than a mere expectancy differing therein from the California laws; but the community personal property was held liable on execution for the husband's debts; extended note 86 Am. Dec. 628, as to the derivation of the system from the civil or Spanish law, also as to what constitutes community property, etc.

General Citation.—*Senn v. Southern Ry. Co.*, 124 Mo. 626, in connection with the meaning of the word "survivor," that case being an action for the death of a minor.

17 Cal. 541-547; 79 Am. Dec. 147. **BERNAL v. HOVIOUS.**

Growing Crops are not goods and chattels within the statute of frauds, and will pass by deed or parol sale without delivery until harvested, p. 545.

Cited, *Davis v. McFarlane*, 37 Cal. 638, 99 Am. Dec. 343, to the same point; *O'Brien v. Ballou*, 116 Cal. 321, also so holding; *Kimball v. Sattley*, 55 Vt. 291, to the same effect; also holding that a valid chattel mortgage can be made of growing crops; notes 87 Am. Dec. 483; 97 Am. Dec. 348; 41 Am. St. Rep. 518.

Same.—The rule is not altered by the fact that the parties live on the same ranch and the vendee works for the vendor, p. 545.

Cited *O'Brien v. Ballou*, 116 Cal. 321, to the same point.

Tenancy in Common of a crop exists until division is made, where there is a contract to work farm on shares, pp. 545, 546.

This rule is followed or approved in *Knox v. Marshall*, 19 Cal. 621; *Walls v. Preston*, 25 Cal. 63; *Callender v. McLeod*, 74 Cal. 380; *Baughman v. Reed*, 75 Cal. 321; 7 Am. St. Rep. 172; *Hudepohl v. Mining and Water Co.*, 80 Cal. 558; and in *Schneider v. Brown*, 85 Cal. 207. Cited in *Clarke v. Cobb*, 121 Cal. 597, 598, but holding contract there discussed to be a mere lease and not a cropping contract; *Scott v. Ramsey*, 82 Ind. 334, holding that even if the agreement in that case was a lease, the rule applied, and the act of the lessee in dividing and taking his portion made the landlord the owner of his share; *Chicago etc. Co. v. Linard*, 94 Ind. 327, 328, 48 Am. Rep. 160, 161, where the rule is declared dicta in the principal and other cases and not authority, and it is held that under a lease of a farm for years, the rent payable in crops, the title thereto is in the tenant until delivery; *Kamerick v.*

Castleman, 23 Mo. App. 492, in substantial affirmance, holding also, that the landlord may enter without force to gather and divide the crop; extended note, 37 Am. Dec. 318; notes 89 Am. Dec. 319; 91 Am. Dec. 186; 97 Am. Dec. 55; 100 Am. Dec. 428.

Same.—Sheriff may seize whole of crop for purpose of selling the interest of one tenant in common, but he can only sell that interest and the execution purchaser becomes tenant in common of the other tenant, p. 547.

Cited, *Veach v. Adams*, 51 Cal. 611, quoting from the principal case in affirmance; *Sims v. Jones*, 54 Neb. 771, 69 Am. St. Rep. 751, construing local statutes; *Sharp v. Johnson*, 38 Or. 249, officer levying on undivided interest in chattels may take entire chattel into his possession; notes 97 Am. Dec. 348, 100 Am. Dec. 641.

17 Cal. 547-564. **SMITH v. JUDGE TWELFTH DISTRICT.**

Constitutional Law.—Special law can be passed as an exception or modification to a general statute. The word "uniform" does not mean "universal," but that the law shall bear equally in burdens and benefits upon persons in the same category, pp. 551-556.

Cited in *In re Zhizhuzza*, 147 Cal. 335, upholding Oakland ordinance providing for exclusive removal of garbage by the city, its agents and employees; *Van Hurlingen v. Doyle*, 134 Cal. 57, quoting *Hellman v. Shoulters*, 114 Cal. 136; *Crovatt v. Mason*, 101 Ga. 250, approving act confined to cities of specified population; *Saasser v. Martin*, 101 Ga. 456, holding local liquor act not general; distinguished in concurring opinion, *State v. Magney*, 52 Neb. 527, under local constitution; *Ex parte Andrews*, 18 Cal. 686, where the Sunday law of 1861 was held not unconstitutional as not being uniform; *Bourland v. Hildreth*, 26 Cal. 256, in dissenting opinion in discussing uniformity and general laws in connection with election laws; *Jackson v. Shawl*, 29 Cal. 271, holding that the act of 1861 as to the amount of interest to be charged by pawnbrokers did not violate the constitutional requirement as to uniformity; *Appeal of N. B. etc. Co.*, 32 Cal. 527, in dissenting opinion to the point that a certain act as to widening streets lacked uniformity and was a general act; *Brooks v. Hyde*, 37 Cal. 376, 379, again construing the meaning of the word "uniform" in its application to the act of 1864 as to limitations of actions for the recovery of real estate in San Francisco. So also in *Ex parte Smith & Keating*, 38 Cal. 710, the same constitutional provision is so construed. The act there being one to prohibit noisy amusements and to prevent immorality. *People v. Henshaw*, 76 Cal. 443, holding that the act of 1885 providing for police courts was not obnoxious on the ground of want of uniformity; *Hellman v. Shoulters*, 114 Cal. 147, quoting from the principal case as to the meaning of "uniform" and holding that the act of 1891 relative to a system of street improvement bonds was not unconstitutional in that respect; *Solano County v. Mc-*

Cudden, 120 Cal. 651, maintaining constitutionality of provisions of County Government Act relative to presentation of claims by members of board of supervisors; *McConihe v. Ex rel. McMurray*, 17 Fla. 267, holding that a statute "regulating municipal business" must be general and uniform throughout the state; *Ex parte Wells*, 21 Fla. 304, to the point that an act to dissolve municipal corporations and to provide provisional governments was a general law and not obnoxious for want of uniformity; *Vermont etc. Co. v. Whithed*, 2 N. Dak. 94; and *Northern Pac. R. Co. v. Barnes*, 2 N. Dak. 341, both following the construction of "uniform" given in the principal case; so also in *Board of Education v. Commissioners*, 111 N. C. 59, to the same effect; *McGill v. State*, 34 Ohio St. 240, quoting with approval from the principal case (at p. 554) on this same point; *Gordon v. State*, and *Santoro v. State*, 46 Ohio St. 628, also quoting to the same point and holding an act as to traffic in intoxicating liquors not unconstitutional in that respect; *Driggs v. State*, 52 Ohio St. 51, quoting with approval (p. 554) as to the construction of the term "uniform"; *Maxwell v. Tillamook Co.*, 20 Oreg. 501, holding an act relating to appropriations for wagon roads unconstitutional; See extended note, 21 Am. St. Rep. 781.

Constitutional Law.—Power of courts to pronounce unconstitutional acts invalid is unquestioned, but the legislative will is respected except where an act is clearly unconstitutional, pp. 551, 562.

Cited in *Deyoe v. Superior Court*, 140 Cal. 490, sustaining code provisions as to interlocutory divorce decrees; *Bourland v. Hildreth*, 26 Cal. 229, in dissenting opinion quoting from the principal case; *Stockton etc. R. R. Co. v. City of Stockton*, 41 Cal. 160, to the same point.

State Constitution is not a grant of power, but merely a restriction. The legislature may exercise all powers not prohibited by the state or federal constitution or delegated to the general government, p. 552.

Cited, *Cohen v. Wright*, 22 Cal. 308, in affirmance; *Stockton etc. R. Co. v. City of Stockton*, 41 Cal. 162, approving the doctrine; *Treadway v. Schnauber*, 1 Dak. Ter. 247, to the same point.

Constitutional Law.—Legislature may deny to one man a privilege extended to another, pp. 555, 557.

Cited, *Cohen v. Wright*, 22 Cal. 321, to the same point as applied to the right to exclude an attorney at law from practice.

Powers of the Legislature with relation to the judiciary and also the executive department discussed, pp. 557-563.

Cited, *Lawson v. Jeffries*, 47 Miss. 705, 12 Am. Rep. 354, but only generally as to the power of a legislative body to perform judicial acts, and holding an ordinance of a constitutional convention granting new trials to be void; *Estate of Sticknoth*, 7 Nev. 229, to the point that a statute validating an unattested will did not encroach upon judicial

functions; note 53 Am. Dec. 581, as citing in this connection; *Lycoming v. Union*, 15 Pa. St. 166; 53 Am. Dec. 575.

Mandamus will not lie to compel change of venue, though required by statute, p. 563.

Cited, *People v. Pratt*, 28 Cal. 169, holding that mandamus would not lie to control judicial and discretionary action of the court; *People v. Weston*, 28 Cal. 641, to the point that the manner of exercising discretion cannot be controlled by mandamus; *Strong v. Grant*, 99 Cal. 102, to the same effect as the first citing case under this heading; *State v. Smith*, 23 Mont. 332, denying writ where remedy by appeal was adequate.

17 Cal. 564-566. **KELLY v. VAN AUSTIN.**

Entry of Judgment by default is void where defendants are jointly liable but the entry is made against only the parties served, pp. 565, 566.

Cited, *Welsh v. Kirkpatrick*, 30 Cal. 205, 89 Am. Dec. 87, to the point that a judgment by default against a defendant served is not void though sued by a wrong name. In this case the judgment was against the "Red Star Mining Co.," sued as "M. Walsh et al.," composing said company, and Walsh was served; *Junkans v. Bergin*, 64 Cal. 204, in affirmance; *Wharton v. Harlan*, 68 Cal. 427, to the point that such judgment cannot be entered against a part only who have been served and have not answered; although joint judgments may be entered against all served or separate defaults against those served but not answering.

Entry of Default by Clerk is a ministerial act and is void unless in conformity to the statute, p. 565.

Cited, *Wallace v. Eldredge*, 27 Cal. 497, in affirmance. Distinguished in *Boyd v. Steele*, 6 Idaho, 629, clerk cannot defeat dismissal by neglecting or refusing to enter formal judgment of dismissal. *Glidden v. Packard*, 28 Cal. 651, quoting from the principal case and holding that a default entered by the clerk where there has been no service or appearance is void; *Willson v. Cleaveland*, 30 Cal. 198, with approval; *Welsh v. Kirkpatrick*, 30 Cal. 205, 89 Am. Dec. 87, where the rule is acknowledged in effect, but the case turned upon another point; *Bond v. Pacheco*, 30 Cal. 534, 535, where the court says the principle ought not to be extended to those cases where the clerk is authorized to do an act but errs in doing it, and so holds, but it is also decided that where a judgment is entered which the clerk has no authority to enter without direction of the court it is void; *Providence Tool Co. v. Prader*, 32 Cal. 636, 91 Am. Dec. 599, to substantially the same effect as the principal case; *County of Sacramento v. Central P. R. R. Co.*, 61 Cal. 255, to the same point, also holding that a judgment would be reversed where the clerk had no power to enter it; *Junkans v. Bergin*, 64 Cal. 204, with approval; *Wharton v. Harlan*, 68 Cal. 427, to the same point; so also in

Reinhart v. Lugo, 86 Cal. 398, 21 Am. St. Rep. 54, where the clerk was not authorized to enter the default; *Lacoste v. Eastland*, 117 Cal. 680, to the same point in affirmance; so also in *Files v. Robinson*, 30 Ark. 495. Followed in *Blount v. Gallagher*, 22 Fla. 95; cited, *Ropes v. Snyder etc. Co.*, 37 Fla. 532, holding that the power of the clerk is purely statutory and should be strictly construed; *State v. California M. Co.*, 13 Nev. 214, in affirmance; so also in *Application of Rourke*, 13 Nev. 256; and in *Graydon v. Thomas*, 3 Oreg. 251; *Salter v. Hilgen*, 40 Wis. 369, distinguishing between a judgment entered by default by a ministerial officer and by a court having jurisdiction, the former being held void and the latter irregular.

17 Cal. 566-569. **HICKS v. HERRING.**

Forcible Entry and Detainer—Damages.—Plaintiff may elect to claim damages for waste or for rents and profits or recover them in a separate suit, pp. 567, 568.

Cited, *Warburton v. Doble*, 38 Cal. 622, considering the points at length and noting that the statute upon which the case rested was amended in 1861 and 1863, and construing the same; *Pierro v. St. Paul etc. Ry. Co.*, 37 Minn. 315, as authority contrary to the ruling that a recovery for use and occupation in an action for possession of land is a bar to the recovery of damages for injuries to the estate during the occupancy; *Williams v. Missouri F. Co.*, 13 Mo. App. 74, as sustaining the point that all damage from a particular injury must be recovered in one suit and the law does not tolerate splitting causes of action; also, that in trespass all damages may be recovered in one action.

Same.—Proof of damage or amount of rent may extend to verdict including all matters which are the natural result of the previous injury, p. 569.

Cited, *Anderson v. Taylor*, 56 Cal. 132, 38 Am. Rep. 54, holding that the rule does not permit damages in such actions for injury to credit nor for bodily or mental pain; *Williams v. Missouri F. Co.*, 13 Mo. App. 74, holding that though part of the damages have accrued since suit commenced they may be recovered; extended note 92 Am. Dec. 628, 631.

Distinguished in *Pacific etc. Co. v. W. U. Tel. Co.*, 123 Cal. 432, construing Civil Code, 3283 not to extend to damages to third person claimed for nondelivery of telegram.

General Citation.—*Oklahoma City v. Hill*, 6 Okla. 150.

17 Cal. 569-574. **CAULFIELD v. SANDERS.**

Pleadings.—Literal and conjunctive denials to verified complaint are insufficient and raise no issue, p. 571.

Cited, *Woodworth v. Knowlton*, 22 Cal. 168; *Fish v. Redington*, 31 Cal. 194; *Scovill v. Barney*, 4 Oreg. 290; and *Moser v. Jenkins*, 5 Oreg. 449, all in express affirmance.

Parties.—Assignee may sue in his own name, p. 571.

Cited, *Bassett v. Inman*, 7 Colo. 273, holding that an assignee is a real party in interest under the code, although the consideration of the assignment may have been the payment to the assignor after recovery in a suit by the assignee; *Rock Spring Coal Co. v. Salt Lake etc. Assn.*, 7 Utah, 162, holding answer insufficient; *Moulton v. McLean*, 5 Colo. App. 464, to the point that a county treasurer is the real party in interest in a suit on a bond taken by him as security for money deposited in bank by him as treasurer.

Plea of Payment admits original liability and throws burden of establishing payment on defendant, p. 571.

Cited in *Melone v. Ruffino*, 129 Cal. 518, 79 Am. St. Rep. 130, affirming rule though nonpayment pleaded in complaint; *Blass v. Lawhorn*, 64 Ark. 466, holding instruction improperly denied; *Lokken v. Miller*, 9 N. Dak. 513; *Mohr v. Barnes*, 4 Colo. 352, to the same point.

Plea of Statute of Limitations averring that action is barred thereby is a conclusion of law and fatally defective; the facts must be alleged which bring the demand within the operation of the statute, p. 571.

Cited in *Spaulding v. Howard*, 121 Cal. 197, from counsel's brief, but holding finding of bar properly one of fact; *Spanish Fork v. Hopper*, 7 Utah, 238, holding simple plea of bar insufficient without reference to appropriate code section; *Fullerton v. Bailey*, 17 Utah, 92, on point that bar cannot be raised by demurrer unless appearing on face of complaint; *Table M. T. Co. v. Stranahan*, 31 Cal. 393, to the same effect; *Adams v. Patterson*, 35 Cal. 126, in approval, although a different question was presented, the plea there being held good as to all except certain items; *Brennan v. Ford*, 46 Cal. 12, holding that an allegation in a demurrer "that it appears by the complaint that the cause of action is barred by the statute of limitations" was sufficient.

One Partner may Transfer a partnership account to a third party, p. 572.

Cited, *Pacific M. L. I. Co. v. Fisher*, 109 Cal. 570, where the same rule was applied to the assignment by a partnership to one of its members of a claim of lien filed by the partnership.

Instructions not prejudicial are not ground for reversal, p. 573.

Cited, *Pico v. Stevens*, 18 Cal. 378, in approval; *Gaudette v. Travis*, 11 Nev. 161, in affirmance of the principle as applied to the inadvertent assumption by the court of certain facts constituting nonprejudicial error.

General Citation.—*White v. Whitney*, 82 Cal. 166, as sanctioning but not expressly declaring the rule that trademen's books of original entries supported by his oath are prima facie proof; *Adams v. Smith*, 19 Nev. 271, to the point as to ratification being a question of law.

17 Cal. 574-578. BARRON v. KENNEDY.

Statute of Limitations.—Part payment, after limitation has run, unqualified at the time and evidenced by a writing, takes a debt out of the statute, p. 577.

Cited in *Concannon v. Smith*, 134 Cal. 20, further holding formal acknowledgment unnecessary; *Kelly v. Leachman*, 3 Idaho, 635-637, promise in writing to pay interest due on whole of pre-existing debt, given by debtor to creditor, is an acknowledgment of whole debt; *Pena v. Vance*, 21 Cal. 149, explaining the principal case and holding that part payment must be evidenced by a writing; *Heinlin v. Castro*, 22 Cal. 103, holding that such payment indorsed upon a note was insufficient, but that the acknowledgment must be contained in some writing signed by the party to be charged thereby; *Auzerais v. Naglee*, 74 Cal. 69, affirming the same rule as in the last citing case, but also holding that a receipt written by the debtor on the back of the account was a sufficient writing and subscription; *Reed v. Smith*, 1 Idaho, 535, to the point that a new promise must be in writing; *Wilcox v. Williams*, 5 Nev. 214, where the court says: "*Pena v. Vance*, 21 Cal. 149, is the leading case and has been followed in California since pronounced. It clears away the doubts suggested by" the principal case, "and correctly decides the meaning of the statute;" *Blaskower v. Steele*, 23 Oreg. 111, holding that part payment on an entire account revives the debt.

17 Cal 578-582. KOHNER v. ASHENAUER.

Pleadings—Fraud.—What particularity of facts required to be averred where a fraudulent conveyance is charged, noticed but not considered, p. 580.

Cited, *Water Works v. San Francisco*, 82 Cal. 321, 16 Am. St. Rep. 134, in dissenting opinion, as supporting the point that it is not sufficient to aver fraud in general terms, but the facts must be alleged.

Husband may Convey or mortgage common property during marriage, it not appearing to have been transferred to her before marriage or as a gift or in exchange for her separate property, p. 581.

Tolman v. Smith, 85 Cal. 283, as supporting the right of the husband to mortgage community property without consent of the wife, notwithstanding the fact that the deed was taken in her name; note 73 Am. Dec. 543, to the point that presumption is that all property belongs to community; extended note 86 Am. Dec. 637, as to the presumption in case of real property acquired during marriage, etc.; note 96 Am. Dec. 423.

If Transfer Directly to Wife of common property can be made by husband, it must be in exchange for her separate property or as a gift, he being free of debts and liabilities, p. 582.

Cited in *Hamilton v. Hubbard*, 134 Cal. 606, as overruled by later

cases holding that deed from husband to wife of common property makes it *prima facie* her separate property; and at page 607, as noted under *Meyer v. Kinzer*, 12 Cal. 251; *Dow v. Gould etc. Co.*, 31 Cal. 653, as deciding that the wife could take real estate as a gift by direct conveyance, and also that "there is no reason why she cannot take and hold in the same manner personal property"; *Peck v. Brummagin*, 31 Cal. 446, 89 Am. Dec. 199, and commented on as not so deciding, but also holding the same doctrine; *Tillaux v. Tillaux*, 115 Cal. 671, holding that husband and wife may contract with each other as freely as if unmarried; note 86 Am. Dec. 642, extended note 88 Am. Dec. 55.

17 Cal. 582-585. **CRANE v. HIRSHFELDER.**

Judgment will be reversed when entered by the clerk without power to enter it; such judgment is not merely irregular, but void, p. 585.

Cited, *County of Sacramento v. Central P. R. R. Co.*, 61 Cal. 255, affirming the rule, also reversing the judgment in that case.

17 Cal. 586-588. **DODGE v. CLARK.**

Pleading.—Demand and refusal are necessary to be averred in action to compel a conveyance, p. 588.

Cited, *Whitehill v. Lowe*, 10 Utah, 427, where the rule was applied in an action for specific performance to compel the transfer of shares of stock of a corporation.

17 Cal. 589-593. **FOGARTY v. SAWYER.** S. C. 23 Cal. 573, in affirmance as to the power of sale and its effect, but also considering other points.

Power of Sale in Mortgage implies power to convey, p. 591.

Cited, *Hemstreet v. Burdick*, 90 Ill. 450, and in *Hunter v. Wooldert*, 55 Tex. 435, to the same point; note 33 Am. Dec. 723.

Mortgage at common law was a conveyance of a conditional estate which became absolute on breach of its condition, p. 592.

Cited, *Dutton v. Warschauer*, 21 Cal. 623; 82 Am. Dec. 769; *Low v. Allen*, 26 Cal. 144; and *Heyland v. Badger*, 35 Cal. 413, all to this same point.

Mortgage is a mere Lien or Security under the statute, only enforceable by judicial proceedings, except by authority of the owner. It confers no right of possession, except by agreement therefor, which may be made by parol, nor does the mortgage furnish support for ejectment, pp. 592, 593.

Cited, *Lord v. Morris*, 18 Cal. 488, to the same points; *Adams v. Hopkins*, 144 Cal. 32, holding instrument a mortgage though deed in form; *London etc. Bank v. Dexter, Horton & Co.*, 126 Fed. 607, in action by mortgagee, who is purchaser on foreclosure, to cut off right of redemp-

tion of defendant, who was not party to foreclosure, but is in privity with a defendant therein, court may, under prayer for general relief, decree general foreclosure and resale; *Dutton v. Warschauer*, 21 Cal. 623; 82 Am. Dec. 769, and *Savings etc. Soc. v. McKoon*, 120 Cal. 179, as to a mortgage being a mere lien; *Kidd v. Teeple*, 22 Cal. 262, to the point as to possession; *Low v. Allen*, 26 Cal. 144, also upon the same points; *Wilson v. Brannan*, 27 Cal. 270, declaring decree of foreclosure necessary, but also noting a difference as to mortgages of personal property; *Heyland v. Badger*, 35 Cal. 413, noting the effect of the statute in connection with the same points; also the right to possession under a chattel mortgage; *Jackson v. Lodge*, 36 Cal. 39, 52; and *Savings and Loan Soc. v. McKoon*, 120 Cal. 179, to the point that a mortgage is a mere security or lien, conferring no title or estate on the mortgagee, also quoting from the principal case (p. 593) as to the right of possession in the mortgagee; *Id.* 59, in dissenting opinion as to the effect of the statute in general upon a mortgage; *Spect v. Spect*, 88 Cal. 440, 22 Am. St. Rep. 316, to the point that a parol agreement to give the mortgagee possession is valid, also discussing the effect of such possession; *Pueblo etc. R. R. Co. v. Bershoar*, 8 Colo. 34, in approval as to the right of possession and the effect of the statute, also holding that a mortgagee has a lien only and cannot maintain trespass for damages; *First Nat. Bank v. Bell etc. Co.*, 8 Mont. 44, quoting at length from pp. 592, 593, upon the same points; *Belle v. Butte Bank*, 156 U. S. 476, also quoting at length from the same pages (592, 593); *Bullion etc. Bank v. Otto*, 59 Fed. Rep. 257, declaring that the right to make an oral agreement giving the mortgagee possession is well settled; *Witherell v. Wiberg*, 4 Sawy. 235, 238, to the same points as the principal case; note 70 Am. Dec. 675, as to a mortgage being a mere security.

Sale of Mortgaged Real Estate in accordance with conditions of a power therefor passes a good title upon conveyance, p. 593.

Cited, *Wilson v. Brannan*, 27 Cal. 272, to the point that there was no reason why the rule should not apply to personal property "under the authority conferred on the mortgagee by the law of the land;" *First Nat. Bank v. Bell etc. Co.*, 8 Mont. 44, in affirmance; *Bell M. Co. v. Butte Bank*, 156 U. S. 476, applying the rule to a trust deed in the nature of a mortgage.

Distinguished in *Brown v. Bryan*, 6 Idaho, 16, trust deed given to secure given debt, payable at specified time, cannot be foreclosed by notice and sale under power in deed, but only by judicial foreclosure.

Purchaser under Power of Sale in mortgage has a right to have his deed considered in evidence in ejectment under a sheriff's deed of sale on execution, pp. 590, 593.

Cited, *Carpentier v. Williamson*, 25 Cal. 161, to the point that the little of the grantee of mortgaged premises is not affected by a foreclosure

of a mortgage in a suit commenced after the conveyance by the mortgagor, unless said grantee is made a party.

General Citation.—*McNeill v. Lee*, 79 Miss. 460.

17 Cal. 594-595. **FRAYLOR v. SONORA MINING CO.**

Compensation.—Secretary of a corporation, though entitled to compensation for services, is chargeable with knowledge of a custom to the contrary, p. 595.

Cited, *Rosborough v. Shasta R. C. Co.*, 22 Cal. 561, holding that the president of a corporation is entitled to reasonable compensation, though a stockholder, in the absence of usage or agreement to the contrary; *Burns v. Sennett*, 99 Cal. 372, but only generally as recognizing the doctrine of usage; *McCarthy v. Mt. Tecarte etc. Co.*, 111 Cal. 338, 342, to the same points as the principal case, but holding that a stockholder and director cannot recover compensation as superintendent and general manager in absence of a contract express or implied; *Maux Ferry etc. Co. v. Branegan*, 40 Ind. 366, holding that compensation for past services cannot be allowed directors in absence of a law of organization, or by-law, or contract so providing; *National Bank v. Drake*, 29 Kan. 317, to the general proposition that an officer is not entitled to compensation for past services, but holding that one appointed by directors to act as treasurer or other officer is entitled to reasonable compensation.

Statute of Limitations.—If items of account are all on one side, so much of account as did not accrue within two years will be barred, p. 596.

Cited, extended note, 89 Am. Dec. 85, fully considering the cases involving the principles as to mutual accounts and the statute.

General Citation.—*Pixley v. Western etc. R. R. Co.*, 33 Cal. 199, 91 Am. Dec. 634, in concurring opinion, as to the liability of corporations for acts of their agents.

17 Cal. 596-597. **KLINE v. CHASE.**

Execution.—Purchaser is entitled to rents and profits during time for redemption, p. 597.

Cited, *Wells v. Walker*, 37 Cal. 432; 99 Am. Dec. 295; *Otis v. McMillan*, 70 Ala. 55; and *Kane v. Mink*, 64 Iowa, 86, all in affirmance; dissenting opinion, *Clarke v. Cobb*, 121 Cal. 603, as stating rule before code; *Whithead v. Elevator Co.*, 9 N. Dak. 227, noted under *Reynolds v. Lathrop*, 7 Cal. 43; note 73 Am. Dec. 603.

17 Cal. 598-602. **CASE v. CASE.**

To Sustain Bigamy Marriage must be Proven.—It will not be inferred from cohabitation or reputation, p. 600.

Cited in *People v. Hartman*, 130 Cal. 490, as explained by *White v.*

White, 82 Cal. 447, 450; *Lorimer v. Lorimer*, 124 Mich. 634, noted under *Graham v. Bennet*, 2 Cal. 503, as to essentials of common-law marriages; *People v. Anderson*, 26 Cal. 133, applying the rule, also, to actions of crim. con. divorce, and like cases where marriage is the foundation of the claim to be enforced; *White v. White*, 82 Cal. 447, 450, where the rule is limited in its application to those only where a public offense is involved on the ground that the exception is to favor innocence; *Kilburn v. Kilburn*, 89 Cal. 51, 23 Am. St. Rep. 450, where the rule is neither affirmed nor dissented from, but declared not applicable to the facts in that case, which was one of divorce for adultery, and the admissibility of evidence of marriage with the woman with whom the adultery was alleged to have been committed; *People v. Beevers*, 99 Cal. 289, in affirmance, but holding that marriage under the age of consent, followed by cohabitation after reaching the proper age, will support a prosecution for bigamy upon a second marriage by one of the parties; *Green v. State*, 21 Fla. 406, 58 Am. Rep. 672, in affirmance; *Cartwright v. McGown*, 121 Ill. 406, 2 Am. St. Rep. 116, holding that a presumption in favor of innocence will not justify an inference of marriage if it involves guilt of one of the parties; *Hutchins v. Kimmell*, 31 Mich. 131, 18 Am. Rep. 166, in affirmance; *Waddingham v. Waddingham*, 21 Mo. App. 628, 629, affirming the principle as applied to the presumption of innocence in cases of bigamy against a presumption of former marriage; *United States v. Simpson*, 4 Utah, 229, to the point that marriage is complete when full, free, and upon mutual consent of parties able to contract, though there is no cohabitation; notes 9 Am. Dec. 73; 48 Am. Dec. 115; 93 Am. Dec. 255; extended notes, 57 Am. Rep. 453; and 47 Am. St. Rep. 228, exhaustively reviewing the cases.

17 Cal. 605-613. **FULLER v. FULLER.**

Witness is Competent without regard to religious belief, his competency being left to other and independent considerations, p. 612.

Cited, *People v. Sanford*, 43 Cal. 34, with approval; *Londoner v. Lichtenheim*, 11 Mo. App. 386, to the same effect; extended note 92 Am. Dec. 474, considering numerous cases.

General Citation.—*Sharon v. Sharon*, 67 Cal. 188, to the point that in the principal case the complaint was denominated “a bill for divorce.”

17 Cal. 613-618. **DE COSTA v. MASSACHUSETTS MINING CO.**

Measure of Damages in trespass in digging a ditch is only the actual injury sustained, but not the cost of filling. Prospective damages are not allowed in such a case, p. 617.

Cited in *Pac. etc. v. W. U. Tel. Co.*, 123 Cal. 432, denying prospective damages alleged as resulting from nondelivery of message; *Watt v. Nev. Co.*, 23 Nev. 175, 62 Am. St. Rep. 785, on point that plaintiff must prove that prospective damages claimed will happen with reasonable cer-

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tainty; *Williams v. Missouri F. Co.*, 13 Mo. App. 74, in connection with the rule as to the measure of damages being all which have flowed or which will reasonably flow directly from the wrongful acts; *California Dry Dock v. Armstrong*, 17 Fed. Rep. 221, 4 Sawy. 529, confining the rule of damages to those actually accrued and applying it where plaintiff has been subjected by act of defendant to liability to a third party.

Judgment may be modified in accordance with offer to remit damages, p. 618.

Cited, *Muller v. Boggs*, 25 Cal. 187, with approval; *Fox v. Hale etc. Co.*, 122 Cal. 222, when followed by remission by respondent.

17 Cal. 618-623. **MULFORD v. ESTUDILLO.** S. C. 23 Cal. 94, 98, but upon other points. S. C. 32 Cal. 131, 135, where the point as to what was determined on the last appeal was considered.

General Citation.—*State v. California M. Co.*, 13 Nev. 212, as to the sufficiency and effect of an undertaking on appeal.

17 Cal. 623-626. **HOLMES v. WEST.**

Promissory Note is due immediately when payable generally, no specific time being mentioned, and this is true although the note provides that interest is to accrue after a certain event, p. 626.

Cited, *Roberts v. Snow*, 27 Neb. 429, 430, with approval, *Newhall v. Sherman*, 124 Cal. 511, as to limitation holding payment immediately or on demand presumed when instrument silent.

17 Cal. 626-628. **SHORES v. SCOTT RIVER WATER CO.** S. C. 21 Cal. 135, but on other points.

Sheriff's Sale.—Insufficient notice no ground for setting it aside, p. 628.

Cited, *Frink v. Roe*, 70 Cal. 302, in affirmance; note 65 Am. Dec. 480.

17 Cal. 629-641. **ADAMS v. LANSING.**

Estoppel.—Will ratifying a donation estops heirs to deny title ratified, pp. 639, 640.

Cited, *Hill v. Den*, 54 Cal. 20, applying the principle to the point that parties claiming under a will are estopped to deny the validity of a deed referred to and recognized in said will.

General Citation.—*Mathewson v. Fitch*, 22 Cal. 93, but merely referred to as a case in which a judgment was rendered constituting the basis of the contract in that suit.

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By CHARLES T. BOONE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

18 Cal. 11-30. **TESCHEMACHER v. THOMPSON.** 79 Am. Dec. 151.

Estate of Decedent.—Marriage of executrix divests her of authority to act under the California statute, p. 20.

Cited as authority in 93 Am. Dec. 685, note.

Public Lands.—Lands belonging to the state by virtue of its sovereignty include the land usually overflowed by the neap or ordinary tides, p. 22.

Cited as authority to the ruling stated, in *People v. Morrill*, 26 Cal. 354; and *Wright v. Seymour*, 69 Cal. 126. Referred to in *Coburn v. San Mateo County*, 75 Fed. Rep. 529. Distinguished in *More v. Massini*, 37 Cal. 435, in that in the former case it was admitted that the patent of the United States to the plaintiffs embraced the lands in controversy.

Property Rights.—Cession of territory from one government to another does not impair the rights of the inhabitants to their property. They retain all such rights, and are entitled to protection in them to the same extent as under the former government, p. 22.

Doctrine affirmed in *Estrada v. Murphy*, 19 Cal. 270; *Leese v. Clark*, 20 Cal. 421, 422; *Minturn v. Brower*, 24 Cal. 669; *Ward v. Mulford*, 32 Cal. 370; and approved in *Tripp v. Spring*, 5 Sawy. 214; *Coburn v. San Mateo County*, 75 Fed. Rep. 528, 529; *Knight v. United States Land Assn.*, 142 U. S. 184.

Property.—The term, as applied to lands, embraces all titles, legal or equitable, perfect or imperfect, p. 24.

Approved in *Thompson v. Doaksum*, 68 Cal. 597.

Patent for Mexican Grant is a solemn record of the government, of its action and judgment, with respect to the title of the claimant, and, as such, it imports absolute verity, p. 26.

Affirmed, as respects conclusiveness of patent, in *Weber v. Marshall*, 19 Cal. 458; *Pioche v. Paul*, 22 Cal. 111; *McGarrahan v. New Idria Min.*

Co., 49 Cal. 335; *People v. San Francisco*, 75 Cal. 399, 402; and *De Guyer v. Banning*, 91 Cal. 402; S. C. affirmed, 167 U. S. 742. Cited as authority, asserting this doctrine, in *Henshaw v. Bissell*, 1 Sawy. 565, 579; S. C. affirmed, 18 Wall. 265, holding that a patent under the eldest grant carries the superior title; *Boyle v. Hinds*, 2 Sawy. 530; *Manning v. San Jacinto Tin Co.*, 9 Fed. Rep. 730; S. C. 7 Sawy. 423; *Hayner v. Stanley*, 13 Fed. Rep. 222; S. C. 8 Sawy. 220; and *Knight v. United States Land Assn.*, 142 U. S. 184, 204; reversing S. C. 85 Cal. 484, and affirming the ruling in *People v. San Francisco*, supra. Cited in 7 Am. St. Rep. 146.

Same.—The patent, as a conveyance, takes effect by relation from the date of the presentation of the petition to the land commissioners, p. 26.

Ruling affirmed in *Merrill v. Chapman*, 34 Cal. 253; S. C. 35 Cal. 88, holding that a title depending thereon will prevail over a subsequent patent issued upon a purchase from the United States.

Same.—“Third persons” against whose interests the patent is not conclusive under the statute (act of 1851), are those whose title accrued before the duty of the government and its rights under the treaty attached, p. 27.

Approved in *Leese v. Clark*, 18 Cal. 572; *Miller v. Dale*, 44 Cal. 576; *Hale v. Akers*, 69 Cal. 166; and *Byrne v. Alas*, 74 Cal. 639, holding that the Mission or Pueblo Indians are “third persons” within the meaning of the act. Cited in *People v. San Francisco*, 75 Cal. 399, 402, holding that the state of California is not a “third person” within the meaning of the act, and this ruling is affirmed in *Knight v. United States Land Assn.*, 142 U. S. 184, 204; reversing S. C. 85 Cal. 484.

General Citations.—In *Phelan v. Poyoreno*, 74 Cal. 452, as authority that the holders of titles to lands in the ceded territory which were perfect at the date of the treaty of Guadalupe Hidalgo could, if they so elected, present them to the commission for confirmation, but were not bound to do so. In *Botiller v. Dominguez*, 130 U. S. 254, holding that title to land in California, dependent upon Spanish or Mexican grants, to be valid, must be confirmed as provided by the act of 1851, or by the district court or supreme court of the United States. *United States Land Assn. v. Knight*, 85 Cal. 465. In 85 Am. Dec. 93, note, impeachment of patent for public lands; 89 Am. Dec. 166, note, shore, what is; and 43 Am. St. Rep. 186, note, patents as evidence.

Cross-references.—*Moore v. Wilkinson*, 13 Cal. 478.

18 Cal. 30-31. ADAMS v. WOODS.

Appeal.—From order on intervention, sustained, p. 31.

Cited as authority in *Mayberry v. Bowker*, 14 Nev. 341, holding that an order denying a motion that a justice of the peace be required to transmit to the district court the papers on appeal is an appealable

order. Distinguished in the same case again, 21 Cal. 165, holding that an order for distribution of funds in the hands of the receiver was not appealable.

18 Cal. 38-40. PEOPLE v. MONTEJO.

Indictment.—Fact relied on to take case out of the statute of limitations should be alleged in the indictment, p. 40.

Approved in *United States v. Owen*, 13 Sawy. 57; S. C. 32 Fed. Rep. 537.

18 Cal. 41-42. GOLDSTONE v. DAVIDSON.

Evidence.—Fact that papers composing record of insolvent's discharge were certified separately does not authorize their rejection as evidence. It is not necessary that the papers be attached together and the whole certified as one record, p. 42.

Cited in *Railroad Bank v. Evans*, 32 Iowa, 209, holding that the records of an inferior court may be proved either by the production of the original or by copy duly authenticated.

18 Cal. 42-47. MULFORD v. COHN.

New Trial.—Grounds upon which equity will interfere and grant a new trial set forth, p. 46.

Approved in *Boston v. Haynes*, 33 Cal. 36, 38, holding that if the party moving for a new trial in an action at law loses the same through his own blunders and laches without any fraud, mistake, surprise, or excusable neglect existing, equity will not relieve him. So in *Whitney v. Kelley*, 94 Cal. 153, which was an action to set aside a judgment upon the ground of fraud. Cited as authority in *Oliver v. Pray*, 19 Am. Dec. 610, note, collecting the authorities and discussing the subject at length. So in 28 Am. St. Rep. 111, note, and *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 261, note, treating of relief in equity against judicial determination.

18 Cal. 47-49. PROSSER v. PARKS.

Mining Claim.—Quantity of ground miner can claim for mining purposes may be limited by the mining rules of the district, p. 48.

Cited in 76 Am. Dec. 580, note. So in *McClintock v. Bryden*, 63 Am. Dec. 104, note, discussing subject of force and effect of customs and rules of miners not conflicting with statutory provisions.

18 Cal. 49-59. HASTINGS v. CITY AND COUNTY OF SAN FRANCISCO.

Boards of Supervisors cannot be sued in their official character, in ordinary common-law actions, without express statutory provision, p. 58.

Distinguished in *Vincent v. County of Lincoln*, 30 Fed. Rep. 749, 750, holding that in Nevada, counties are liable to be sued in any court of competent jurisdiction. Cited to the ruling stated in 63 Am. Dec. 132, note.

Same.—Boards of supervisors, and similar bodies, are subject to the writ of certiorari, for the review of their acts where partaking of a judicial character, p. 58.

Ruling affirmed in *Spring Valley Water Works v. Bryant*, 52 Cal. 137, and holding that the passage of a certain preamble and resolution by the board of supervisors was not the exercise of the judicial function.

18 Cal. 60-66. EX PARTE PERKINS.

Contempt.—Judgments for, will not be reviewed on habeas corpus where jurisdiction is not exceeded, p. 63.

Ruling approved in *Ex parte Cottrell*, 59 Cal. 421; *Golden Gate M. Co. v. Superior Court*, 65 Cal. 191; *Cooper v. People*, 13 Colo. 355; *Ex parte Goodin*, 67 Mo. 643, contempt in refusing to serve as juror; *State v. Barnes*, 5 N. Dak. 354; *State v. Knight*, 3 S. Dak. 516; S. C. 44 Am. St. Rep. 815; and *Ex parte Stickney*, 40 Ala. 168, holding that a stranger to a suit cannot purge himself of contempt by showing that the court (one of general jurisdiction) had no jurisdiction of the particular suit. Cited to the ruling stated in *Clark v. People*, 12 Am. Dec. 185, note, discussing the subject at length. So in 26 Am. Dec. 49, note.

In suit for divorce court may order husband to pay money for wife's support, counsel fees, and legal expenses, and such order may be enforced by imprisonment for contempt in case of refusal to pay, p. 64.

Approved in *Ex parte Spencer*, 83 Cal. 465; S. C. 17 Am. St. Rep. 270; and *Ex parte Gordan*, 95 Cal. 378; and *State v. Judge*, 49 La. Ann. 1509. Referred to in *Ex parte Hollis*, 59 Cal. 412, in which case it is held that a superior court has no authority to adjudge a party guilty of contempt, and to fine and imprison him for not turning over to a receiver in insolvency money and effects held by him adversely to the insolvent debtor; *Ex parte Tinsley*, 37 Tex. Cr. 531, 66 Am. St. Rep. 825, quoting *Ex parte Hollis*, 59 Cal. 405.

Same.—A sum so ordered to be paid is not a debt within the meaning of provisions prohibiting imprisonment for debt, p. 64.

Approved as authority to the ruling stated in *Livingston v. Superior Court*, 117 Cal. 636; *Stonehill v. Stonehill*, 146 Ind. 447; and *Andrew v. Andrew*, 62 Vt. 500.

General Citations.—Cited as authority in *Wyatt v. Wyatt*, 2 Idaho, 221; and *In re Kelsey*, 12 Utah, 410, holding that an order directing the payment of alimony pendente lite is not appealable. Explained in *Sharon v. Sharon*, 67 Cal. 215, 216, 220, where it is said that no question

of appeal was involved in the case, and holding that an order made pendente lite, for the payment of alimony, is in effect a final judgment, and therefore appealable. McKee, J., dissenting, p. 204.

18 Cal. 67-76. ORD v. DE LA GUERRA.

Community Property.—By Mexican law, the husband was entitled to the control of the common property during coverture, and upon the death of the wife was still entitled to its possession, as surviving partner of the matrimonial union, and could sell or dispose of it in liquidation of community debts, p. 74.

Cited as authority in *Johnston v. San Francisco Sav. Union*, 75 Cal. 142, 144; S. C. 7 Am. St. Rep. 134, 135, holding that under the act of 1850, the community property, upon the death of the wife, remained subject to the community debts, and the duty of settling such debts was upon the surviving husband. Explained in *Robertson v. Burrell*, 110 Cal. 575, where it is said that the decision was largely based upon the opinion expressed, that there was no necessity for taking out administration upon the wife's estate under the old system of the Mexican law. And holding that the heirs of a deceased person are not the proper parties to maintain an action for an accounting and settlement of a partnership between the decedent and a surviving partner or his representatives, and they have no legal capacity to do so, but that the surviving partner is required to account not with the heirs, but with the executor or administrator of the deceased partner. Referred to in *People v. De la Guerra*, 24 Cal. 77, holding that, in California, in the statute relating to descent and distribution, the rule of computation which prevails under the civil law has been adopted.

Statute of Limitations.—Does not run in favor of an express trustee, until notice of repudiation is brought home to the beneficiary, p. 75.

Affirmed in *Roach v. Caraffa*, 85 Cal. 446.

Same.—When it clearly appears upon the face of the complaint that the statute has run, the objection may be made by demurrer, p. 75.

Approved as authority in *Cameron v. San Francisco*, 68 Cal. 391; *Kraner v. Halsey*, 82 Cal. 211; *Redington v. Cornwell*, 90 Cal. 60; and *McGehee v. Blackwell*, 28 Ark. 30.

18 Cal. 76-77. BROWN v. HARTER.

Plaintiff has right to take nonsuit at any time, before final submission of the case and retirement of the jury, p. 77.

Cited in *Goldtree v. Spreckels*, 135 Cal. 668, noted under *Ditch Co. v. Bradford*, 13 Cal. 637; *Sheldon v. Gunn*, 56 Cal. 588, dismissal of petition by intervenors. So in *Westbay v. Gray*, 116 Cal. 667, holding that where an order of submission of a cause after trial by the court has been set aside, and leave given to amend the pleadings, the case stands as though

no submission had ever been had, and the court has power, under such circumstances, to grant a dismissal of the cause without prejudice to another action. So in *Burns v. Rodefer*, 15 Nev. 63, nonsuit after plaintiff's evidence stricken out.

18 Cal. 77-80. **ORD v. CHESTER.**

Tenant in Common.—Party holding part of premises under one tenant in common cannot be sued as trespasser by another, without notice to quit, p. 80.

Approved as authority in *Lee Chuck v. Quan Wo Chong*, 91 Cal. 598.

18 Cal. 80-82. **McLAREN v. HUTCHINSON.** S. C. again, distinguished, 22 Cal. 189; S. C. 83 Am. Dec. 59.

Contract.—Stranger to consideration cannot enforce the contract by an action thereon in his own name, though he be avowedly the party intended to be benefited, p. 82.

Commented on and questioned in *Lewis v. Covillaud*, 21 Cal. 189. So in *Sacramento Lumber Co. v. Wagner*, 67 Cal. 295, holding that an action like that described in the principal case may be maintained; so in *Malone v. Crescent City etc. Transp. Co.* 77 Cal. 44; and *Chung Kee v. Davidson*, 102 Cal. 197. Approved as authority in *Lehow v. Simonton*, 3 Colo. 348; and denied in *Carnahan v. Tousey*, 93 Ind. 564. Cited in note to *Baxter v. Camp*, 71 Am. St. Rep. 182, on general subject.

18 Cal. 83-89. **DREUX v. DOMEQ.**

Gist of action of conspiracy is the combining of two or more persons to do an unlawful and injurious act, p. 88.

Cited in *Dowdell v. Carpey*, 129 Cal. 169, but distinguished holding that conspiracy not the gravamen; *People v. Richards*, 67 Cal. 420, 8 C. 56 Am. Rep. 724, holding that in a prosecution for conspiracy, one conspirator may be separately informed against, tried, and convicted.

Appeal.—Objections to evidence must be specific, or will not be considered on appeal, p. 89.

Approved as authority in *Owen v. Frink*, 24 Cal. 177; *Leet v. Wilson*, 24 Cal. 403; *People v. Nichols*, 62 Cal. 521; *Rush v. French*, 1 Ariz. 126; *Kansas etc. Ry. Co. v. Cutter*, 19 Kan. 88; and *Kent v. State*, 42 Ohio St. 430.

18 Cal. 89-94. **PEOPLE v. ROMERO.**

Mandamus.—To authorize issue of writ of, it must appear that the performance of the act to enforce which the writ is asked, is a duty resulting from the office, trust, or station of the party to whom the writ is to be directed, and that performance has been requested and refused, p. 91.

Ruling approved in *Crandall v. Amador County*, 20 Cal. 75; *Oroville etc. R. R. Co. v. Plumas County*, 37 Cal. 363, insisting on necessity of demand or request; *Chumasero v. Potts*, 2 Mont. 293; *Mauran v. Smith*, 8 R. L. 222; S. C. 5 Am. Rep. 571; *State v. McArthur*, 23 Wis. 429; and *State v. Mayor etc.*, 22 Fla. 26, holding however, that no demand is necessary where the act to be performed is a public, official duty. And see *Oroville etc. R. R. Co. v. Plumas Co.*, *supra*.

Resettlement of Bill of Exceptions denied where existence of alleged mistakes rests in mere recollection of the judge or of the counsel in the case, p. 93.

Approved in *Griffiths v. Montandon*, 4 Idaho, 333, following rule; principle of the decision approved in *Dougherty v. People*, 118 Ill. 165; *Bridges v. Kuykendall*, 58 Miss. 828; *West v. Burney*, 71 Mo. App. 274; *Ross v. Railroad Co.*, 141 Mo. 397, and *State v. Central Pac. R. R. Co.*, 21 Nev. 101.

Criminal Law.—Accused held to answer before indictment is entitled to an opportunity to challenge the panel of the grand jury, but objections not then taken are waived, p. 94.

Approved in *People v. Coffman*, 24 Cal. 234, and *People v. Henderson*, 28 Cal. 469; and cited as authority bearing on the right of the accused in such case, in *Territory v. Ingersoll*, 3 Mont. 457; *State v. Larkin*, 11 Nev. 325; *Dakota v. O'Hare*, 1 N. Dak. 41; and *United States v. Jones*, 69 Fed. Rep. 976; *People v. Hawkins*, 127 Cal. 374, holding objection under Penal Code, section 1382, so waived; *State v. Warner*, 165 Mo. 413, sustaining right to challenge special grand jury under local statutes.

General citation: *West v. Burney*, 71 Mo. App. 274.

18 Cal. 96-102. ESTATE OF DE CASTRO v. BARRY.

Descents and Distribution.—Where a wife dies leaving separate property, and a husband and two infant children, and one of the children dies, the surviving child, and not the father, inherits the deceased child's share, p. 99.

Explained in *Barnard v. Wilson*, 74 Cal. 515, 516. Cited in *Veeder v. McKinley etc. Co.*, 61 Neb. 912, construing local statutes; construing Michigan statute of descents, in *Burke v. Burke*, 34 Mich. 455. Referred to and explained in *Robinson v. Fair*, 128 U. S. 81, pointing out the difference between distribution and partition of real estate among heirs. Cited in *Stitt v. Bush*, 22 Oreg. 241, but held to be inapplicable by reason of the difference in statutory provisions. Cited, rule of descent, in *In re Ingram*, 12 Am. St. Rep. 105, note; and in *Buckley v. Superior Ct.*, 41 Am. St. Rep. 141, 142, 143, note, treating of partition in connection with the distribution of estates of decedents.

Probate Court has jurisdiction to make partition of real estate of deceased among alienees of heirs or devisees, p. 99.

Approved in *Snyder v. Murdock*, 26 Utah, 240, probate court decree, by which interest of certain heirs in estate of father was distributed to one of judgment creditors of heirs, is conclusive on assignee for creditors of heirs, in absence of appeal.

18 Cal. 102-108. **RICHARDSON v. WHITE.**

Notice of *lis pendens* to charge subsequent purchaser must appear of record, p. 106.

Affirmed in *Page v. W. W. Chase Co.* 145 Cal. 582, in absence of filing *lis pendens* provided by C. C. P. § 409, purchaser pending foreclosure of street assessment lien without actual notice of its pendency, and who was not party, is not bound thereby; *Ault v. Gassaway*, 18 Cal. 205; and *Corwin v. Bensley*, 43 Cal. 263. Cited in *McNamara v. Oakland etc. Assn.*, 132 Cal. 249, holding *lis pendens* binding on parties; *Warnock v. Harlow*, 96 Cal. 304, S. C. 31 Am. St. Rep. 212, holding that the mere pendency of a suit does not, as at common law, charge the subsequent purchaser; so, to same effect, in *Partridge v. Shepard*, 71 Cal. 476; so in *Grattan v. Wiggins*, 23 Cal. 38, holding that the statute relative to *lis pendens* applies to those purchasing or taking encumbrances upon the property during the pendency of the action; so in *Horn v. Jones*, 28 Cal. 204; and so, to same effect, in *Bennett v. Hotchkiss*, 20 Minn. 168. Cited to the ruling stated in *Stout v. Mfg Co.*, 56 Am. St. Rep. 856, note, treating of law of *lis pendens*.

Same.—Whether actual notice of *lis pendens* would be equivalent to notice filed with the recorder, not decided, p. 106.

Cited in *Sampson v. Ohleyer*, 22 Cal. 211, holding that the statute does not change the rules of law relating to actual notice of a pending action, and the effect of such actual notice upon parties dealing with or taking possession of property in litigation.

18 Cal. 108-111. **GRADY v. EARLY.**

Excusing Juror.—Where the court below exercises its discretion in excusing a juror to attain justice, the appellate court will interfere with great reluctance, p. 110.

Approved in *Lawlor v. Linforth*, 72 Cal. 206, dismissal of juror after completion of panel. So in *People v. Ward*, 105 Cal. 338, and holding that a juror may for cause be excused by the court after having been once accepted. Approved in *Denver etc. R. R. Co. v. Driscoll*, 12 Colo. 522, S. C. 13 Am. St. Rep. 244, court saying: "When a full examination of a juror leaves the question of his competency doubtful, we should hesitate to interfere with the ruling of the trial court thereon." Cited in *People v. Barker*, 1 Am. St. Rep. 522, 524, note discussing discretionary power of court in rejecting and excusing jurors without challenge.

Ejectment.—Plaintiff in, may rely on prior possession, and the legal title is not necessarily involved, p. 111.

Cited as authority in *Toland v. Mandell*, 38 Cal. 43, that in order to maintain ejectment, a right of entry and possession is all that is required.

18 Cal. 113-115. **KNIGHT v. TRUETT.**

Purchaser at execution sale is entitled to rents and profits from tenant in possession during the time for redemption, p. 114.

Affirmed in *Walls v. Walker*, 37 Cal. 432, S. C. 99 Am. Dec. 295; *Walker v. McCusker*, 71 Cal. 597; *Whithed v. Elevator Co.*, 9 N. Dak. 228, noted under *Reynolds v. Lathrop*, 7 Cal. 43; approved as authority in *Otis v. McMillan*, 70 Ala. 55; *Clement v. Shipley*, 2 N. Dak. 432, 433; and *Hardy v. Herriott*, 11 Wash. St. 461, 463, holding that there is no distinction in this respect between a purchase at an execution sale and a purchase at a mortgage sale; otherwise, however, in *Rudolph v. Herman*, 4 S. Dak. 296, *Kellam, J.*, dissenting. Cited to the ruling stated in 73 Am. Dec. 603, note.

18 Cal. 117-120. **FORD v. IRWIN.**

Deed.—In construing, intention of parties must govern, p. 119.

Cited in *Northern etc. Ry. v. Hering*, 93 Md. 176, as to whether mortgage secured an annuity; *Rockwell v. Humphrey*, 57 Wis. 416, in determining whether transaction was a conditional sale. So in *Chase's case*, 17 Am. Dec. 300, note.

18 Cal. 121. **PEOPLE v. SHIRLEY.**

In action on bail bond the sureties cannot set up as a defense that the amounts in which they justified were insufficient under the statute. The justification is no part of their contract, p. 121.

Approved in *People v. Penniman*, 37 Cal. 273. So in *Murdock v. Brooks*, 38 Cal. 603; and *Moffat v. Greenwalt*, 90 Cal. 371, actions against sureties upon undertakings on appeal. Cited in *Carpenter v. Furrey*, 128 Cal. 669, as to informality of justification; *State v. Dist. Court*, 22 Mont. 455, 74 Am. St. Rep. 621, as to failure to justify on appeal bonds. Cited as authority to the ruling stated in *Howell v. Alma Milling Co.*, 38 Am. St. Rep. 708, n.

18 Cal. 122-126. **PEOPLE v. QUINN.**

Criminal Law.—Under act of 1853, the repeal of a criminal law does not operate to bar the indictment and punishment of an offense committed under the law, unless the intention so to bar be expressly declared in the repealing act, p. 124.

Cited as authority in *People v. McNulty*, 93 Cal. 437, as sustaining the rule that a permanent saving clause in the general body of the law, if it be clothed in apt language to express the purpose, is as

efficient as a special clause expressly inserted in a particular statute. So in *Wharton v. State*, 94 Am. Dec. 219, note, treating of effect of repeal of a criminal statute.

18 Cal. 126-128. **WIGGINS v. McDONALD.**

Party in Interest.—The only mode in which an equitable assignment of a debt can be enforced is by action in the name of the assignee to recover the debt, p. 127.

Approved as authority and applied in *Western Development Co. v. Emery*, 61 Cal. 614; so in *Board of Commissioners v. Jameson*, 86 Ind. 164.

Form of Action.—Under code system there is but one form of action to enforce private rights, whether legal or equitable, and the action must be in the name of the real party in interest, p. 127.

Approved in *Houghtaling v. Ellis*, 1 Ariz. Ter. 387; and *Waching v. Constantine*, 1 Idaho, 267; so in *McPherson v. Weston*, 64 Cal. 280; and *Watson v. Sutro*, 86 Cal. 528, holding that a complaint which states a sufficient cause of action either at law or in equity is not demurrable as not stating facts sufficient to constitute a cause of action.

Assignment.—Any act amounting to an appropriation of a debt, will constitute an assignment of it, p. 127.

Approved as authority in the similar cases of *Moore v. Lowrey*, 25 Iowa, 339; S. C. 95 Am. Dec. 792; and *Good Fellows v. Campbell*, 17 R. I. 410.

18 Cal. 128-130. **HAMILTON v. McDONALD.**

Non-negotiable Note.—Holder of, under act of 1850, has a right of action against every person from whom the note has passed by assignment, p. 130.

Examined in *Kendall v. Parker*, 103 Cal. 322, 324, S. C. 42 Am. St. Rep. 118, 120, construing later code provisions and holding that when the payee of a non-negotiable note, having a stipulation for an attorney's fee, in case of suit, transfers the same by simply indorsing it in blank, he does not become liable as an indorser to the indorsee of his indorsee.

18 Cal. 131-137. **WOODBEEK v. WILDERS.**

Partition.—Verbal agreement for, is not binding until executed, p. 137.

Cited in *Tomlin v. Hilyard*, 92 Am. Dec. 122, 127, note, collecting and collating the authorities.

18 Cal. 137-140. **HANCOCK v. WATSON.**

Construction of Instrument.—That construction should be followed

which will accomplish the object for which it was executed, though violating the strict rules of grammatical construction, p. 139.

Approved in *Sprague v. Edwards*, 48 Cal. 249, reading the right word in place of wrong one in contract, the result of clerical error.

Mortgage.—Extrinsic evidence is admissible to identify the property described or referred to in the mortgage, pp. 139, 140.

Approved and applied in *California Title etc. Co. v. Pauly*, 111 Cal. 128.

18 Cal. 141-144. HORN v. VOLCANO WATER COMPANY.

Writ of Assistance.—Purchaser at foreclosure sale is entitled to, although the decree in the foreclosure action contains no direction to deliver the possession, p. 143.

Affirmed in *Montgomery v. Middlemiss*, 21 Cal. 107; S. C. 81 Am. Dec. 148.

Where there are several appeals in the same transcript, each must be accompanied by an undertaking, designating the particular appeal to which it applies, p. 142.

Rule affirmed in *Sharon v. Sharon*, 68 Cal. 333, 336, 339, 341; and *Corcoran v. Desmond*, 71 Cal. 102, noting as the only exception to the rule, cases where in the same notice and transcript there is an appeal from a judgment, and also from an order denying a new trial. Cited in *Cook v. Oregon etc. Co.*, 7 Utah, 420, denying right to file new bond when original filed too late. Cited as authority to the ruling stated in *Centerville etc. Co. v. Bachtold*, 109 Cal. 113, discussing subject of practice on dismissal of appeals. So, to same effect, in *Kimbrell v. Rogers*, 90 Ala. 346; *McCoy v. Oldham*, 1 Idaho, 463; and *Sebree v. Smith*, 2 Idaho, 329.

18 Cal. 144-149. EL DORADO COUNTY v. ELSTNER.

County cannot enjoin collection of warrant against a bona fide purchaser, for mistake in its issuance under false charges, p. 148.

Distinguished in *Keller v. Hyde*, 20 Cal. 595, in which case the board of supervisors, in allowing the demand, acted upon a matter not within their jurisdiction, and their action had no effect to create any liability against the county. Cited as authority in *Bank of California v. Shaber*, 55 Cal. 327, 328, case of a claim against a city for injuries caused by a mob or riot, holding that the order of the board of supervisors, directing the payment of the judgment, operated as an estoppel upon the city and county, as against an assignee for value, who purchased the claim, relying upon the action of the board. Principle of the decision approved in *Beeney v. Irwin*, 6 Colo. App. 70.

County.—A claim against, allowed by the board of supervisors cannot, except in cases of fraud, be collaterally impeached, but the order allowing the claim must be reviewed by certiorari, p. 149.

Cited as authority in *Mountain v. Multnomah County*, 8 Oreg. 474, holding that under the provisions of the Oregon code, the decisions of the county court in the transaction of county business may be reviewed upon writ of review.

18 Cal. 149-152. **TERRILL v. GROVES.**

Taxation.—Several city lots cannot be assessed in gross for taxes, and then sold for the aggregate amount of the tax, and a tax deed based on such sale is void, p. 151.

Affirmed in the similar case of *People v. Clunie*, 70 Cal. 507; and distinguished in *Cooper v. Miller*, 113 Cal. 243, in which case the lots were contiguous, all belonging to the same owner; and so, to same effect, in *Wright v. Cradlebaugh*, 3 Nev. 348, 356. Ruling approved in *Casey v. Wright*, 14 Mont. 319; *Strode v. Washer*, 17 Oreg. 55; and *Young v. Joslin*, 13 R. I. 678, construing similar statutory provisions; *Salmer v. Lathrop*, 10 S. Dak. 225, holding tax deed void under local statutes.

18 Cal. 152-155. **FRIDENBERG v. PIERSON.** 79 Am. Dec. 162.

Attachment.—Junior attaching creditor cannot take advantage of irregularities in the affidavit or bond given by a prior attaching creditor of a common debtor, p. 154.

Affirmed in *Harvey v. Foster*, 64 Cal. 297, holding that the regularity of a writ of attachment or of the affidavit upon which it was issued cannot be brought in question collaterally by one not a party to the action. So in *Shea v. Johnson*, 101 Cal. 457; and approved as authority to same effect, in *Goodbar v. National Bank*, 78 Tex. 468. Cited in *McComb v. Reed*, 28 Cal. 287, questioning whether a junior attaching creditor can successfully attack the validity of the first attachment on the ground that the complaint did not contain a cause of action upon a contract express or implied for the direct payment of money; dissenting opinion in *Mentzer v. Ellison*, 7 Colo. App. 331, main opinion sustaining right of creditor to enjoin sale under void attachment.

Same.—As to what irregularities and defects will avoid an attachment, considered, p. 155.

Cited, bearing upon this subject, as follows: 86 Am. Dec. 148, note; 87 Am. Dec. 121, note; 89 Am. Dec. 658, note; 97 Am. Dec. 206, note; 100 Am. Dec. 246, note; 5 Am. St. Rep. 605, note; 8 Am. St. Rep. 310, note; 12 Am. St. Rep. 41, note; 38 Am. St. Rep. 747, note; 40 Am. St. Rep. 592, note; 40 Am. St. Rep. 910, note; 47 Am. St. Rep. 238, note; and 50 Am. St. Rep. 656, note.

18 Cal. 155-160. **MAGEE v. WELSH.**

Infancy.—Mortgage executed by feme covert under age, upon her separate estate, cannot be enforced against her plea of infancy, p. 159.

Cited in *Harris v. Ross*, 86 Mo. 96; S. C. 56 Am. Rep. 415, in which case it is held that where a feme covert under age conveys her land, and dies before attaining majority, leaving a minor heir, the latter may disaffirm the conveyance within the statutory period of limitation. Also cited, bearing upon the ruling stated, in *Craig v. Van Bebber*, 18 Am. St. Rep. 585, 589, 606, 655, 674, 679, extended note, discussing at length the subject of contracts of infants.

18 Cal. 160-165. McFADDEN v. O'DONNELL.

Attachment.—Garnishee cannot plead pendency of attachment suit in bar of recovery by his creditor, but may have proceedings suspended, upon a proper showing, p. 164.

Approved in *McKeon v. McDermott*, 22 Cal. 669; S. C. 83 Am. Dec. 37; and *Glugermovich v. Zicovich*, 113 Cal. 66. Cited as authority, to same effect, in *Dufer v. Hayden*, 12 Colo. 200; *Van Ness v. McLeod*, 2 Idaho, 1150; *Howland v. Railroad Co.*, 134 Mo. 483; and *Lynch v. Hartford Ins. Co.*, 17 Fed. Rep. 629. So in *Railway Co. v. Fulton*, 71 Miss. 390, holding that a creditor may proceed to judgment against his debtor, notwithstanding the latter has been garnished in respect to the debt sued for, but, this being shown, the judgment should require execution to be stayed for the amount the defendant has been or is sought to be charged as garnishee. *Nevian v. Poschinger*, 23 Ind. App., 698, but holding garnishee not entitled to stay when garnishment collusive; *Virginia etc. Co. v. New York etc. Co.*, 95 Va. 518, dismissing garnishment suit on proof of payment under execution in other suit; 25 Am. Dec. 196, note; and 44 Am. Dec. 468, note.

Building Contract.—May be altered by parol, notwithstanding provision that no extra work shall be paid for except by written contract, p. 165.

Referred to as authority in dissenting opinion of DeWitt, J., in *Wortman v. Kleinschmidt*, 12 Mont. 343. Approved in *Crowley v. United States Fidelity etc. Co.*, 29 Wash. 274, in action between owner and surety on contractor's bond, alterations in contract may be shown by parol, though contract requires written authority from owner for deviations in plans. *Truckee Lodge v. Wood*, 14 Nev. 307, case of waiver of provisions of contract as to extra work.

18 Cal. 176-180. HIGBY v. CALAVERAS COUNTY.

District Attorney is entitled to commissions on money collected for the county, whether he recovers the money by action of debt or proceeds by mandamus, p. 178.

Followed in *Territory v. Board of Commissioners*, 8 Mont. 414.

District Attorney's claim for commissions is a liability fixed by statute and is barred in three years, p. 179.

Cited in *Miller v. Batz*, 131 Cal. 405, but holding action to recover proportion of swamp land fund barred as arising upon contract and not statute; *County of Sonoma v. Hall*, 132 Cal. 593, holding liability of county recorder for failure to pay over fees collected founded upon statute; *Robertson v. Blaine Co.*, 90 Fed. 66, 61 U. S. App. 250, ruling similarly as to liability imposed on new county by act of creation; held applicable to a claim for services rendered as secretary of the board of education, in *Banks v. Yolo County*, 104 Cal. 260. So in *State v. Baker County*, 24 Oreg. 146, holding that the obligation of a county to pay its proportion of the state taxes is "a liability created by statute," within the meaning of the statute of limitations. Referred to as an illustration of "a liability created by statute," distinguishing it from a mere regulation for the enforcement of a right secured by the fundamental law of the land, in *Land v. Railroad Co.*, 107 N. C. 76.

18 Cal. 180-186. **PEOPLE v. MAHONEY.**

Bias of Judge does not disqualify him from sitting on trial of case, and is not sufficient ground for change of venue, p. 186.

Approved in *People v. Williams*, 24 Cal. 35; *People v. Shuler*, 28 Cal. 495; and *In re Jones*, 103 Cal. 398. Cited in *Gaines v. State*, 38 Tex. Cr. App. 215, sustaining denial of change under local statutes. Distinguished in *State v. Board*, 19 Wash. 14, 67 Am. St. Rep. 711, holding member of board incompetent to try school superintendent against whom he had personal enmity and had been instigator of charges.

Change of Venue in a criminal case is a matter as to which the court is to exercise a reasonable discretion, p. 186.

Affirmed in *People v. Perdue*, 49 Cal. 427, holding that the court's decision on the motion for a change will not be disturbed, unless there has been an abuse of discretion. So in *People v. Elliott*, 80 Cal. 298; and approved as authority in *State v. Millain*, 3 Nev. 434, 460, 461; *State v. Pomeroy*, 30 Oreg. 20; *State v. Chapman*, 1 S. Dak. 420; and *Coughlin v. People*, 144 Ill. 196, dissenting opinion of Magruder, J. Approved, as to the practice on application for change of venue, in *People v. Yoskum*, 53 Cal. 568; *Territory v. Egan*, 3 Dak. Ter. 125; *Kennon v. Gilmer*, 5 Mont. 263; *Territory v. Manton*, 8 Mont. 103; and *State v. Gray*, 19 Nev. 216. Cited in *Shattuck v. Myers*, 74 Cal. 244, note, treating of change of venue.

Challenge to Juror.—Insufficient ground of challenge to juror for implied bias, set forth, p. 186.

Approved in *People v. King*, 27 Cal. 512; S. C. 87 Am. Dec. 98, asserting the rule that in order to render a juror incompetent on the ground of implied bias, it must appear that he entertains a fixed and settled conviction of the guilt or innocence of the defendant, or that he has expressed such a conviction. So to same effect in *State v. Davis*, 14 Nev. 450. Cited in *Smith v. Eames*, 36 Am. Dec. 533, note, discussing sub-

ject of preconceived opinions as ground for challenge. So in *Commonwealth v. Brown*, 9 Am. St. Rep. 748, note.

18 Cal. 187-195. **PEOPLE v. WILLIAMS.** S. C. 24 Cal. 31.

Appeal.—In criminal cases, error in the proceedings is presumed to be injurious to the prisoner, and generally entitles him to a reversal, p. 194.

Affirmed in *People v. Eppinger*, 109 Cal. 297; and approved in *State v. Walker*, 77 Me. 492; *Preston v. State*, 4 Tex. App. 201; and *Hatch v. State*, 8 Tex. App. 421; S. C. 34 Am. Rep. 754.

When evidence offered by the defense in a criminal case is not plainly inadmissible, it is better practice to admit it than run the risk of a reversal for error in excluding it, p. 194.

Approved in *People v. Devine*, 44 Cal. 460; *People v. Benson*, 52 Cal. 382; *State v. O'Brien*, 18 Mont. 10; *State v. O'Neil*, 13 Oreg. 191; and *Somerville v. State*, 6 Tex. App. 438; *State v. Shafer*, 22 Mont. 24, disapproving technical objections and rulings and reversing conviction.

General citations: *Ramsbottom v. Bailey*, 124 Cal. 262; *Williams v. Cooper*, 124 Cal. 669.

18 Cal. 198-202. **RILEY v. HEISCH.**

Mexican Grant of itself gave a right of possession, and whether the title it created be legal or equitable, would support ejectment, p. 202.

Ruling approved in *Soto v. Kroder*, 19 Cal. 97; *Thornton v. Mahoney*, 24 Cal. 580; *Rich v. Maples*, 33 Cal. 108; and *Shanklin v. McNamara*, 87 Cal. 381. Harmonized in *Mahoney v. Van Winkle*, 21 Cal. 582.

Same.—Right of segregation belongs solely to the government, to be exercised only by its officers, p. 202.

Approved as authority in *Van Reynegan v. Bolton*, 95 U. S. 36; and *Frasher v. O'Connor*, 115 U. S. 108.

Same.—Motion for new trial having been made, the appellate court may look into the evidence to see whether the findings cover all the material matters presented for consideration, p. 201.

Affirmed in *Nieto v. Carpenter*, 21 Cal. 484.

18 Cal. 203-205. **LOUCKS v. EDMONDSON.**

New Trial.—Notice of motion to strike out statement must specify the particular grounds upon which the motion will be made, p. 204.

Approved as authority, and applied to notice of motion to discharge attachment, in *Donnelly v. Strueven*, 63 Cal. 183; *Omaha Upholstering Co. v. Furniture Co.*, 18 Mont. 471; and *Cupit v. Park City Bank*, 10 Utah, 297; S. C. affirmed on rehearing, 11 Utah, 428. Cited in dissenting opinion of *Sawyer, J.*, approving practice of striking out statement on motion for new trial, in *Quivey v. Gambert*, 32 Cal. 326.

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Court below may allow amendment to statement, by adding the grounds of the motion after time for filing statement has passed, p. 204.

Cited as authority, allowing amendment to bill of exceptions, in *In re Lamb*, 95 Cal. 408; *Swett v. Gray*, 141 Cal. 68, noted under *Valentine v. Stewart*, 15 Cal. 387.

Same.—On appeal from order granting or refusing new trial, the statement on motion for new trial in court below will be sufficient, p. 204.

Approved in *Walden v. Murdock*, 23 Cal. 549; S. C. 83 Am. Dec. 137.

18 Cal. 205. **AULT v. GASSAWAY.**

Lis Pendens.—Filing notice of, is the only way to charge a purchaser, pendente lite, with constructive notice of the suit, p. 205.

Cited as authority in *Sampson v. Ohleyer*, 22 Cal. 211; *Grattan v. Wiggins*, 23 Cal. 38; and *Corwin v. Bensley*, 43 Cal. 263. So in 56 Am. St. Rep. 856, extended note on subject.

Cross-references.—*Richardson v. White*, 18 Cal. 102; ante p. 922.

18 Cal. 206-210. **HICKS v. COMPTON.**

The Same questions involved and the case similarly disposed of, in *Grinter v. Compton*, 18 Cal. 210.

Injunctions.—Granting and continuing of, are, to some extent, matters of discretion, and should be exercised in favor of the party most likely to be injured, p. 210.

Ruling approved in *Real del Monte M. Co. v. Pond M. Co.*, 23 Cal. 85; *West v. Smith*, 52 Cal. 325; *Porter v. Jennings*, 89 Cal. 444; *Paige v. Akins*, 112 Cal. 412, case of insolvency of defendant; so in *Rohrer v. Babcock*, 114 Cal. 125; *Blue Bird Min. Co. v. Murray*, 9 Mont. 475; *Slater v. Gunn*, 170 Mass. 510, and *Copper King v. Wabash etc. Co.*, 114 Fed. 992, respectively enjoining trespass and diversion of water under facts stated; *Miller v. Wills*, 95 Va. 339, holding complaint sufficient for such injunction; *Milwaukee etc. Co. v. Bradley*, 108 Wis. 487, reversing order vacating temporary injunctions; *Taylor v. Clark*, 89 Fed. 7, but holding injunction not warranted against defendant in adverse possession of property; *Huron W. W. Co. v. City of Huron*, 3 S. Dak. 619, injunction to restrain defendant from taking possession of waterworks; and *Cattle Co. v. Chipman*, 13 Utah, 471, to restrain injury to grazing lands. Cited in *Jerome v. Ross*, 11 Am. Dec. 505, note, granting of injunction where defendant is insolvent.

General Citations.—In *Hiller v. Collins*, 63 Cal. 237, as to plaintiff's right to use counter-affidavits on motion to dissolve injunction.

18 Cal. 211-217. **HEAD v. HORN.**

Loan Made to Individual Stockholders and afterward recognized by corporation as its debt held not fraudulent as to creditors, pp. 216, 217.

Approved in *Murray v. Beal*, 23 Utah, 561, where defendant loaned money to corporation, and directors agreed to secure it by conveyance of realty, but conveyance not actually made until within four months of bankruptcy, deed not invalid as preference.

18 Cal. 217-219. NORRIS v. HOYT.

Alienage.—Nonresident alien can acquire title to real property, by purchase, and, until "office found," no individual can question his rights or title, on the ground of alienage or nonresidence, p. 219.

Cited as authority, and applied to appropriation of water by alien, in *Santa Paula Water Works v. Peralta*, 113 Cal. 44; *Carrasco v. State*, 67 Cal. 386, holding that aliens could not, at common law, take property by descent or other mere operation of law, but that this rule has been changed by statute (Cal. Civ. Code, sec. 671).

Ejectment.—Alleged agreement to pay for improvements no defense to action of, the proper remedy being by direct action upon the agreement, p. 219.

Cited in *Pitt v. Moore*, 6 Am. St. Rep. 496, note.

18 Cal. 219-224. LICK v. STOCKDALE.

Judgments.—Finding of service of process is conclusive on appeal from a judgment by default, p. 223.

Approved as authority sustaining the rule that a judgment and its recitals will be presumed to be correct upon appeal unless the contrary is made to appear, in *Meredith v. Santa Clara Min. Co.*, 60 Cal. 622; *Lyons v. Roach*, 84 Cal. 29; and *Kahn v. Matthai*, 115 Cal. 692. So, to same effect, in *Galpin v. Page*, 1 Sawy. 325, 327.

If the facts necessary to give jurisdiction exist, the judgment is good, and is not vitiated by reason of the clerk's neglect of duty in making up the judgment-roll, p. 223.

Approved in *Sharp v. Lumley*, 34 Cal. 614; and *Terry v. Berry*, 13 Nev. 522; *Whitfield v. Howard*, 12 S. Dak. 362, holding recital of service in default judgment sufficient though return of service did not appear in judgment-roll.

Same.—Joint judgment in ejectment against several defendants, sustained, p. 224.

Cited as authority in the similar case of *Andrews v. Carlile*, 20 Colo. 372.

18 Cal. 229-260. GILMER v. LIME POINT. S. C. 19 Cal. 47.

Eminent Domain.—Act of state legislature authorizing the federal government to condemn land within the state for a United States fort or other military or naval purposes, held to be constitutional, p. 249.

Approved as authority in *Burt v. Merchants' Ins. Co.*, 106 Mass. 363, S. C. 8 Am. Rep. 341, holding that a state legislature may delegate the

right of eminent domain to an agent of the United States for the purpose of obtaining land in such state as a postoffice site. Doctrine approved in *Matter of Petition of United States*, 96 N. Y. 234, 236; and *Orr v. Quinby*, 54 N. H. 592. Cited in *Kohl v. United States*, 91 U. S. 373, holding that the right of eminent domain may be exercised by the federal government within the states; *Postal Tel. Cable Co. v. O. S. L. Ry.*, 23 Utah, 486, telegraph company seeking to condemn railroad's right of way for its lines cannot be authorized to enter into possession and construct lines until it has paid compensation therefor, to be ascertained by resorting to state statutes; *Darlington v. United States*, 82 Pa. St. 387, S. C. 22 Am. Rep. 768, but denying that the state can exercise the right in behalf of the United States.

Same.—The words "public use" mean a use which concerns the whole community, as distinguished from a particular individual or a particular number of individuals, p. 252.

Definition approved in *Irrigation District v. Williams*, 76 Cal. 369, condemning lands, water, etc., for irrigation purposes; *Gt. Falls Mfg. Co. v. Fernald*, 47 N. H. 456; *Hildreth v. Water Co.*, 139 Cal. 30, holding such use not shown as to water supply; *Kansas etc. Ry. v. N. W. etc. Co.*, 161 Mo. 313, 84 Am. St. Rep. 726, holding that in case of condemnation by railway length of road or volume of business is immaterial; *Overman Silver M. Co. v. Corcoran*, 15 Nev. 157, condemning lands for reduction of ores; *Keller v. City of Corpus Christi*, 50 Tex. 629; S. C. 32 Am. Rep. 617; *McQuillen v. Hatton*, 42 Ohio St. 204; and *Railroad Co. v. Iron Works*, 31 W. Va. 729. So in *Board of Health v. Van Hoesen*, 87 Mich. 539, holding that the taking of lands to establish and maintain rural cemeteries was not for a public use. Cited in *Contra Costa R. R. Co. v. Moss*, 23 Cal. 327, holding that the question of the necessity of railroads for public use is one resting much in the discretion of the legislature; and so, to same effect, in *Wulzen v. Board of Supervisors*, 101 Cal. 21; S. C. 40 Am. St. Rep. 24; so in *Beekman v. Railroad Co.*, 22 Am. Dec. 690, note, treating of extent of public use for which lands may be condemned.

Same.—Nature of proceedings to condemn land, pointed out, p. 258.

Referred to in *Appeal of Houghton*, 42 Cal. 68, dissenting opinion of Rhodes, C. J., discussing jurisdiction of supreme court. So in *Mining Co. v. Weinstein*, 7 Mont. 349, discussing appealable character of order. So in *Abbott v. New York etc. Railroad*, 145 Mass. 453, holding that the power of eminent domain may be given to a foreign corporation.

Same.—Constitutional provision that "just compensation" be made for private property taken for public uses only requires that a certain and adequate remedy be provided by which the owner can obtain his compensation without measurable delay, p. 260.

Referred to with approval in *Fox v. Railroad Co.*, 31 Cal. 548; and

Orr v. Quimby, 54 N. H. 644, 650. Cited in **Varick v. Smith**, 28 Am. Dec. 423, note.

18 Cal. 261-262. BLANCHARD v. BEIDEMAN.

Taxation.—Liability of property owners in San Francisco for assessments made by the city authorities for repairing streets, depends on the statute, and only inures after the steps required by the statute have been taken, p. 262.

Cited as authority to sufficiency of complaint to recover street assessment, in **Himmelman v. Danos**, 35 Cal. 448.

18 Cal. 265-275. BRUMAGIM v. TILLINGHAST. 79 Am. Dec. 176.

Constitutional Law.—Statute imposing stamp tax on bills of lading held to be unconstitutional, p. 269.

Approved in **Carson River Lumbering Co. v. Patterson**, 33 Cal. 340, holding that a state has no power to pass a law imposing a toll on lumber and logs floated down a stream from that state into an adjoining state. So, to same effect, in **People v. Raymond**, 34 Cal. 498.

Voluntary Payments.—Money voluntarily paid upon a claim of right, with full knowledge of all the facts, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability, p. 270.

Ruling approved in **Cooper v. Chamberlin**, 78 Cal. 453; **Bucknall v. Story**, 46 Cal. 598; S. C. 13 Am. Rep. 225; and so, to same effect, in **Evans v. Hughes County**, 3 S. Dak. 252; S. C. on application for rehearing, 3 S. Dak., 586; and **Jefferson County v. Hawkins**, 23 Fla. 232; **Senuchy v. McNulta**, 86 Fed. Rep. 829. Cited in **San Diego etc. Co. v. School Dist.**, 122 Cal. 100, denying recovery back of school tax when based on alleged mistake of taxpayer as to location of land assessed, relative to its assessability, and **Rooney v. Snow**, 131 Cal. 54, as to payment of void license tax when imposed on property afterward found to be outside city limits; **Huddleston v. Washington**, 136 Cal. 519, holding taxes paid voluntarily by owner of fee and life tenant not liable to him therefor; **Flack v. Bank**, 8 Utah, 200, denying recovery on payment of note before maturity though attachment threatened; 45 Am. Dec. 741, note; 54 Am. Dec. 719, note; 84 Am. Dec. 57, note; and 4 Am. St. Rep. 608, note.

Same.—To render a payment compulsory or involuntary, there must be a present and controlling necessity upon the party making the payment, p. 272.

Approved in **Garrison v. Tillinghast**, 18 Cal. 407, 408; S. C. No. 2, 18 Cal. 409; **Maxwell v. County of San Luis Obispo**, 71 Cal. 467; **Dear v. Varnum**, 80 Cal. 90; **Holt v. Thomas**, 105 Cal. 276, 277; **Vick v. Shinn**, 49 Ark. 72; S. C. 4 Am. St. Rep. 28; **Kraemer v. Deustermann**, 37 Minn.

473; *Joannin v. Ogilvie*, 49 Minn. 567; S. C. 32 Am. St. Rep. 583; *Lehigh Coal and Nav. Co. v. Brown*, 100 Pa. St. 346; *Sowles v. Soule*, 59 Vt. 135; *Custin v. City of Viroqua*, 67 Wis. 320; *Radich v. Hutchins*, 95 U. S. 213; and *Loneragan v. Buford*, 148 U. S. 590; *Chesebrough v. United States*, 192 U. S. 260, written application to internal revenue commissioner to refund money expended in purchase of stamps to be affixed to conveyance is not equivalent to appeal to him from adverse decision by collector, which is essential to maintenance of suit for recovery of taxes; *Lippincott v. Supreme Council*, 130 Fed. 484, where insurance company illegally renounced contracts by attempting to reduce amount payable on certificates, and levied assessments on reduced amount, one refusing to assent thereto, but paying reduced assessment, could rescind contract and recover payments previously made. Examined in *Winzer v. City of Burlington*, 68 Iowa, 283, in which case it is held that when a tax is illegal and the party pays under protest he may recover back the money. So, to same effect, in *Rand v. Bd. Co. Commrs.*, 50 Minn. 393. Cited in *Mayor etc. v. Lefferman*, 45 Am. Dec. 155, 156, 163, note, discussing subject of compulsory payment and what constitutes. So in 87 Am. Dec. 194, note; 89 Am. Dec. 366, note; 89 Am. Dec. 584, note; 100 Am. Dec. 751, note; 89 Am. Dec. 660, note; 92 Am. Dec. 568, note. Assumpsit lies to recover back money paid under compulsion, 70 Am. Dec. 676, note.

18 Cal. 275-291. **RAUN v. REYNOLDS.** S. C. 11 Cal. 14; and 15 Cal. 459.

Judgment.—Unreversed and not suspended may be enforced, but when reversed it is as if never rendered, and money collected by authority of it may, as a general rule, be recovered back, p. 290.

Approved as authority in *Applegarth v. Dean*, 68 Cal. 494; *Dickerson v. Davis*, 111 Ind. 440; *Hiler v. Hiler*, 35 Ohio St. 647; *Mann v. Insurance Co.*, 38 Wis. 118; and *Beard v. Beard*, 25 W. Va. 490; S. C. 52 Am. Rep. 222. Cited in *Ashton v. Heydenfeldt*, 124 Cal. 17, 18, compelling restitution of property distributed under probate decree afterward recovered; *Cowdery v. Bank*, 139 Cal. 304, noted under *Reynolds v. Harris*, 14 Cal. 681; as authority in support of the ruling stated, in 12 Am. Dec. 35, note; 28 Am. Dec. 369, note; 45 Am. Dec. 167, note; and 76 Am. Dec. 467, note. So in 52 Am. Dec. 759, note, treating of action for money had and received.

General Citations.—In *Townsend v. Tallant*, 33 Cal. 55; S. C. 91 Am. Dec. 622, holding that the supreme court will not give an appellant the benefit of the act of 1866 ratifying probate sales, in cases where the judgment in the court below was rendered prior to the act. In such cases said act must be made the basis of an original proceeding in equity, if the party would claim the benefit of its provisions. Referred to, giving a history of the case, and distinguished, in *Conro v. Crane*, 110 U. S. 412.

18 Cal. 291-303. PAYNE v. PAYNE.

Husband and Wife.—On death of husband, one-half of the common property goes absolutely to the wife, and the remaining half is subject to the testamentary disposition of the husband, p. 301.

Ruling approved in *Burton v. Lies*, 21 Cal. 91. Cited in *Morrison v. Bowman*, 29 Cal. 348, discussing effect of election by wife to take under her husband's will. Referred to in *In re Rowland*, 74 Cal. 525, S. C. 5 Am. St. Rep. 465, discussing effect of amendment of 1874, of section 1401, California Civil Code, and holding that the husband does not, upon the death of his wife, as to the community property, take by descent or succession, but holds the community property as though acquired by himself, and as if his deceased wife had never existed. Cited in 63 Am. Dec. 128, note.

Codicil to Will operates as a republication of the will, and the two are to be regarded as forming but one instrument, speaking from the date of the codicil, p. 302.

Approved and applied in *In re Ladd*, 94 Cal. 673; and so in *Barney v. Hayes*, 11 Mont. 106. Cited in *Estate of McCauley*, 138 Cal. 434, 435, holding charitable bequests in will executed more than thirty days prior to death not affected by codicil made within that period; *Wilson v. Fosket*, 39 Am. Dec. 743, note, treating of construction of codicil; so in 55 Am. Dec. 127, 128, note; and 45 Am. Rep. 332, note.

Same.—Will and codicil to be construed together in determining whether children or their issue not provided for were intentionally omitted, p. 302.

Referred to as authority, construing statutory provisions relative to omission of testator to provide in will for his or her children, in *Estate of Callaghan*, 119 Cal. 574; *Coulam v. Doull*, 4 Utah, 274; S. C. affirmed, 133 U. S., 232; and *Hunt v. Hunt*, 11 Nev. 450.

Same.—In this case, held that the wife took one-half the property in her own right, and the other half as devisee under the will of her husband, p. 302.

Cited in *Estate of Wickersham*, 138 Cal. 363, noted under *Beard v. Knox*, 5 Cal. 256; *In re Gilmore*, 81 Cal. 243, holding that it is only where there is such a clear manifestation of intent to devise the whole community property as to overcome the presumptions against such a devise that the widow can be put to her election to take under the will, or to take what she is entitled to by law. So in *Pratt v. Douglas*, 38 N. J. Eq. 537, as declaring the rule in dealing with the question of election, when the widow's right in community property is in the issue.

Will may give power to sell property devised without an order of court. The statute is operative only in the absence of testamentary power, p. 303.

Approved as authority in *Fallon v. Butler*, 21 Cal. 31; S. C. 81 Am.

Dec. 143; *Larco v. Casaneuava*, 30 Cal. 567; and *Clark v. Hornthal*, 47 Miss. 489. Cited in *White v. Moses*, 21 Cal. 44, but holding recital in executor's deed insufficient alone to show right to sell under will; In re Walker's Estate, 6 Utah, 373, but holding mere power in will insufficient under its terms and local statutes. Case is cited in *Toland v. Earl*, 129 Cal. 154, 79 Am. St. Rep. 105, discussing power of probate court to construe wills.

General Citations.—In *Rosenberg v. Frank*, 58 Cal. 401, as sustaining jurisdiction of district court of an action to construe a will after the same had been admitted to probate, Myrick, J., dissenting, p. 417. So, to same effect, in *Williams v. Williams*, 73 Cal. 104, claiming such jurisdiction for the superior court. Referred to as a "consent case," in *Siddall v. Harrison*, 73 Cal. 562, and holding that the superior court is not bound to entertain such an action, and should not do so, except in a case where there is some special reason therefor, other than a mere desire to obtain the opinion of a court of equity as to the proper construction of the will. Cited in *Clark v. Hornthal*, 47 Miss. 497, approving rules of construction set forth.

18 Cal. 303-309. **BURR v. HUNT.**

Injunction lies to restrain a tax sale when the invalidity will not appear upon the face of the deed, p. 308.

Cited as authority to the ruling stated in *Bucknall v. Story*, 36 Cal. 71; *Woodruff v. Perry*, 103 Cal. 613; and 69 Am. Dec. 201, note. So in *San Francisco etc. R. R. Co. v. Dinwiddie*, 8 Sawy. 316; and *Spring Valley Water Works v. Bartlett*, 8 Sawy. 569; S. C. 16 Fed. Rep. 625, holding that a tax deed based upon a void assessment constitutes no cloud on title.

18 Cal. 315-327. **NIGHTINGALE v. SCANNELL.**

Objection to Evidence must be specific, and not general unless the evidence objected to is absolutely inadmissible for any purpose, p. 323.

Ruling approved in *Fabian v. Callahan*, 56 Cal. 161; *Brumley v. Flint*, 87 Cal. 474; *People v. Gordon*, 99 Cal. 234; *Wise v. Wakefield*, 118 Cal. 110; and *Kent v. State*, 42 Ohio St. 430. Cited in *Swan v. Thompson*, 124 Cal. 196, *State v. Magone*, 32 Or. 210, and *Snowden v. Coal Co.*, 16 Utah, 373, holding form of objection sufficient; *Morehouse v. Morehouse*, 140 Cal. 94, holding general objection sufficient as to testimony outside of issues in case. Referred to as applicable to specification of grounds of motion for nonsuit, in *Daley v. Russ*, 86 Cal. 117.

Exemplary Damages may be given in case of malicious trespass by an officer acting under color of process, p. 325.

Approved as authority in *Winstead v. Hulme*, 32 Kan. 573, 574; and cited to the ruling stated, in 50 Am. Dec. 768, note.

Same.—Motives of plaintiff in writ cannot be given in evidence in aggravation of damages against sheriff, p. 325.

Approved in *Dexter v. Paugh*, 18 Cal. 376.

In Action Against Sheriff for wrongful levy, damages are not affected by recapture, p. 326.

Approved in *Sears v. Lydon*, 5 Idaho, 364, applying rule in action for conversion.

18 Cal. 327-330. COUNTY OF SAN JOAQUIN v. JONES.

County Treasurer.—Not entitled to allowance for salary in addition to percentage, unless specially authorized by law, p. 330.

Principle approved in *County of Modoc v. Spencer*, 103 Cal. 501, holding that under the County Government Act, boards of supervisors have no power to employ counsel on behalf of the county to prosecute or assist in the prosecution of criminal cases, prosecuted in the name, and on behalf of, the people of the state. Distinguished in *Lewis v. Colgan*, 115 Cal. 537, and holding that the state board of examiners have implied power to employ an expert to assist them in examining books and accounts.

18 Cal. 330-334. HIGGINS v. WORTELL.

Pleading.—In answer to a verified complaint, a mere literal denial of indebtedness is insufficient, p. 333.

Ruling approved in *Wells v. McPike*, 21 Cal. 218; *Woodworth v. Knowlton*, 22 Cal. 168; *Doll v. Good*, 38 Cal. 290; *Huston v. Railroad Co.*, 45 Cal. 553; *Stewart v. Budd*, 7 Mont. 579; and *Conway v. Clinton*, 1 Utah, 223.

Same.—Ordinary counts in indebitatus assumpsit, for goods sold and delivered, etc., are sufficient, p. 331.

Cited as authority to the proposition stated, in *Abadie v. Carrillo*, 32 Cal. 175.

Payment.—Acceptance of note for a debt does not discharge the debt unless expressly agreed to be payment, p. 333.

Approved as authority in *Comptoir D'Escompte v. Dresbach*, 78 Cal. 20; and *Tolman v. Smith*, 85 Cal. 287. So, to same effect, in *Bantz v. Basnett*, 12 W. Va. 801. And cited to the ruling stated, in 41 Am. St. Rep. 761, note.

Evidence.—Objection to deposition on ground that certain questions asked on the examination were improper must be confined to the particular questions, p. 333.

Approved in *Neyland v. Bendy*, 69 Tex. 713. Cited in *Bank v. Rush*, 85 Fed. 542, 56 U. S. App. 563, holding general objection insufficient if any part of deposition not subject thereto.

18 Cal. 337-338. **PEOPLE v. JERSEY.**

Criminal Law.—Sufficiency of indictment charging larceny by bailee, pointed out, p. 338.

Cited as authority in *People v. Smith*, 23 Cal. 280, and holding that where the bailee of property obtains possession of it from the owner with the intent of stealing it, and carries out that intent, he is guilty of larceny, and should be indicted for that crime; and the principle approved in *People v. Raschke*, 73 Cal. 383; and *People v. Morino*, 85 Cal. 517.

18 Cal. 339-349. **McMILLAN v. DANA.**

Attachment.—Sufficiency of complaint in action on undertaking for release of, considered, p. 347.

Examined and approved in *Gardner v. Donnelly*, 86 Cal. 370, the facts in the two cases being similar.

Recitals in undertaking given on release of attachment are conclusive of the facts therein stated, p. 347.

Approved as authority in *Smith v. Fargo*, 57 Cal. 159; and *Bowers v. Beck*, 2 Nev. 152, dissenting opinion of Cowen, J. Cited in *McCormick v. National Surety Co.*, 134 Cal. 513, holding sureties on bond to release attachment liable irrespective of actual ownership of property by their principal. *Ogden v. Davis*, 116 Cal. 37, holding that the sureties, equally with the principal, are bound by such recitals. So, to same effect, in *Brown v. Hamil*, 76 Ala. 509; *Hundley v. Filbert*, 73 Mo. 35; and *Griswold v. Sundback*, 4 S. Dak. 449. Explained and distinguished in *Murphy v. Montandon*, 2 Idaho, 1051; S. C. 35 Am. St. Rep. 281. Cited in *United States v. Eldredge*, 5 Utah, 173, discussing question as to when the liability of sureties attaches.

18 Cal. 351-358. **RICHMOND v. SACRAMENTO VALLEY RAILROAD COMPANY.**

Railroad Company is liable for damages done cattle by running over them on the track, if the accident could have been avoided by ordinary care on the part of the company, p. 355.

Approved as authority in *Union Pac. Ry. Co. v. Rollins*, 5 Kan. 187; and *Atchison etc. Ry. Co. v. Davis*, 31 Kan. 655. Cited to the ruling stated, in 49 Am. Dec. 264, note.

Same.—No California statute requires railroad corporations to fence in their tracks, p. 355.

Cited in *Logan v. Gedney*, 38 Cal. 581, holding that the rule of the common law, that every man is bound to keep his beasts within his own close, never was the law in California. By provision of statute (Cal. Civ. Code, sec. 485), railroad corporations are now required to fence their track and property. And see *Los Angeles etc. Ry. Co. v. Rumpff*, 104 Cal. 28.

Negligence disabling a plaintiff from recovering must be that which directly or by natural consequence conduces to the injury, p. 357.

Cited as authority in *Sawyer v. Sauer*, 10 Kan. 472; *Jacobus v. Railway Co.*, 20 Minn. 135; S. C. 18 Am. Rep. 367; *Mississippi etc. R. R. Co. v. Mason*, 51 Miss. 244; and *Buck v. People's Ry. etc. Co.*, 46 Mo. App. 566. So, to same effect, in *Union Pacific Ry. Co. v. McDonald*, 152 U. S. 278. Distinguished in *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. St. 32; S. C. 37 Am. Rep. 658.

Same.—Whether negligence exists in a particular case is a question for the jury, p. 358.

Approved in *Solen v. Virginia etc. R. R. Co.*, 13 Nev. 130.

18 Cal. 359-368. **HAVENS v. DALE.**

Deed.—Fact that a deed, under Mexican law, does not recite a consideration does not invalidate the deed, p. 366.

Approved as authority in *De Merle v. Mathews*, 26 Cal. 470; *Schmitt v. Giovanari*, 43 Cal. 624; and *Steinbach v. Stewart*, 11 Wall. 578.

Same.—All the words employed in a deed should be given some effect, if possible, and if consistent with the evident purpose and operation of the deed, p. 366.

Approved in *Faivre v. Daley*, 93 Cal. 670. Referred to in *Steinbach v. Stewart*, 11 Wall. 576, construing Mexican deed.

Notice.—Rule that open and notorious possession of land is evidence of notice, not to be extended, p. 368.

Referred to as authority in *Brophy Min. Co. v. Brophy etc. Min. Co.*, 15 Nev. 114; and cited in 73 Am. Dec. 549, note.

General Citation.—*Lash v. Lardick*, Fed. Cas. No. 8,097.

18 Cal. 370-372. **CROWELL v. GILMORE.**

Mechanics' Lien.—Under act of 1856, all liens are on an equality, unless some began work before a mortgage is recorded, and some after, in which case the mortgage takes its place in point of time, p. 372.

Cited as authority, construing lien law of Nebraska, in *Henry v. Fisherick*, 37 Neb. 218; and *Hoagland v. Lowe*, 39 Neb. 410. So in *In re Hoyt*, 3 Biss. 341, construing Wisconsin statute. So, to same effect, in *Huttig Bros. Mfg. Co. v. Hotel Co.*, 6 Wash. St. 129. Cited, but not fully adopting the doctrine, in *Gardner v. Leck*, 52 Minn. 525; overruling *Finlayson v. Crooks*, 47 Minn. 77, in which the doctrine was wholly disapproved. Distinguished in *Farmers' etc. Trust Co. v. Railway Co.*, 127 Ind. 267, discussing subject of priority among special liens.

18 Cal. 376-378. **PICO v. STEVENS.**

Instructions.—Judges must not charge juries with respect to matters of fact, p. 378.

Approved in *Miller v. Stewart*, 24 Cal. 505, where one of the issues raised was a question of fraudulent intent in the sale of property.

Where no other conclusion could be arrived at from the evidence, error in instructing on facts is without prejudice, and is not ground of reversal, p. 378.

Approved in *Miller v. Stewart*, 24 Cal. 505; *Robinson v. Railroad Co.*, 48 Cal. 424; *Watson v. Damon*, 54 Cal. 279; *Robinson v. Mining Co.*, 6 Nev. 78; and *Gaudette v. Travis*, 11 Nev. 161; *Williams v. Casebeer*, 126 Cal. 88, holding error immaterial under facts stated.

Estate of Decedent.—Upon recovery of judgment against an estate upon a rejected claim, the claimant is entitled to interest from the time of presenting his claim, p. 378.

Cited as authority in *Estate of Glenn*, 74 Cal. 568; and in *In re Kennedy*, 94 Cal. 24. So in *Rhemke v. Clinton*, 2 Utah, 238, holding that the jury may allow interest eo nomine in their verdict in computing the damages in gross.

Attachment on debt not due is void as to creditors prejudiced thereby, p. 381.

See note to *Holker v. Hennessey*, 65 Am. St. Rep. 646.

18 Cal. 378-382. **DAVIS v. EPPINGER.** 79 Am. Dec. 184.

Attachment, on debt not due, is void as to creditors whose rights are injuriously affected by it, p. 381.

Patrick v. Montader, 13 Cal. 434, harmonized. Cited to the ruling stated in *Deere v. Eagle Mfg. Co.*, 49 Neb. 391; and 58 Am. St. Rep. 105.

In attachment suit, judgment creditors of defendant may intervene to set aside the attachment because void as to them, p. 381.

Affirmed in *Speyer v. Ihmels*, 21 Cal. 287; S. C. 81 Am. Dec. 158, 159; and *Kimball v. Richardson-Kimball Co.*, 111 Cal. 393. Approved in *People v. Green*, 1 Idaho, 239; *Lewis v. Harwood*, 28 Minn. 435, 436; *Freiberg v. Freiberg*, 74 Tex. 127; and *Davis v. Claffin Co.*, 63 Ark. 165; S. C. 58 Am. St. Rep. 105. Cited in *McEldowney v. Madden*, 124 Cal. 109, granting right of intervention when first attachment issued on complaint not showing cause of action; dissenting opinion, *Standard etc. Co. v. Lansing W. W.*, 58 Kan. 134, noted under *Patrick v. Montader*, 13 Cal. 434. Followed in *Langert v. Brown*, 3 Wash. Ter. 106. Denied in *Espenhain v. Meyer*, 74 Wis. 384, the Wisconsin statute authorizing an attachment for a debt not due. Cited in *Brown v. Saul*, 16 Am. Dec. 181, 182, note, discussing subject of intervention.

Promissory Note, payable one day after date, without grace, cannot be sued on the day after its execution, p. 381.

Cited as authority in *Bell v. Sackett*, 38 Cal. 410. Cited in *Farmers' etc. Bank v. Salina etc. Co.*, 58 Kan. 209; noted under *Wilcombe v.*

Dodge, 3 Cal. 260. Distinguished in *Sabin v. Burke*, 4 Idaho, 119, note without grace made payable in a bank, placed and remaining therein for collection until due, may be sued upon after banking hours on day it falls due. So in 11 Am. Dec. 218, note; and 58 Am. Dec. 412, note.

18 Cal. 382-384. PEOPLE v. CHAMBERS.

Criminal Law.—Possession of stolen property is not of itself sufficient to convict of larceny, p. 383.

Ruling affirmed in *People v. Ah Ki*, 20 Cal. 179; *People v. Gassaway*, 23 Cal. 51; *People v. Antonio*, 27 Cal. 407; *People v. Kelly*, 28 Cal. 427, 429; *People v. Noregea*, 48 Cal. 123; *People v. Swinford*, 57 Cal. 87; and *People v. Etting*, 99 Cal. 578, in all of which cases it is held that other circumstances indicative of guilt must be shown; *State v. Walters*, 7 Wash. 251, holding instruction incorrect; *State v. Bliss*, 27 Wash. 467, instruction in prosecution for burglary that if jury believe defendant was found in possession of stolen property soon after it was stolen, such possession is strong circumstance tending to show guilt, is erroneous. Approved as authority to same effect, in *State v. Jennings*, 81 Mo. 214; *People v. Hart*, 10 Utah, 209; *State v. Walters*; and *Ingalls v. State*, 48 Wis. 656. Denied, holding that the burden of proof is on the prisoner to explain such possession in *Territory v. Casio*, 1 Ariz. Ter. 487; *State v. Cassady*, 12 Kan. 559; and *Jones v. State*, 51 Miss. 725. Cited in *Hunt v. Commonwealth*, 70 Am. Dec. 447, 448, 451, extended note on subject; so in 76 Am. Dec. 506, note.

18 Cal. 385-388. GOSTORFS v. TAAFFE.

Pleading.—Sham answers, when consisting of affirmative defenses, may be stricken out, p. 388.

Approved in *Wedderspoon v. Rogers*, 32 Cal. 574; and cited as authority in *Foren v. Dealey*, 4 Oreg. 95. Examined in *Greenbaum v. Turrill*, 57 Cal. 291, and holding that a verified answer, setting up a sufficient defense, cannot be stricken out as sham, whether such answer consists of denials, or sets up an affirmative defense; *Stokes v. Farnsworth*, 99 Fed. 838, holding answer not sham; *Patrick v. McManus*, 14 Colo. 69; S. C. 20 Am. St. Rep. 255, holding that if there is conflicting evidence regarding the truth of the defense, the answer cannot be stricken out. Cited in *People v. McCumber*, 72 Am. Dec. 521, 524, 525, note, discussing subject of striking out answer as shown.

18 Cal. 388-390. BECKMAN v. MANLOVE.

Setoff.—Execution judgment cannot be set off against damages for seizure of exempt property, p. 389.

Principle of the decision approved and applied in *Johnson v. Hall*, 84 Mo. 213. Referred to in *Herman v. Miller*, 17 Kan. 331, holding that

courts will not set off judgments upon motion when it would be inequitable to do so. Cited in *Dutton v. Mason*, 21 Tex. Civ. App. 393, discussing principles of setoff and denying it under facts stated; note to *Cullen v. Harris*, 66 Am. St. Rep. 384, on proceeds of exempt property. Also, to same effect, in *Diehl v. Friester*, 37 Ohio St. 477.

18 Cal. 390-391. HASTINGS v. DOLLARHIDE.

" **Pleading.**—Where the complaint in an action on a promissory note avers assignment thereof, by payee to plaintiff, a general denial in answer does not admit, but denies, the assignment, and the plaintiff must prove it, p. 391.

Cited as authority in *Tullis v. Shannon*, 3 Wash. St. 722.

18 Cal. 394-396. GAGLIARDO v. HOBERLIN.

New Trial.—Findings of the court and verdict of the jury are conclusive as to the facts, if no motion is made for a new trial in the court below, and this rule applies to equity cases as well as to other actions, p. 395, overruling *Dewey v. Bowman*, 8 Cal. 145.

Affirmed in *Allen v. Fennon*, 27 Cal. 69; *Burnett v. Pacheco*, 27 Cal. 411; *People v. Banvard*, 27 Cal. 475; *Doe v. Vallejo*, 29 Cal. 391; and *Hihn v. Peck*, 30 Cal. 287; and approved as authority in *Federico v. Hancock*, 1 Ariz. Ter. 512; *Whitmore v. Shiverick*, 3 Nev. 303; *Burbank v. Rivers*, 20 Nev. 84; and *Silva v. Pickard*, 14 Utah, 254.

18 Cal. 397-399. INOS v. WINSPEAR.

Judgment against partnership, one partner only being served with process, is void as against the partner not served, p. 398.

Cited as authority to the ruling stated in *Wood v. Watkinson*, 44 Am. Dec. 570, note, discussing the subject at length.

Same.—Justice, officer and plaintiff in the writ are all liable for levy of a void execution against a defendant not served, p. 399.

Approved as authority in *McVea v. Walker*, 11 Tex. Civ. App. 47.

18 Cal. 399-401. LEWIS v. CLARKIN.

Joint Liability.—Common-law rule as to recovery against all or none, modified by statute, and judgment may go against those defendants merely who are found liable upon the obligation, p. 400.

Cited as authority to the ruling stated in *Tay v. Hawley*, 39 Cal. 95; *Shain v. Forbes*, 82 Cal. 584; *Bailey Loan Co. v. Hall*, 110 Cal. 492; *Kleinschmidt v. Freeman*, 4 Mont. 408; *Knatz v. Wise*, 16 Mont. 558; *Evans v. Cook*, 11 Nev. 72; *Sears v. McGrew*, 10 Oreg. 51; *Hamm v. Basche*, 22 Oreg. 519; *Brodek v. Farnum*, 11 Wash. St. 576; *North Star Boot and Shoe Co. v. Stebbins*, 3 S. Dak. 546; *Noyes v. Barnard*, 63

Fed. Rep. 786; *Dairy v. Schermorhorn*, 31 Or. 312; and *Atlantic and Pacific Railroad v. Laird*, 164 U. S. 401; *Dobbs v. Purington*, 136 Cal. 71, noted under *Rowe v. Chandler*, 1 Cal. 167; *First Nat. Bank v. Grignon*, 7 Idaho, 656, judgment rendered in another state on promissory notes against firm, one of members of which is resident of this state and is served by publication, is no bar to suit in this state on original obligation; *Hewitt v. Maize*, 5 Idaho, 638, where A made contract to do work for three defendants and contract made with one of them, and on trial judgment entered against two defendants by consent, judgment of nonsuit for variance properly denied on motion of other defendant.

18 Cal. 402-404. PEOPLE v. FRISBIE.

Joint Liability.—In a suit against two on joint assessment of taxes, judgment may be rendered against one only. Common-law rule modified, if not wholly abrogated, p. 403.

Cited as authority in *Tay v. Hawley*, 39 Cal. 95; *Shain v. Forbes*, 82 Cal. 584; *Bailey Loan Co. v. Hall*, 110 Cal. 492; *Kleinschmidt v. Freeman*, 4 Mont. 408; *Noyes v. Barnard*, 63 Fed. Rep. 786; and *Atlantic and Pacific Railroad v. Laird*, 164 U. S. 401.

18 Cal. 404-408. GARRISON v. TILLINGHAST.

Payment.—Money paid for stamps for passenger tickets, held not to be deemed compulsory payment, and cannot be recovered back, p. 407.

Cited in *Mayor etc. v. Lefferman*, 45 Am. Dec. 156, 166, note, discussing subject of compulsory payment; so in 79 Am. Dec. 184, note.

Cross-reference.—*Brumagim v. Tillinghast*, 18 Cal. 265.

18 Cal. 409-411. GILLESPIE v. BENSON.

Legal Jury.—Less number than twelve persons does not constitute a legal jury, without the consent of the adverse party, p. 411.

Cited as authority in *City of Huron v. Carter*, 5 S. Dak. 8, holding that parties to a civil action may voluntarily consent to a jury of any number.

Jurisdiction.—Of supreme court, on appeal, is determined by amount claimed in the complaint, where plaintiff is appellant, and the judgment is for defendant, p. 411.

Cited as authority in *Votan v. Reese*, 20 Cal. 91; *Skillman v. Lachman*, 23 Cal. 202; S. C. 83 Am. Dec. 37; and *Dashiell v. Slingerland*, 60 Cal. 657, where the case is commented on by Morrison, C. J., in dissenting opinion, pp. 658, 659. Referred to in *Decker v. Williams*, 73 Fed. Rep. 311, as maintaining the rule established in the courts of the United States, that the amount involved is determined by the case as it ap-

pears in the appellate court, and not the sum in controversy in the court below.

18 Cal. 420-421. **BOWERS v. DICKERSON.**

Pleading.—Answer filed without leave after expiration of time to answer, but before default entered, is not a nullity, but at most an irregularity, p. 421.

Cited as authority to the ruling stated, in *Acock v. Halsey*, 90 Cal. 220. And referred to in *Drake v. Duvenick*, 45 Cal. 463, holding that the only purpose of a default is to limit the time during which the defendant may file his answer, and that time never extends beyond a trial and judgment.

18 Cal. 422-432. **PICO v. DE LA GUERRA.** Followed in *Pico v. De La Guerra*, 18 Cal. 432.

Estate of Decedent.—Presentation of contingent claims against, construing act of 1851, relative to estates of decedents, pp. 425, et seq.

Cited in *Willis v. Farley*, 24 Cal. 498; and explained in *Estate of Hill*, 67 Cal. 243. So in *Verdier v. Roach*, 96 Cal. 469, and holding that under section 1493 of the Code of Civil Procedure, as amended in 1880, all contingent claims must be presented within the time limited in the notice to the creditors, or such claims are barred forever.

Same.—Allowance of claim, due and not contingent, fixes the obligation upon the estate as a judgment, pp. 428, 431.

Approved as authority in *Matter of Estate of Hidden*, 23 Cal. 363. Cited to ruling stated in *Moore v. Hillebrant*, 65 Am. Dec. 122, note, collecting and collating the authorities bearing upon the subject.

18 Cal. 432-433. **PEOPLE v. KAHL.**

Appeal.—Mandamus will not lie to compel settlement of statement unless the papers tend to show error, p. 433.

Cited as authority to the ruling stated, in *People v. Dickson*, 46 Cal. 54; *Gay v. Torrance*, 145 Cal. 147, determining right to mandamus to compel judge to settle bill of exceptions embodying affidavits stricken out as scandalous.

18 Cal. 433-436. **FREMONT v. SEALS.**

Statute of Limitations.—Does not begin to run against a patentee until issuance of the patent, p. 435.

Cited in *Jatunn v. Smith*, 95 Cal. 157, holding that there can be no adverse possession of land so long as the title thereto remains in the United States.

General Citations.—In dissenting opinion of *Boreman, J.*, 1 Utah, 225, as to effect of admissions in answer. In 79 Am. Dec. 139, note, as to title resting upon mining rules and regulations.

18 Cal. 436-438. FORE v. MANLOVE.

Purchaser of Judgment on sale under execution, takes as assignee only, p. 438.

Affirmed in *Northam v. Gordon*, 23 Cal. 255; *Southard v. McBrown*, 63 Cal. 546. Cited in *Curtin v. Kowalsky*, 145 Cal. 435, assignee of judgment need not file assignment nor give notice of it to others who might be about to take second assignment, as caveat emptor applies; *Stoddard v. Benton*, 6 Colo. 512, holding that after notice to the judgment debtor of a bona fide transfer of the judgment, the rights of the assignee will be protected.

Judgment is not negotiable, but a mere chose in action between two bona fide purchasers thereof, first in time is prior in right, p. 438.

Cited as authority in *Southard v. McBrown*, 63 Cal. 547; and so, to same effect, in *Thompson v. Sutton*, 23 Minn. 50; in note to *Graham etc. Co. v. Pembroke*, 71 Am. St. Rep. 31, on priority of assignments; note to *Chilstrom v. Eppinger*, 78 Am. St. Rep. 47, on effect of assignments of judgments; 54 Am. Dec. 368, note.

18 Cal. 438-443. CROSBY v. PATCH.

Statutes.—Repeal of, by implication, is not favored, p. 441.

Cited as authority in *Home for Inebriates v. Reis*, 95 Cal. 148, holding that this rule has peculiar force in case of laws of special and local application, which are never to be deemed repealed by general legislation, except upon the most unequivocal manifestation of intent to that effect. Ruling approved in *State v. La Grave*, 23 Nev. 28. To same effect, in *Jobb v. County of Meagher*, 20 Mont. 434.

18 Cal. 443-447. DAUBENSPECK v. GREAR.

Injunction will lie to prevent mining by a trespasser, p. 447.

That the injury must be irreparable to warrant the granting of the injunction, cited in *Jerome v. Ross*, 11 Am. Dec. 500, note; as cutting down ornamental shrubbery and fruit trees, *Id.* p. 501; *Dudley v. Hurst*, 1 Am. St. Rep. 377, note. The fact that the defendants are willing to pay for the property is immaterial, in 53 Am. Rep. 350, note; and *Thorn v. Sweeney*, 12 Nev. 257. That miner has no right to mine land used for houses, orchards, vineyards, gardens, etc., in 91 Am. Dec. 695, note. Must be no adequate remedy at law, *Heagy v. Black*, 90 Ind. 539. Distinguished in *Tevis v. Ellis*, 25 Cal. 519, denying injunction to restrain a sheriff from executing a writ of restitution.

18 Cal. 447-449. LYONS v. LYONS.

Appeals.—Act of 1861 regulating appeals applies, as to findings of fact and conclusions of law, equally to cases in law and equity, p. 448.

Notes Cal. Rep.—60

Cited in *Sharon v. Sharon*, 67 Cal. 188, and in dissenting opinion of *McKee, J.*, p. 213. So, in *Wadsworth v. Wadsworth*, 81 Cal. 187; 8 C. 15 Am. St. Rep. 42, as authority that a suit for divorce is a suit in equity.

18 Cal. 451-455. WINTON v. SPRING.

Contract.—Word "cancel" in, not equivalent to word "rescind," p. 454.

Cited as authority in construing similar contract, in *Stratton v. Cal. Land etc. Co.* 86 Cal. 359; *Barth v. Jones*, 7 Colo. 466. Approved in *Clark v. American etc. Min. Co.*, 28 Mont. 476, determining question of rescission of optional contract on mining property.

18 Cal. 455-458. ROLAND v. KREYENHAGEN.

Default.—Where judgment by default is set aside, and a party permitted to come in and defend, the appellate court will not interfere, unless there has been a clear abuse of discretion, p. 456.

Cited, and the principle of the decision approved, in *Bailey v. Taaffe*, 29 Cal. 423; *Chamberlin v. County of Del Norte*, 77 Cal. 151; *Ward v. Clay*, 82 Cal. 509; *Buell v. Emerich*, 35 Cal. 117; *Stonesifer v. Kilburn*, 94 Cal. 44; and *Horton v. New Pass Co.*, 21 Nev. 189, the last two being cases of excusable neglect. Cited in *Merchants' etc. Co. v. L. A. etc. Co.*, 128 Cal. 621, *Winchester v. Black*, 134 Cal. 127, sustaining vacation of default under facts stated; *Melde v. Reynolds*, 129 Cal. 311, and *Utah etc. Co. v. Trombo*, 17 Utah, 209, reversing orders refusing vacation; *McDongald v. Hulet*, 132 Cal. 162, applying principle to filing of amended answer; also in *Burnham v. Hays*, 58 Am. Dec. 394, note, treating of exercise of discretion of court in vacating defaults.

General Citations.—In *Reed v. Calderwood*, 22 Cal. 465, as authority for motion to set aside default and judgment where there was collusion in having them entered. Referred to in *Casement v. Ringgold*, 28 Cal. 338, as a case in which the motion to vacate was made before the adjournment of the term.

18 Cal. 458-459. UPDEGRAFF v. TRASK.

Succession.—Title vests in heirs immediately on ancestor's death, p. 457.

Cited in *Murphy v. Crouse*, 135 Cal. 18, noted under *Beckett v. Selover*, 7 Cal. 215.

Heir is entitled to possession of estate of ancestor, subject only to statutory right of administrator, and can maintain ejectment, where there is no administrator, p. 459.

Cited as authority to the ruling stated, in *Estate of Woodworth*, 31 Cal. 604; *Chapman v. Hollister*, 42 Cal. 464; and *Gossage v. Crown Point etc. Min. Co.*, 14 Nev. 158. So in *Smith v. Shrieves*, 13 Nev. 326, construing homestead law, and holding that upon the death of either

spouse the homestead property vests absolutely in the survivor. So, to same effect, in *Wright v. Smith*, 19 Nev. 147. Cited to the ruling stated, in 60 Am. Dec. 230, note; and 68 Am. Dec. 257, note.

18 Cal. 461-465. **WALLACE v. BEAR RIVER WATER AND MINING COMPANY.**

Pleading.—Plea, professing to answer whole complaint, but in fact only answering one of the two counts, is bad, p. 464.

Cited as authority in *Norris v. Glenn*, 1 Idaho, 591.

18 Cal. 465-478. **SAN FRANCISCO v. LAWTON.** 79 Am. Dec. 187; S. C. again, 21 Cal. 589.

Mortgage Foreclosure.—All persons who are beneficially interested, either in the estate mortgaged or the demand secured, are proper parties to the suit, p. 473.

Cited as authority, and holding that persons claiming title adversely to the mortgagor are not proper parties, in *Croghan v. Spence*, 53 Cal. 16; and *McComb v. Spangler*, 71 Cal. 423. So, to same effect in *Banning v. Bradford*, 21 Minn. 311; S. C. 18 Am. Rep. 400. And cited to the ruling stated, in 76 Am. Dec. 550, note; 76 Am. Dec. 567, note; 85 Am. Dec. 506, note; 97 Am. Dec. 540, note; 99 Am. Dec. 109, note; 1 Am. St. Rep. 189, 190, note; 16 Am. St. Rep. 381, note; and 36 Am. St. Rep. 574, note.

Same.—Titles adverse to that of the mortgagor are not the proper subject of determination in such suit, but must be settled in a different action, p. 473.

Approved as authority in *Odell v. Wilson*, 63 Cal. 160; *McComb v. Spangler*, 71 Cal. 423; *Houghton v. Allen*, 75 Cal. 105; *Ord v. Bartlett*, 83 Cal. 430; *Cody v. Bean*, 93 Cal. 579; and *Wells v. Mortgage Co.*, 109 Ala. 440, 441. Cited in *Ramsbottom v. Bailey*, 124 Cal. 262, 263, holding as to title asserted by judgment creditor under facts stated and modifying decree so as to protect rights asserted by his answer; *Murray v. Etchipare*, 129 Cal. 319, applying rule to adverse equitable estate arising through fraud, and *Williams v. Cooper*, 124 Cal. 669, to adverse tax title; *Farmers' etc. Bank v. Gates*, 33 Or. 390, but holding rule inapplicable in controversy between mortgages claiming under same mortgagor; note to *Provident etc. Co. v. Marks*, 68 Am. St. Rep. 354, 355, 358, on general subject. Referred to in *Hibernia Sav. and Loan Soc. v. Ordway*, 38 Cal. 681, but whether in point not determined, as the question had not been raised in the proper mode. Distinguished in *Johnston v. San Francisco Sav. Union*, 75 Cal. 140; S. C. 7 Am. St. Rep. 132, holding that if adverse interests are put in issue, tried, and determined, the judgment is not void on a collateral attack. Examined in *Hefner v. Insurance Co.*, 123 U. S. 752, and holding that a court of equity, in a foreclosure suit, may permit a person, to whom the land has been sold and conveyed for non-payment of taxes assessed after the date of the mortgage, to be made a

party, and may determine the validity of his title. Denied in *Bradley v. Parkhurst*, 20 Kan. 485. Cited as authority that title may not be tried in foreclosure proceedings, in *King v. Mason*, 89 Am. Dec. 434, note, collecting the authorities upon the subject.

Same.—If any of the parties defendant in the foreclosure suit claim title adversely, their rights should be reserved in the decree, p. 478.

Approved as authority in *Elias v. Verdugo*, 27 Cal. 425; and *Wells v. Mortgage Co.*, 109 Ala. 441. Cited in *Banning v. Bradford*, 21 Minn. 314; S. C. 18 Am. Rep. 403, where it is said to be more consistent with usual equity practice for the court to order the action dismissed as to those improperly made defendants, the dismissal to be without prejudice. Cited to the ruling stated in *Strobe v. Downer*, 80 Am. Dec. 717, note, where the authorities are collected and collated.

Same.—Foreclosure decree operates only upon estate of mortgagor at time of conveyance, and upon subsequent title accruing by estoppel, p. 474.

Cited as authority in *Bostwick v. McEvoy*, 62 Cal. 502; *Sichler v. Look*, 93 Cal. 610; *Pancoast v. Insurance Co.*, 79 Ind. 176; *Rice v. Kelso*, 57 Iowa, 119; *Marrier v. Lee*, 2 Utah, 462; 76 Am. Dec. 458, note; 93 Am. Dec. 239, note; and 19 Am. St. Rep. 514, note. So, to same effect, in *Vallejo Land Assn. v. Viera*, 48 Cal. 579.

Quitclaim Deed.—Conveyance by does not preclude the grantor from afterward acquiring and holding for his own use the true title to the land, p. 475.

Approved in *McDonald v. Edmonds*, 44 Cal. 330; and cited as authority bearing on the effect of such deed, in *Emeric v. Alvarado*, 90 Cal. 459; *Grattan v. Wiggins*, 23 Cal. 39; *Cummings v. Parker*, 61 N. H. 549; 58 Am. Dec. 586, note; 83 Am. Dec. 653, note; 99 Am. Dec. 181, note; 7 Am. St. Rep. 155, note; 42 Am. St. Rep. 627, note; and 43 Am. St. Rep. 38, note.

Disputing Title of Grantor.—A grantee of land in fee may deny that he received any estate by the conveyance, p. 476.

Cited as authority to the ruling stated, in *Wenzel v. Schultz*, 100 Cal. 255; *Rice v. St. Louis etc. Ry. Co.*, 47 Am. St. Rep. 77, note.

Estoppel by Deed.—Grantee under two deeds is not estopped from claiming title under the first, p. 476.

Cited in *Tully v. Tully*, 137 Cal. 67, holding no estoppel established under facts stated.

18 Cal. 478-481. **CASTRO v. RICHARDSON.**

Wills.—Probate court has exclusive jurisdiction over probate of wills p. 479.

Approved in *Rosenberg v. Frank*, 58 Cal. 403; and cited to the ruling stated, in *Deck v. Gerke*, 73 Am. Dec. 560, note.

Will cannot be offered in evidence to show title until it has been proved, p. 479.

Approved in *Rosenberg v. Frank*, 58 Cal. 403; *McDaniel v. Pattison*, 98 Cal. 97, 101; *Willamette Falls etc. Co. v. Gordon*, 6 Oreg. 180; *Jones v. Dove*, 6 Oreg. 192. Cited in *Estate of Christensen*, 135 Cal. 676, holding will improperly offered in proceedings to determine heirship. So, to same effect, in *In re Pearsons*, 98 Cal. 613. Distinguished in dissenting opinion of Beatty, C. J., in *McDaniel v. Pattison*, 98 Cal. 90.

Same.—Probate of will, until revoked, is conclusive of its validity in all collateral proceedings, and its rejection by the probate court is also conclusive of its invalidity, p. 480.

Approved as authority in *Loosemore v. Smith*, 12 Neb. 345. So in *State v. McGlynn*, 20 Cal. 273, S. C. 81 Am. Dec. 129, in support of the doctrine that the decision of the court to which the proof of wills is confided, whether of real or personal estate, is conclusive upon the question of the validity or invalidity of the will. So, to the same effect, in *Barney v. Hayes*, 11 Mont. 106, but holding that an unreversed decree denying probate is not a bar to a subsequent petition for probate of the same will with a codicil referring thereto and modifying the same, as such codicil operates as a republication of the will.

18 Cal. 482-491. **LORD v. MORRIS.**

Statute of Limitations.—When action upon note is barred by, the remedy upon a mortgage given to secure the note is also barred, p. 490.

Rule affirmed in *McCarthy v. White*, 21 Cal. 501, 504; *Heinlin v. Castro*, 22 Cal. 102; *Cunningham v. Hawkins*, 24 Cal. 409; S. C. 85 Am. Dec. 76; *Willis v. Farley*, 24 Cal. 498; *Low v. Allen*, 26 Cal. 144; *Lent v. Shear*, 26 Cal. 365-369; *Sichel v. Carrillo*, 42 Cal. 501, 503; *Henderson v. Grammar*, 66 Cal. 336; *Ward v. Waterman*, 85 Cal. 505; and *Allen v. Allen*, 95 Cal. 197. Cited in *Newhall v. Sherman*, 124 Cal. 512, further holding as to presumption of maturity when note silent; *Daniels v. Johnson*, 129 Cal. 418, 79 Am. St. Rep. 126, but holding bar avoided by agreements in deed. Distinguished in *Law v. Spence*, 5 Idaho, 253, mortgage lien cannot be defeated by declaration of homestead made after mortgage lien attaches. Approved as authority in *Lilly v. Dunn*, 96 Ind. 225; so in *Stephens v. Shannon*, 43 Ark. 468, holding that after the debt is barred, the lien of the vendor cannot be enforced; and the principle of the decision approved and applied, in *King v. Meighen*, 20 Minn. 267; *McKeen v. Sultenfuss*, 61 Tex. 330; *Goldfrank v. Young*, 64 Tex. 438. Examined, and the doctrine disapproved, in *Browne v. Browne*, 17 Fla. 614; S. C. 35 Am. Rep. 105; and *Jordan v. Sayre*, 24 Fla. 6. So in *Henry v. Confidence Min. Co.*, 1 Nev. 621; and *Cookes v. Culbertson*, 9

Nev. 208. Cited in *Gisborn v. Insurance Co.*, 142 U. S. 337, but held inapplicable, the instruments under consideration not creating a mortgage, but an express trust.

Same.—Applies to suits in equity equally with actions at law, p. 486.

Approved as authority in *Grattan v. Wiggins*, 23 Cal. 34; *White v. Sheldon*, 4 Nev. 289; *Lang Syne Gold Mining Co. v. Ross*, 20 Nev. 140; S. C. 19 Am. St. Rep. 345 (an action for relief from a judgment obtained by fraud and conspiracy); *Hardy v. Harbin*, 4 Sawy. 549; *Norton v. Meader*, 4 Sawy. 615; and *Norris v. Haggin*, 12 Sawy. 52; S. C. 28 Fed. Rep. 279. Cited, to point stated, in 12 Am. Dec. 369, note; and 65 Am. Dec. 545, note.

Same.—A junior mortgagee may interpose the plea of the statute in a suit to foreclose the first mortgage, p. 490.

Approved as authority in *McCarthy v. White*, 21 Cal. 504; S. C. 82 Am. Dec. 757; *Grattan v. Wiggins*, 23 Cal. 25; *Coster v. Brown*, 23 Cal. 143; *Jeffers v. Cook*, 58 Cal. 161; *Carpentier v. Williamson*, 25 Cal. 161; *Cal. Bank v. Brooks*, 126 Cal. 200, applying rule to second mortgagee as against renewal by owner and first mortgagee; *Brandenstein v. Johnson*, 140 Cal. 32, sustaining right of subsequent judgment lienors to plead statute not available to mortgagor personally; *Stubblefield v. McAuliff*, 20 Wash. 449, as to effect of part payment by mortgagor after payment; but cf. *Corbey v. Rogers*, 152 Ind. 171, denying right to plead statute to defendant not shown to have an interest in property affected; *Ward v. Waterman*, 85 Cal. 507, holding, however, that it is otherwise with a mere creditor, who has acquired no contract lien, and parted with no value. Cited with approval in *Schmucker v. Sibert*, 18 Kan. 110; S. C. 26 Am. Rep. 769; *Adams v. Harris*, 47 Miss. 158; *Ballard v. Williams*, 95 N. C. 130; *Wild v. Stephens*, 1 Wyo. 375, in dissenting opinion of Thomas, J.; and *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 305, which was a civil suit to foreclose a judgment lien. Examined in *Saenger v. Nightingale*, 4 Woods, 489, and the rule denied under Georgia law.

The mortgagor, after conveying the mortgaged premises, loses all control over them, and he can by no subsequent act create or revive charges upon the premises, p. 490.

Approved in *Wood v. Goodfellow*, 43 Cal. 188; *Cook v. Prindle*, 97 Iowa, 474; S. C. 59 Am. St. Rep. 431; *Damon v. Leque*, 17 Wash. St. 577; and *Nix v. Cardwell*, 2 Posey, 268. Cited in *Hall v. Glass*, 123 Cal. 504, 69 Am. St. Rep. 80, on point that chattel mortgage to secure future advances is not unlimited in duration; *De Voe v. Rundle*, 33 Wash. 611, where limitation has run against mortgage no act of mortgagor can revive it as against subsequent judgment lien; *Raymond v. Bales*, 26 Wash. 499, partial payment by mortgagor does not extend limitations as against his judgment creditor, who has bought in mortgaged premises at execution sale; *George v. Butler*, 26 Wash. 462, absence of mort-

gagor from state does not suspend running of limitations as to mortgage where he has parted with interest in premises to resident against whom foreclosure has been available at all times; *Barber v. Babel*, 36 Cal. 20, holding that the husband cannot, by his act alone, extend the time for commencing an action upon a note and mortgage given in due form, so as to prolong a lien upon the homestead. So, to same effect, in *Jenkins v. Simmons*, 37 Kan. 508. So in *Cottrell v. Shepherd*, 86 Wis. 654, S. C. 39 Am. St. Rep. 923, holding that in such cases neither the mortgagor nor the grantee, by acknowledgment or payments, can remove the bar of the statute as to the other. Distinguished in *Lent v. Morrill*, 25 Cal. 499, in which case the mortgagor, after extending the time of payment, became reinvested with the title to the premises.

Mortgage, in California, is a mere security operating upon the property as a lien or encumbrance only, p. 487.

Approved in *Dutton v. Warschauer*, 21 Cal. 623, 82 Am. Dec. 769; Cited in *Warner v. Freud*, 138 Cal. 655, noted under *McMillan v. Richards*, 9 Cal. 365; *McGovney v. Gwillim*, 16 Colo. App. 293, when action on note secured by deed of trust is barred by limitation, action to foreclose deed of trust is also barred; 76 Am. Dec. 488, note; 76 Am. Dec. 550, note; and 76 Am. Dec. 567, note.

General Citations.—In *Smith v. Ford*, 48 Wis. 151, as to litigation of claims of creditors in foreclosure suit, and who may be made parties defendant therein.

18 Cal. 491-493. KEARSING v. KILIAN.

Deed.—Redelivery of by grantee to grantor, with intent to cancel the same, does not revest the title in the grantor, p. 493.

Cited as authority to the ruling stated, in *Lawton v. Gordon*, 34 Cal. 38; S. C. 91 Am. Dec. 671; *Same v. Same*, 37 Cal. 207; *Campbell v. Jones*, 52 Ark. 497; and 12 Am. Dec. 688, note.

18 Cal. 494-496. LUMLEY v. CORBETT.

Agency.—Receipt of payment by agent discharges debt, p. 495.

Approved as authority in *Bailey v. Pardridge*, 134 Ill. 192, holding that an agent in possession of goods of his principal, with authority to sell, has implied authority to receive payment. So, in *Rice v. Groffman*, 56 Mo. 436. Distinguished in *Sawyer v. Smyns*, 39 Kan. 151, the facts materially differing.

18 Cal. 498-499. PEOPLE v. SMITH.

Action on Forfeited Bail Bond.—In what name brought, p. 499.

Cited as authority that the action has been sustained when brought in the name of the people in *People v. De Pelanconi*, 63 Cal. 410, and holding that the action may be sustained when brought either in the name of the county or of the people.

18 Cal. 499-508. **IRWIN v. SCRIBER.**

Letters of Administration cannot be collaterally attacked by showing administration in wrong county, p. 503.

Ruling approved and applied in *Estate of Dole*, 147 Cal. 194, determination of probate court as to residence of deceased testator in comity at time of death, which was unappealed, not collaterally attackable by contestants claiming non-residence by decedent in such county; *Rogers v. King*, 22 Cal. 73; *Halleck v. Moss*, 22 Cal. 276 (sale of personal property under an order of the probate court); *In re Griffith*, 84 Cal. 110; *Goldtree v. McAllister*, 86 Cal. 102; *Burris v. Kennedy*, 108 Cal. 338 (discussing nature of probate proceedings); *Corrigan v. Jones*, 14 Colo. 314; *Murchison v. White*, 54 Tex. 84; *Holmes v. Railway Co.*, 6 Sawy. 280; S. C. 5 Fed. Rep. 530; S. C. affirmed on petition for rehearing, 7 Sawy. 396; 9 Fed. Rep. 241; *State v. Benton*, 12 Mont. 80; and *Chow v. Brockway*, 21 Oreg. 448. Referred to with approval in *Stevenson v. Superior Court*, 62 Cal. 63, as overruling *Beckett v. Selover*, 7 Cal. 226, 227, in so far as the question of the residence of the deceased at the time of death is concerned. Cited to ruling stated, in 33 Am. Dec. 242, note; and 47 Am. Rep. 465, note.

Jurisdiction.—Under act of 1858, same presumptions as to jurisdiction attach to proceedings of probate courts, as in case of district courts, p. 503.

Cited as authority in *Brewster v. Ludekins*, 19 Cal. 171, discussing jurisdiction of district court in matters of insolvency. In *Townsend v. Gordon*, 19 Cal. 209, holding that courts of probate, prior to act of 1858, should be regarded as courts of limited and inferior jurisdiction. Ruling approved in *Lucas v. Todd*, 28 Cal. 185; *Burris v. Kennedy*, 108 Cal. 338; *Epping v. Robinson*, 21 Fla. 49; and *Brockenborough v. Melton*, 55 Tex. 503, 505. Cited to ruling stated, in 68 Am. Dec. 257, note; and 73 Am. Dec. 366, note. And cited as authority in *Crall v. Poso Irrigation District*, 87 Cal. 148, maintaining sufficiency of constructive notice to give jurisdiction in special proceeding.

18 Cal. 508-526. **HUBBARD v. SULLIVAN.**

Van Ness Ordinance.—Application of, and what title passed under, considered, pp. 522, 526.

Cited and held not to conflict with *Board of Education v. Fowler*, 19 Cal. 25. Cited as authority, holding that such ordinance, and the act of the legislature confirming it, vested in the possessors described in the ordinance a title to the lands therein mentioned, as against the city of San Francisco, in *Carleton v. Townsend*, 28 Cal. 223. So in *San Francisco v. Canavan*, 42 Cal. 557, maintaining the power of the legislature to direct a sale of pueblo lands owned by a municipal corporation; and in *United States v. Carr*, 3 Sawy. 484, holding that such ordinance only pur-

ported to give what interest the city held, and it could give no more. *Bissell v. Henshaw*, Fed. Cas. No. 1447.

18 Cal. 526-535. **SHELDON v. STEAMSHIP UNCLE SAM.** 79 Am. Dec. 193.

Common Carrier may be sued in tort for nonperformance of contract with passenger, p. 533.

Cited in *Louisville etc. Co. v. Hine*, 121 Ala. 237, and *Pittsburg etc. Co. v. Street*, 26 Ind. App. 233, holding railroads liable in contract or tort for wrongful ejection.

Husband and Wife.—Must join in action for personal injuries to wife, but cannot recover jointly for the husband's disbursements or loss of service, p. 534.

Affirmed in *Matthew v. Railroad Co.*, 63 Cal. 451; *Baldwin v. Railroad Co.*, 77 Cal. 392. Cited in *Henley v. Wilson*, 137 Cal. 277, discussing his liability for her torts. Referred to in *Barnes v. Martin*, 82 Am. Dec. 678, note, as authority that two actions are possible where the wife is injured through negligence or design by another—one by the husband and wife for the injury to the wife's person, and the other by the husband, alone, for the loss of service, expenses, etc. Cited in 59 Am. St. Rep. 467, note, as authority that a party may sue in tort instead of upon contract where the breach of the contract constitutes a wrong.

18 Cal. 535-575. **LEESE v. CLARK.** S. C. 20 Cal. 387; 3 Cal. 17.

Mexican Grant.—Jurisdiction of land commissioners of grant within limits of pueblo, considered, pp. 565, et seq.

Referred to as authority in *Steinbach v. Moore*, 30 Cal. 506; *Merle v. Dixey*, 31 Cal. 131; and *De La Guerra v. Santa Barbara*, 117 Cal. 533. Cited as to nature of tenure by which pueblo lands are held by San Francisco in *San Francisco v. Canavan*, 42 Cal. 556; and *Ohm v. San Francisco*, 92 Cal. 454; nature of title to Indian lands in California, in *Thompson v. Doaksum*, 68 Cal. 597.

Same.—Patent takes effect by relation at the date of the presentation of the petition to the land commissioners, p. 571.

Approved as authority in *Weber v. Marshall*, 19 Cal. 458; *Touchard v. Crow*, 20 Cal. 160; S. C. 81 Am. Dec. 114; *Leese v. Clark*, 20 Cal. 415; *Merrill v. Chapman*, 34 Cal. 253; S. C. again, 35 Cal. 88; and *McGarrahan v. New Idria Min. Co.*, 49 Cal. 334.

Same.—Patent is conclusive against the government and all claiming by title subsequent thereto, p. 571.

Cited as authority in *Pioche v. Paul*, 22 Cal. 111; *Semple v. Hagar*, 27 Cal. 168; *Thompson v. Felton*, 54 Cal. 554; *Miller v. Dale*, 44 Cal. 578; *Chipley v. Farria*, 45 Cal. 539; *Montgomery v. Donnelly*, 57 Cal. 69;

De Guyer v. Banning, 91 Cal. 402, 403; S. C. affirmed 167 U. S. 743; *Omaha etc. Refining Co. v. Tabor*, 13 Colo. 53; S. C. 16 Am. St. Rep. 193; *Houck v. Kelsey*, 17 Kan. 336; *Henshaw v. Bissell*, 1 Sawy. 566, 577; S. C. affirmed, 18 Wall. 265; *Boyle v. Hinds*, 2 Sawy. 530; *Patterson v. Tatum*, 3 Sawy. 175; and *Hayner v. Stanly*, 8 Sawy. 220; S. C. 13 Fed. Rep. 222; *Stoneroad v. Stoneroad*, 4 N. Mex. 64, discussing effect of grants in New Mexico under acts of Congress referred to; *United States v. Peralta*, 99 Fed. 631, quoting *Chipley v. Farris*, 45 Fed. 539 *California Reduction Co. v. Sanitary Reduction Works*, 126 Fed. 42, validity of grant of franchise by city under which grantee is acting collaterally attackable by private party in equity suit on ground of irregularity in exercise of municipal power, or because of failure of grantee to perform conditions.

Same.—Only persons not concluded are those whose titles accrued prior to the cession of California, p. 572.

Cited as authority in *Miller v. Dale*, 44 Cal. 576; and *People v. San Francisco*, 75 Cal. 399, the latter holding that the state of California is not a "third person" within the meaning of the statute. Overruled, however, in *United Land Assn. v. Knight*, 85 Cal. 467; which last case is reversed in 142 U. S. 204. See, also, *De Guyer v. Banning*, 91 Cal. 402, 403; S. C. affirmed, 167 U. S. 743. Cited as to conclusiveness of patent, in 12 Am. Dec. 565, note; so in 79 Am. Dec. 162, note.

Same.—Location and survey necessary to completion of title, p. 574.

Cited as authority in *Rodriguez v. Comstock*, 24 Cal. 87, wherein the nature of the proceeding is pointed out; so in *De Arguello v. Greer*, 26 Cal. 628; and *Yates v. Smith*, 38 Cal. 66, 71, dissenting opinion of Crockett, J.

General Citations.—In *Truckee etc. Road Co. v. Campbell*, 44 Cal. 92, holding that the grant of a turnpike franchise is not liable to be attacked by a private person, or in a collateral proceeding, for mere error in the exercise of the authority to make the grant. And in *Stark v. Mather*, 12 Am. Dec. 566, note, as authority that where it is desired to set aside or control the operation of a patent the remedy is in equity. So in 2 Am. Dec. 570, note. Referred to in *Crespin v. United States*, 168 U. S. 213, as holding that a grant of a pueblo lot made by an alcalde raises a presumption that the alcalde was a proper qualified officer.

18 Cal. 576-582. **CORDIER v. SCHLOSS.**

Judgment.—Omission, in confession of, to state the facts out of which the indebtedness arose, etc., strictly in accordance with the statute, does not render the judgment a nullity, but is prima facie evidence of fraud, p. 581, affirming *Richards v. McMillan*, 6 Cal. 422, on principle of stare decisis.

Cited as authority and explained in *Wilcoxson v. Burton*, 27 Cal. 235; S. C. 87 Am. Dec. 72. So in *Lee v. Figg*, 37 Cal. 336; and *Pond v. Davenport*, 44 Cal. 487. Approved in *Brown v. Miller*, 11 Colo. 434; and referred to as authority to the ruling stated, in *Richardson v. Fuller*, 2 Oreg. 182; *Puget Sound Nat. Bank v. Levy*, 10 Wash. St. 505; S. C. 45 Am. St. Rep. 808; and in *In re Elder*, 1 Sawy. 76; S. C. 3 Bank. Reg. 673. So in 65 Am. Dec. 522, note.

18 Cal. 582-590. **GORE v. McBRAYER.**

Mining Claim.—Location may be authorized by parol, and statute of frauds has no application, pp. 588, 589.

Cited as authority in *Moritz v. Lavelle*, 77 Cal. 11, S. C. 11 Am. St. Rep. 230, holding that an agreement to locate and develop a mining claim for the joint benefit of the parties need not be in writing. So, to same effect, in *Hirbour v. Reeding*, 3 Mont. 21; *Raymond v. Johnson*, 17 Wash. St. 237; and *Book v. Justice Mining Co.*, 58 Fed. Rep. 119. Explained and distinguished in *Moore v. Hamerstag*, 109 Cal. 124, 125, to the effect that at the time of the transaction involved in the case, a mining claim could be transferred by parol, the statute requiring it to be in writing, having been passed in 1860; and holding that a mining claim is real estate, and under the statute of frauds can be transferred only by operation of law or an instrument in writing; Cited in *Eberle v. Carmichael*, 8 N. Mex. 698, 699, 702, sustaining oral agreement that location to be taken in name of one should inure to benefit of all; also quoting *Book v. Mining Co.*, 58 Fed. 119; *Dunlap v. Pattison*, 4 Idaho, 475, an agent may locate claim for principal and make affidavit required by Revised Statutes, section 3104.

Same.—When location is made for another by his authority, or by custom, title is vested, and cannot be divested by taking down notice, and putting up another with different names, pp. 588, 589.

Cited as authority in *Thompson v. Spray*, 72 Cal. 530, 532; *Murley v. Ennis*, 2 Colo. 305; *Burke v. McDonald*, 2 Idaho, 309; *Wenner v. McNulty*, 7 Mont. 36; and *South End Min. Co. v. Tinney*, 22 Nev. 67, dissenting opinion of Murphy, C. J. Cited in *Eberle v. Carmichael*, 8 N. Mex. 177, holding cotenancy established and that annual labor performed inured to benefit of all co-owners. Referred to in *McClintock v. Bryden*, 63 Am. Dec. 93, note, for matters relating to proof of customs.

18 Cal. 590-615. **GROGAN v. SAN FRANCISCO.**

San Francisco.—Under charter in force in 1853 no ordinance was valid, unless passed by a majority of the votes of all the aldermen whom the charter provided should be elected, p. 607.

Affirmed in *Satterlee v. San Francisco*, 23 Cal. 318, 319.

The appropriation for municipal purposes of the moneys received

from the sales in December, 1853, of the "city slip" property did not amount to a ratification of the sales, and the city was legally bound to refund the moneys, pp. 608, 610, affirming *McCracken v. San Francisco*, 16 Cal. 616.

Affirmed in *Pimental v. San Francisco*, 21 Cal. 363, 366. So in *Herzo v. San Francisco*, 33 Cal. 140, so far as the facts correspond. Principle of the decision approved in *Colusa County v. Glenn County*, 117 Cal. 439; *Salt Lake City v. Hollister*, 3 Utah, 207; *Stenberg v. State*, 50 Neb. 135; and *City of Aurora v. West*, 22 Ind. 95; S. C. 85 Am. Dec. 418; and case distinguished in *Evans v. Hughes County*, 3 S. Dak. 583; *L. A. etc. Co. v. City*, 88 Fed. 743, holding municipal contract ratified by subsequent legislative action; *Morris v. Ewing*, 8 N. Dak. 103, on general rule of ratification by voluntary acceptance of benefits.

Municipal Corporations.—There is no difference, in the inviolability of a contract, between a grant of property to an individual and a like grant to a municipal corporation, pp. 612, 613.

Principle of the decision approved in *Board of Education v. Blodgett*, 155 Ill. 450; S. C. 46 Am. St. Rep. 355; *Mount Hope Cemetery v. City of Boston*, 158 Mass. 512; S. C. 35 Am. St. Rep. 518; *State v. Foley*, 30 Minn. 357; *Wooster v. Plymouth*, 62 N. H. 210; *Milburn v. South Orange*, 55 N. J. L. 258; and *Milan County v. Bateman*, 54 Tex. 166.

Same.—When the state enters into a contract with a municipal corporation, the subordinate relation of the corporation ceases, and that equality arises which exists between all contracting parties, p. 613.

Approved in *Carr v. State*, 127 Ind. 207; S. C. 22 Am. St. Rep. 626; *New Orleans etc. R. R. Co. v. New Orleans*, 26 La. Ann. 482, 491; and *Skinkle v. Essex Road Board*, 47 N. J. L. 96. Cited to the ruling stated, in 35 Am. St. Rep. 533, note.

Pueblo Lands.—In *San Francisco*, nature of tenure by which held, referred to, p. 614.

Cited as authority in *San Francisco v. Canavan*, 42 Cal. 556; *Garrett v. City of Memphis*, 5 Fed. Rep. 869; and *Meriwether v. Garrett*, 102 U. S. 530; *Holladay v. San Francisco*, 124 Cal. 356, discussing effect of *Van Ness* ordinance; *City v. Jacks*, 139 Cal. 552, 553, noted under *Hart v. Burnett*, 15 Cal. 530.

General Citations.—In *Le Roy v. Dunkerly*, 54 Cal. 460, as authority that the legal title to the tide lands might have been vested in the commissioners of the funded debt for the payment of the city's debts, without the city's consent. In *Frink v. Roe*, 70 Cal. 312, on subject of ratification by principal of acts of agent. And in *Hasbrouck v. Milwaukee*, 80 Am. Dec. 733, note, as authority that the legislature may compel payment by municipal corporations of equitable moral obligations.

18 Cal. 619-621. **HALL v. DOWLING.**

Taxation.—Public land of the United States, within this state, cannot be sold for taxes, and the plaintiff in ejectment for such land cannot recover on a tax deed, p. 621.

Cited as authority in *People v. Morrison*, 22 Cal. 80; and affirmed in *People v. Shearer*, 30 Cal. 655, 657.

18 Cal. 622-625. **STARK v. RANEY.**

Indemnity.—Agreement to indemnify sheriff for seizing property under execution is valid, if the parties are in good faith seeking to enforce a legal right, p. 624.

Approved as authority in *Roussin v. Stewart*, 33 Cal. 212; *Lerch v. Gallup*, 67 Cal. 599; and *California Dry Dock Co. v. Armstrong*, 8 Sawy. 530; S. C. 17 Fed. Rep. 221.

Same.—Sheriff's claim to indemnity extends to the entire damages to which he has been subjected on account of the seizure, p. 625.

Approved in *Graves v. Moore*, 58 Cal. 439.

18 Cal. 625-629. **DOWLING v. POLACK.**

Dismissal of Suit, in which a temporary injunction had been granted, gives right to action upon the injunction bond p. 627.

Cited as authority in *Leese v. Sherwood*, 21 Cal. 164; *Porter v. Hopkins*, 63 Cal. 55; *Dougherty v. Dora*, 63 Cal. 171; *Asevado v. Orr*, 100 Cal. 299; *Swan v. Timmons*, 81 Ind. 245; *Bank of Monroe v. Gifford*, 65 Iowa, 650; *Shenandoah Nat. Bank v. Read*, 86 Iowa, 141; *Mitchell v. Sullivan*, 30 Kan. 233; *Brown v. Smelting Co.*, 32 Kan. 533; *Pugh v. White*, 78 Ky. 214; *Andrews v. School District*, 35 Minn. 72; *Dahler v. Steele*, 1 Mont. 208, 209; *Nevada Cent. R. R. Co. v. District Ct.*, 21 Nev. 412; *Sprick v. Washington County*, 3 Neb. 255 (holding that judgment for costs is not final); *Bemis v. Gannett*, 8 Neb. 238; *Towle v. Towle*, 46 N. H. 434; *Kane v. Cosgrain*, 69 Wis. 433 (a similar case); *Hurgren v. Union etc. Co.*, 141 Cal. 590, applying rule to termination of action as prerequisite to action for malicious prosecution; *Gibson v. Reed*, 54 Neb. 312, on point that such order is tantamount to adjudication that injunction was improperly granted; *State v. Booth*, 21 Utah, 92, on point that judgment discharging prisoner is a final judgment within the local appeal statutes; *Colorado etc. Co. v. U. P. etc. Co.*, 94 Fed. 313, holding judgment of dismissal for want of prosecution a final judgment as to appealability; and *Lewis v. Smith*, 21 R. I. 325, ruling similarly as to right to demand jury trial after dismissal; *Braiden v. Mercer*, 44 Ohio St. 343 (cited as authority bearing on conclusiveness of settlement as against sureties in bond); *Frahm v. Walton*, 130 Cal. 398; *Reddick v. Webb*, 6 Okla. 399. Cited, defining final judgment, in 60 Am. Dec. 427, 430, note; so, to same effect, in 96 Am. Dec. 777, 778, note.

18 Cal. 620-632. KELSEY v. TRUSTEES OF NEVADA.

Taxation.—Tax for a bridge may be apportioned according to assessment of previous year, p. 631.

Approved as authority in *Cross v. Milwaukee*, 19 Wis. 516.

18 Cal. 635-636. PEOPLE v. SEARS.

Instructions.—Courts may, in criminal cases, require written instructions asked to be presented before argument, if no injustice is done, p. 636.

Approved in *Waldie v. Doll*, 29 Cal. 562; *People v. Williams*, 32 Cal. 289; and *Life Ins. Co. v. Francisco*, 17 Wall. 680; *State v. Barry*, 11 N. Dak. 443, error to refuse request for instructions as coming too late where delivered to court after charge read to jury but before retirement.

18 Cal. 636-639. PEOPLE v. KEEFER.

Criminal Law.—Where the offense is statutory, in order to convict the defendant thereof, he must be guilty of the very crime charged, p. 638.

Approved in *People v. Mize*, 80 Cal. 44, holding that where an act becomes criminal only when performed with a particular intent, such intent must be alleged and proved. So, to same effect, in *State v. Marcks*, 3 N. Dak. 537; *People v. Robinson*, 6 Utah, 104, on point that conviction of assault with intent to kill X cannot be predicated on evidence showing intent to kill Y.

Homicide.—Degrees of discussed, p. 638.

Cited in *People v. Suesser*, 142 Cal. 367, sustaining indictment for murder in first degree.

18 Cal. 639-640. FLANDREAU v. WHITE.

Commencement of Suit.—Suit is commenced within the limitation act of 1860 by simply filing the complaint. For other purposes, except to prevent the bar of the statute, suit is commenced by filing complaint and issuance of summons, p. 640.

Approved in *Sharp v. Maguire*, 19 Cal. 577; and *Pacific Coast Ry. Co. v. Porter*, 74 Cal. 263, holding that the statutory proceeding for the condemnation of land is not commenced until the issuance of summons. Explained in *Van Winkle v. Stow*, 23 Cal. 458, 459, and held inapplicable to a proceeding to enforce a lien under the Mechanic's Lien Act of 1861, the provisions of which wholly changed the character of the proceeding. Cited in *Burns v. Mining Co.*, 35 Or. 312, 356, applying rule to action on miner's lien under local statutes. Referred to, stating the nature of the case, in *Flandreau v. Downey*, 23 Cal. 356. Cited to the ruling stated, in 15 Am. Dec. 346, note.

18 Cal. 640-643. HIHN v. PECK.

Tenants in Common.—Each cotenant, in the enjoyment of his legal rights in the common property, may cut timber, and use or dispose of it, at least to an extent corresponding to his share of the estate, p. 643.

Approved as authority to the ruling stated in *Gillum v. Railway Co.*, 5 Tex. Civ. App. 340; and *McDodrill v. Lumber Co.*, 40 W. Va. 579. So, in *McCord v. Oakland etc. Min. Co.*, 64 Cal. 142, 143; S. C. 49 Am. Rep. 692, 693, and holding that each tenant in common of a mine is at least entitled to take out his share of the ore.

18 Cal. 643-649. DOUGLASS v. MAYOR OF PLACERVILLE.

Municipal Charters are special grants and strictly construed, p. 645.

Approved in *Wickmann v. Placerville*, where city authorized by special statute to issue bonds for aid of fire department and subsequently new charter repealed all former acts, issue of bonds under old act is void.

Municipal Corporations.—City charter construed, and held not to authorize the city authorities to levy and collect a tax for making a survey of a railway route, p. 647.

Cited as authority in *Nevil v. Clifford*, 55 Wis. 172, sustaining a taxpayer's action to restrain the allowance of an illegal claim. Cited in *Robinson v. Mayor of Franklin*, 34 Am. Dec. 628, note, discussing subject of limitations implied from form of charter.

18 Cal. 651. HOCKER v. REAS.

Mortgage Foreclosure.—Lien of mortgage securing two notes is not affected by sale under prior encumbrances when mortgagee is not made a party.

Cited in *Dupee v. Salt Valley etc. Co.*, 20 Utah, 115, 77 Am. St. Rep. 906, discussing effect of foreclosure on part of debt after its maturity.

18 Cal. 654-659. LEWIS v. LEWIS.

Husband and Wife.—Mode of estimating community property on settlement of an estate set forth, and affirmed, p. 659.

Approved in *Schmidt v. Huppman*, 73 Tex. 116; and commented on in *Yeaser v. Hochstettler*, 4 Wash. St. 356. Cited in *Cooke v. Bremond*, 86 Am. Dec. 631, 632, note, where it is said that the decision does not correctly enunciate the law of California, and that this is especially apparent when viewed in the light of later decisions. Referring to *Estate of Higgins*, 65 Cal. 407; and also, *Lake v. Lake*, 18 Nev. 361.

18 Cal. 668-669. ROUSH v. VAN HAGEN.

Appeal.—Sureties upon undertaking cannot justify before county judge of another county, p. 669.

Ruling affirmed in *Tavis v. O'Connell*, 21 Cal. 512.

18 Cal. 676-678. SPARKS v. DE LA GUERRA. 14 Cal. 108.

Estate of Decedent.—The obligation of executors under a will, when merely moral, cannot be enforced by creditors, p. 678.

Cited as authority to the ruling stated, in *Massey v. Gorton*, 90 Am. Dec. 294, note, collecting and collating the authorities.

18 Cal. 678-686. EX PARTE ANDREWS.

Constitutional Law.—Act of 1861, commonly called the "Sunday Law," is constitutional, pp. 681, 685.

Affirmed in *Ex parte Bird*, 19 Cal. 131. Cited in *Odd Fellows' Cem. Assn. v. San Francisco*, 140 Cal. 234, sustaining ordinance defining burial limits; *Scougale v. Sweet*, 124 Mich. 317, and *State v. Powell*, 58 Ohio St. 340, 343, 345, sustaining Sunday law prohibiting baseball game; *State v. Petit*, 74 Minn. 380 (affirmed, 177 U. S. 165), as to act forbidding operation of barber-shops; *Ex parte Northrup*, 41 Or. 491, upholding Laws of 1901, page 17, prohibiting barbering on Sunday; *State v. Sopher*, 25 Utah, 322, 324, upholding Revised Statutes, section 4234, prohibiting keeping open of place of business on Sunday as applied to barber-shops; *State v. Nichols*, 28 Wash. 630, 631, 634, upholding Ballinger's Code, section 7251, prohibiting keeping open places of business on Sunday and excepting therefrom certain classes of business; *Ex parte Burke*, 59 Cal. 19; S. C. 43 Am. Rep. 237, 238, sustaining constitutionality of Sunday Law (Pen. Code, sec. 300). So in *Ex parte Koser*, 60 Cal. 189, 192, 193, *McKinstry, J.*, pp. 202, 204, *Ross, J.*, p. 207, and *Sharpstein, J.*, pp. 207, 214, dissenting. Approved as authority sustaining constitutionality of Sunday laws, in *Scales v. State*, 47 Ark. 482; S. C. 58 Am. Rep. 770; *State v. Judge*, 39 La. Ann. 140, 141; *Commonwealth v. Has*, 122 Mass. 42; *State v. Ludwig*, 21 Minn. 206; *People v. Havnor*, 149 N. Y. 202; S. C. 52 Am. St. Rep. 712 (a statute forbidding the carrying on the business and work of a barber on Sunday); *Norfolk etc. R. R. Co. v. Commonwealth*, 88 Va. 114, S. C. 29 Am. St. Rep. 715, in dissenting opinion of *Lacy, J.*, maintaining the constitutionality of a state statute forbidding the running of interstate freight cars on Sunday; so in *Norfolk etc. R. R. Co. v. Commonwealth*, 93 Va. 761, S. C. 57 Am. St. Rep. 836, overruling the prevailing opinion in *Norfolk etc. R. R. Co. v. Commonwealth*, supra; and so, in *Hennington v. Georgia*, 163 U. S. 305, sustaining the constitutionality of a similar Georgia statute. Examined and distinguished in *Ex parte Westerfield*, 55 Cal. 552, S. C. 36 Am. Rep. 49, holding that a Sunday law prohibiting the business of baking on

Sunday for the purpose of sale was a special law, and, as such, unconstitutional. So in *Ex parte Jentzsch*, 112 Cal. 472, in respect of a statute forbidding the business or work of a barber on Sunday. Cited as sustaining validity of Sunday laws, in 18 Am. Dec. 426, note; 58 Am. Rep. 774, note; and 29 Am. St. Rep. 715, note.

Power of Legislature.—Legislature has power to repress whatever is hurtful to the general good, and is generally the exclusive judge of what is or is not hurtful, subject only to such limitations as the constitution prescribes, p. 682.

Cited as authority in *Cohen v. Wright*, 22 Cal. 321, sustaining the constitutionality of a statute requiring attorneys at law and litigants to file affidavits of allegiance to the government of the United States; *Jackson v. Shawl*, 29 Cal. 271, sustaining validity of act fixing rate of interest which pawnbrokers may charge; *Ex parte Shrader*, 33 Cal. 282, 283, 285, sustaining an order of the board of supervisors, acting under power delegated by the legislature, prohibiting the slaughtering of cattle in any part of the city and county of San Francisco; and in *In re Linehan*, 72 Cal. 116, maintaining the power of the city and county of San Francisco to enact an ordinance prohibiting the keeping of cows within certain portions of the city limits. Cited in *City Council v. Benjamin*, 49 Am. Dec. 620, 621, 622, note, as authority to the proposition that the duty of government comprehends the moral as well as physical welfare of the state.

18 Cal. 686. **MURRAY'S ESTATE.**

Probate Sale.—Proceeds on sale of mortgaged property must be applied to payment of mortgage, deducting only expenses of the sale, p. 687.

Cited in *Shepard v. Saltzman*, 34 Or. 43, denying right of executor to lien on proceeds for general expenses of administration, prior to payment of mortgage.

18 Cal. 688. **GORMAN v. RUSSELL.**

Voluntary Association.—Unauthorized expulsion of member is ground for dissolution of, p. 688.

Cited in *Brown v. La Societe*, 138 Cal. 477, noted under S. C., 14 Cal. 531; note to *Breaux v. Le Blanc*, 69 Am. St. Rep. 425, on partnership dissolution. Said to be opposed to principle and authority, in *Otto v. Journeyman Tailors' Union*, 7 Am. St. Rep. 166, 170, note, discussing subject of voluntary associations.

18 Cal. 689-693. **CASSIN v. MARSHALL.**

Unlawful Seizure.—In action for damages for, plaintiff may show what it would cost to purchase in open market and replace the property wrongfully seized and sold, p. 692.

Approved as authority in *Levy v. Scott*, 115 Cal. 49; and *Brasher v. Holtz*, 12 Colo. 203.

Same.—Evidence to show what the property sold for at sheriff's sale, is incompetent, p. 692.

Approved in *Martinett v. Maczkewicz*, 59 N. J. L. 15. Distinguished in *Montgomery v. Sayre*, 100 Cal. 187, S. C. 38 Am. St. Rep. 275, the facts being "very different."

18 Cal. 693. **PEOPLE v. CARMAN.**

Jurisdiction.—Appeal from judgment in certiorari case dismissed, the amount in controversy being less than two hundred dollars, p. 693.

Overruled in *Winter v. Fitzpatrick*, 35 Cal. 273, holding that the jurisdiction of the supreme court in a certiorari case does not depend upon the amount in controversy. Referred to as overruled, in *Palache v. Hunt*, 64 Cal. 474, maintaining appellate jurisdiction of supreme court in cases of mandamus.

18 Cal. 694-696. **BAY v. POPE.**

Ejectment.—In action of, only a defendant holding adversely in good faith under color of title, can set off improvements against the meane profits, p. 695.

Ruling approved in *Love v. Shartzer*, 31 Cal. 495; *Carpentier v. Small*, 35 Cal. 355; *Haggin v. Clark*, 51 Cal. 116; and *Hannan v. McNickle*, 82 Cal. 127. Cited as authority in 1 Am. Dec. 116, note; and 15 Am. Dec. 352, note.

Cited in *People v. Hale*, 27 Cal. 150, construing act of 1864.

18 Cal. 696-698. **PEOPLE v. DUDEN.**

Office and Officers.—Construction of special act fixing salary of county judge, p. 697.

Cited in *People v. Hale*, 27 Cal. 151, construing act of 1864, concerning salary and fees of coroner of city and county of San Francisco.

18 Cal. 698. **PAUL v. MAGEE.**

Appeal.—Refusal in the particular case to consider an assignment of error made by respondent by stipulation, p. 698.

Cited in *Maher v. Swift*, 14 Nev. 332, holding that it is not the rule of appellate courts to look into errors, if any, that may have been committed against the respondent.

18 Cal. 700, 701. **HICKS v. WHITESIDES.** S. C. again, 23 Cal. 404; and S. C. on third appeal, 35 Cal. 152.

18 Cal. 702. BURKETT v. BOARD.

Supervisors.—Ordinance not executed may be rescinded, p. 703.

Cited in *Vernon v. Board*, 142 Cal. 516, as to ordinance establishing town boundaries.

18 Cal. 704-709. SCOTT v. HARBOR.

Criminal Law.—Taking possession of another's hogs, with the unlawful intent to mark them with the defendant's own mark and to use them as his own, would complete the offense of larceny, p. 709.

Cited in *State v. Homes*, 57 Am. Dec. 280, extended note, discussing subject of larceny.



VOLUME XIX.

By WILLIAM FOSTER.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

19 Cal. 11-27. BOARD OF EDUCATION v. FOWLER.

Van Ness Ordinance released to actual possessors of land in San Francisco, on January 1, 1855, the title of the land so possessed, p. 23.

Affirmed in Carleton v. Townsend, 28 Cal. 223.

Commissioners of Funded Debt held the title to the municipal lands of San Francisco in trust for the purposes that the legislature authorized, p. 24.

Cited in San Francisco v. Canavan, 42 Cal. 556, holding that the legislature controlled the execution of the trust by the city regarding the municipal lands; Le Roy v. Dunkerly, 54 Cal. 458, 460, 461, holding that the buyer of a beach and water lot at execution sale acquired whatever equitable title remained in the city. Also, in Forstall v. Consol. Assn., 34 La. Ann. 777, holding that a statute authorizing an insolvent corporation to invest money in state bonds instead of paying its creditors was unconstitutional.

School Sites did not pass by the Van Ness Ordinance to persons in possession of them. "The school department of the municipality is only a part of its government. A reservation of property for school purposes is not a disposition of it for the benefit of third persons, but a keeping of it for its own purposes," p. 24.

Affirmed in Board of Education v. Martin, 92 Cal. 212, 216. Cited in In re Wetmore, 99 Cal. 151, holding that school bonds issued by the city of Oakland were valid, the building of school-houses being one of the functions of a municipal government.

Res Adjudicata cannot be set up regarding a case reversed on appeal and remanded, p. 26.

Affirmed in Ketchum v. Thatcher, 12 Mo. App. 188.

19 Cal. 28-40. PATTERSON v. ELY.

Verification to complaint held sufficient, though it failed to state that

affiant had read the complaint and knew the contents thereof, p. 34. "The object of the verification is to insure good faith in the averments of the party," p. 39.

Cited in *Silcox v. Lang*, 78 Cal. 122, holding an affidavit by an attorney invalid that averred he knew the facts more fully than his client, saying: "The practice of attorneys verifying for their clients should be discouraged, and to that end the provisions of the code referred to should receive a strict construction."

Verbal Stipulations "as to the pleadings or evidence cannot be regarded, except as they are admitted by the parties against whom they are invoked," p. 35.

Affirmed in *Reese v. Mahoney*, 21 Cal. 308. Cited in *Smith v. Whittier*, 95 Cal. 288, holding that if a party admits making a verbal stipulation it will be as binding upon him as if it had been entered in the minutes of the court, also that a written stipulation, signed before but not filed until after the substitution of another attorney for one of the parties, was binding; also in *Reclamation District v. Hamilton*, 112 Cal. 610, holding that where it is agreed in the stipulation that it need not be filed, failure to file it does no harm. Cited in *Haley v. Eureka Bank*, 20 Nev. 424, holding that a default entered contrary to a verbal stipulation could not be set aside.

Surprise, as ground for new trial or reduction of damages, must be such as ordinary prudence could not guard against, and it must occasion injury to the party averring it, p. 35.

Cited in *Spencer v. Doane*, 23 Cal. 420, holding that mistakes made by witnesses cannot be claimed as surprise; also in *Brooks v. Douglass*, 32 Cal. 212, saying: "The moving party must show not only surprise, but that he is injured by it, and this he must do by showing what case he can establish in the event of a new trial;" *McGuire v. Drew*, 83 Cal. 230, holding that failure of a party to appear personally or by counsel at the trial of a case decided against him was not accident or surprise, and also it is not shown that injury resulted; and in *Stewart Co. v. Coulter*, 3 Utah, 181, holding that failure to obtain judgment was due to a party's own neglect, and not caused by surprise.

Pleading.—Damages alleged in a complaint for ejectment, not being denied by the answer, are properly allowed by the jury. "The finding of a jury based upon an admission of the parties, by pleading or otherwise, is not less an assessment than if the finding were made upon conflicting evidence on the subject," p. 40.

Affirmed in *Johnson v. Vance*, 86 Cal. 114, as to an averment of unliquidated damages, not denied by the answer; also in *Carlyon v. Lannan*, 4 Nev. 160, holding that findings or instructions may be based on admissions. Distinguished in *Loeb v. Kamak*, 1 Mont. 156, holding that the amount of damages claimed was immaterial, and plaintiff could

recover whatever amount he proved. Cited in *Conway v. Clinton*, 1 Utah, 223, holding that a denial of the amount of damages averred raises no issue.

Rents and Profits.—It need not be averred that defendant received them, p. 40.

Affirmed in *Johnson v. Visser*, 96 Cal. 312. Cited in note to 1 Am. Dec. 116, on mesne profits.

19 Cal. 40-41. **PEOPLE v. ROBINSON.**

Words Spoken in Sleep, by a defendant in a criminal case, are not evidence against him, p. 41.

Cited in *Plummer v. Ricker*, 71 Vt. 118, 76 Am. St. Rep. 760, rejecting words so spoken by victim of vicious dog in action against its owner; *Reavis v. State*, 6 Wyo. 252, rejecting evidence of alleged confession.

Distinguished in *State v. Morgan*, 35 W. Va. 265, where declarations of a defendant in bed during the night were admitted, it not appearing whether she was awake or asleep. Cited in note to 6 Am. St. Rep. 249, on confessions.

19 Cal. 41-46. **WHEATON v. NEVILLE.**

Attachment of real property is made by serving or posting a copy of the writ, and recording the writ and description of the premises as prescribed by the statute. The two acts prescribed must be done before the lien of the attachment is perfected. The omission of either is fatal to the creation of the lien, p. 45.

Affirmed in *Main v. Tappener*, 43 Cal. 209, holding that "the requisite acts must be performed in the order in which they are named in the statute;" *Porter v. Pico*, 55 Cal. 172, holding that a sheriff's deed on execution takes effect by relation from the levy of the attachment.

Distinguished in *Woldert v. Nedderhut etc. Co.*, 18 Tex. Civ. App. 604, under provisions of local statutes; *First Nat. Bank v. Sonnelitner*, 6 Idaho, 27, notice of levy of attachment required to be filed in recorder's office must describe property sufficiently to identify it so that purchaser can tell from notice itself what he is buying.

Sheriff has no right to take further proceedings on attachment after filing his return of the writ; its efficacy was as a warrant of authority to him limited to acts performed whilst it remained in his possession, p. 46.

Affirmed in *Raynolds v. Ray*, 12 Colo. 121.

Preference of a Creditor is fraudulent only where there is a real design on the part of the debtor to prevent the application of his property in whole or in part to the satisfaction of his debts, p. 46.

Affirmed in *Ross v. Sedgwick*, 69 Cal. 251, and *Dyer v. Bradley*, 89 Cal.

562; also in *Ellis v. Valentine*, 65 Tex. 549, and *Lucas v. Claffin*, 76 Va. 278. Cited in *Vansickle v. Wells, etc. Co.*, 105 Fed. 24, sustaining conveyance from husband to wife by way of preference: *Hodges v. Coleman*, 76 Ala. 120, holding that fraud "cannot be predicated of a mere emotion of the mind disconnected from an act occasioning an injury to some one;" also in notes to 26 Am. Dec. 584, 585, and 60 Am. Dec. 62, on preferences.

19 Cal. 47-60. **GILMER v. LIME POINT.** S. C. 18 Cal. 229.

Condemnation of Land.—The statutory proceedings cannot be instituted until there has been an effort to agree upon the price between the parties, and they have failed to agree, p. 59.

Affirmed in *Contra Costa Co. v. Moss*, 23 Cal. 325, 329; *Lincoln v. Colusa Co.*, 28 Cal. 667. Cited in dissenting opinion in *Appeal of Houghton*, 42 Cal. 68, a majority of the court holding that there is no appeal in special proceedings for changing grade of streets.

Statutes regulating condemnation of land are to be strictly construed, p. 60.

Affirmed in *In re Canal St.*, 18 R. I. 134; *Adams v. Clarksburg*, 23 W. Va. 207; *McCotter v. Town Council*, 21 R. I. 45, holding highway proceedings void for noncompliance with local statutes; *St. Louis etc. Ry. v. Southwestern Tel. etc. Co.*, 121 Fed. 282, where failure to agree is alleged in condemnation petition, and is condition precedent to right to condemn, fact that there was no such failure is ground for injunction against entry thereunder; note to 73 Am. Dec. 584, on eminent domain.

Value for Special Purposes, of the land condemned, cannot be considered, p. 60.

Denied, by Hayne, C. in *San Diego Co. v. Neale*, 78 Cal. 67, 69, saying that the principal case and *Central Pacific Co. v. Pearson*, 35 Cal. 247, are "in violation of sound principles and opposed to the overwhelming current of authority," and holding that the value of land, for purposes of eminent domain, is its value in exchange or market value, but if it has no market value, then its value for the purposes for which it is suitable may be considered. Approved in the dissenting opinion in the case, on page 80. Cited in same case, 88 Cal. 57, saying: "The market value is the ultimate fact to be determined by the jury. If the land has a value for any particular purpose, its market value may be thereby enhanced. . . . There is nothing in what we have said inconsistent with what was decided in *Gilmer v. Lime Point*, 19 Cal. 47, or *Central Pacific R. Co. v. Pearson*, 35 Cal. 247. In the former case, . . . as the government was the only possible purchaser for such a purpose, it was apparent that the attempt to show what it was worth for a fortification was an attempt to prove what was its peculiar value to the government."

19 Cal. 64-77; 79 Am. Dec. 196. **WRIGHT v. SOLOMON.**

Factor cannot pledge, as security for the payment of his individual debt, the goods of his principal consigned to him for sale, p. 71.

Cited in *Brewery Co. v. Merritt*, 82 Mich. 201, holding that persons dealing with an agent must at their peril ascertain the extent of his authority, and that goods in a factor's hands on consignment are not subject to sale on execution for his debts; also, as to factor's powers to pledge, in notes to 36 Am. Dec. 716; 58 Am. Dec. 164; 59 Am. Dec. 297, 299; 70 Am. Dec. 797; 92 Am. Dec. 537; 95 Am. Dec. 406; 97 Am. Dec. 374; 42 Am. St. Rep. 48.

Distinguished in *Shafer v. Lacy*, 121 Cal. 577, holding present rule to be otherwise under Civil Code, 2991; cf. *Baxter v. Sherman*, 73 Minn. 439, 72 Am. St. Rep. 633, discussing right of setoff as against agent of undisclosed principal; *Durkee v. Carr*, 38 Or. 194, fact that owner directed agent to lease lands, reserving share of crop as rent, does not authorize agent to covenant to irrigate lands, where such covenant not necessary to lease lands and not customary for land owners in vicinity to so covenant.

Personal Property.—Possession is only prima facie evidence of ownership, and never prevails against the true owner, except with reference to negotiable instruments and whatever comes under the general denomination of currency. The principle that no one can be divested of his property without his consent, and the maxim that no one can transfer a better title than he has himself, control all questions arising as to property of which a transfer is attempted, with the exceptions stated, p. 76.

Affirmed in *Putnam v. Lamphier*, 36 Cal. 158, holding that "a second vendee is not entitled to stand in any better situation than his vendor in regard to the title of personal property." Cited in *Hayes v. Campbell*, 55 Cal. 424, 36 Am. Rep. 45, holding that a factor cannot tortiously sell a consignment, and saying that the utmost that he could do in that respect would be to mortgage or pledge it to the extent of any lien which he might have upon it"; also in *Chase v. Whitmore*, 68 Cal. 547, holding that the buyer of an overdue note gets no better title than the seller had. Cited in *Truman v. Hardin*, 5 Sawy. 118, 24 Fed. Cas. 250, saying: "It has been held that the vendor's title will prevail over that of the innocent bona fide purchaser for value from the vendee in possession. An assignee in bankruptcy is in no better position than an innocent purchaser for value"; also in *In re Sime*, 12 Bank. Reg. 320, 3 Sawy. 309, holding that the buyer of a dishonored certificate of deposit from an apparent owner has no superior equity to the real owner; notes to 83 Am. Dec. 285; 85 Am. Dec. 300; 100 Am. Dec. 458; 3 Am. St. Rep. 196; 11 Am. St. Rep. 633, on possession as evidence of title; and in note to 3 Am. St. Rep. 201, 202, as to factor's power to sell.

19 Cal. 77-80. COMSTOCK v. CLEMENS.

Equity will not grant relief by injunction, against an execution in a suit at law, to a party who has an effectual remedy by motion, in the court that issued the execution, to set it aside, p. 80.

Cited in *Ketchum v. Crippen*, 37 Cal. 228, holding that relief against proceedings in a foreclosure suit must be sought by motion in that suit, not by a separate suit for an injunction; also in *Gates v. Lane*, 49 Cal. 269, holding that an injunction did not lie against enforcement of a judgment in justice's court, alleged to be void for want of jurisdiction, as there was an adequate remedy by motion in the justice's court. Affirmed in *Luco v. Brown*, 73 Cal. 5; 2 Am. St. Rep. 774.

Certiorari lies from a county court to a justice of the peace to review a judgment alleged to be void, if the time for an appeal in the case has elapsed, p. 80.

Cited in *Spring Valley v. Bryant*, 52 Cal. 135, holding that the writ does not lie from the district court to a board of supervisors, to review legislative action by them; also in *Hetzel v. Board of Commrs.*, 8 Nev. 362, holding that the writ does not lie against county commissioners who have acted within their authority.

19 Cal. 81. DOOLING v. MOORE. S. C. 20 Cal. 141.

Notice of Appeal must be filed before the undertaking, p. 81.

Affirmed in *Little v. Jacks*, 68 Cal. 345, holding that the notice must be served before the undertaking is filed; and to same effect in *Weiss v. Board of Commrs.*, 8 Oreg. 529. Distinguished in *Dooley v. Foster*, 5 Kan. 279, holding that under the Kansas statute filing a notice and transcript earlier than the statute required did no harm.

19 Cal. 82-84. ADDISON v. SAULNIER.

Police Power.—Act appointing a gauger and allowing him to charge fees for his services is constitutional. The charge is not a tax within the provision of the constitution that taxes shall be equal and uniform, p. 84.

Cited in *Leavenworth v. Booth*, 15 Kan. 635, holding that a license tax on insurance companies is constitutional; *Commissioners v. Nelson*, 19 Kan. 241, 27 Am. Rep. 107, holding that a tax affecting counties that had been divided was equal and uniform; and in note to 34 Am. Dec. 638, on license taxes.

19 Cal. 85-86. SMITH v. HALL.

Statute of Limitations may be pleaded by demurrer if it appears on the fact of the complaint that the suit is barred by the statute, p. 86.

Cited in *Kelley v. Kriess*, 68 Cal. 213, holding that if the statute is not pleaded by demurrer or answer it is deemed waived. Also in *McGehee*

v. Blackwell, 28 Ark. 30, holding that under the code of that state the statute may be pleaded by demurrer or answer if the complaint shows on its face that it is barred by the statute, otherwise by demurrer only; Buckingham v. Orr, 6 Colo. 590, holding that where plaintiff declares on a note but relies on a new promise, special demurrer lies; and in note to 41 Am. Dec. 234, on this point.

Limitation of Probate Claims.—The statute of limitations does not begin to run when no administration exists on the decedent's estate at the time the cause of action accrued. The special act, barring claims against estates unless presented within ten months, applies only to cases where the general statute has begun to run; the object was not to curtail but to prolong the period for suing, p. 86.

Distinguished in Quivey v. Hall, 19 Cal. 90, holding that "the right to sue does not come from the existence of the claim and the nonpayment, but comes from the refusal of the executor to acknowledge it as a just claim against the estate. This right, therefore, does not accrue until the presentation of the claim, and the party is not bound to present it until after publication of the notice required by the statute." Also in Grattan v. Wiggins, 23 Cal. 28, saying that in the principal case and Quivey v. Hall, ante, "the administrator was defendant, and not the plaintiff as in the present, and the rule of law is entirely different in the two classes of cases. Section 24 of the statute regulates both, and there is nothing in that section which relieves the plaintiffs in this case from the bar of the statute." Approved in Estate of Bullard, 116 Cal. 356, holding that section 353 of the Code of Civil Procedure is identical with section 24 of the act of 1850, and must receive the same construction. Beatty, C. J., concurring, says of the principal case: "In making that decision, the court cited Danglada v. De la Guerra, to sustain the proposition. That case, however, does not sustain it, and I know of no express provision of law that does. But section 1500 of the Code of Civil Procedure forbids the commencement of any action upon a claim against a decedent unless the claim is first presented to an executor or administrator, etc., and it seems to have always been considered absurd to hold that the statute would run against a cause of action which could not possibly be put in suit. Upon this ground, apparently, and by mere judicial legislation, the rule above quoted has been established, and it is now too late to set it aside by a contrary decision, if a contrary decision could be justified." Cited on the point that the object of the probate limitation was "not to curtail but to prolong," in Sammis v. Wightman, 31 Fla. 38, and Rickards v. Hutchinson, 18 Nev. 223; also in notes to 65 Am. Dec. 597, 601, on this point.

19 Cal. 87-97. SOTO v. KRODER.

Rehearing allowed where, after decision of the supreme court, the parties filed a stipulation admitting facts the absence of which was alleged as the basis of the former decision, p. 95.

Referred to as a precedent in *Leviston v. Ryan*, 75 Cal. 298, where a new trial was ordered, with leave to the parties to file a stipulation admitting certain facts as to the nature of land covered by a patent.

Probate Act of 1851, which gives the possession and control of real property belonging to intestates to their administrators until administration of the estate and distribution of the property are had, only applies to cases arising since the statute was passed." Plaintiff's ancestor "having died in 1845, the heirs took the estate, and are proper parties to suits for a recovery of the premises, p. 97.

Distinguished in *People v. Senter*, 28 Cal. 505, where the court say of the principal case and others, that were claimed to hold the probate acts of 1850 and 1851 not retroactive: "Nothing can be considered as having been adjudged by those cases except that estates, the owners of which died under the Mexican system, were not within the purview of the act. . . . We consider that the legislature intended that all estates, whose owners had deceased prior to the passage of the act [of 1850] and subsequent to the abrogation of the remedial system of the Mexican law, should be settled according to the method of the act. To that extent, at least, the statute was intended to be retroactive. . . . As to the act of 1851, we regard it as retroactive to the same extent as the act which preceded it and of which it was but a revision." Affirmed in *Coppinger v. Rice*, 33 Cal. 423, saying of the principal case and others: "These cases must now be regarded as establishing, beyond further controversy, the proposition that on the death of an intestate under the Mexican system, the heirs succeeded immediately to the estate and became personally responsible for the debts of the deceased, irrespective of the question whether the heirs were adult or minor, and that no administration in the sense of the common law was needed or could be had at any time." Cited in *Ryder v. Cohn*, 37 Cal. 89, where the court say that the above-quoted passage from *Coppinger v. Rice* "was at most but a dictum," and add: "Yet it would be a most strange anomaly in any system of law if there was not some analogous proceeding for preserving and distributing the estate of a deceased person. . . . We are satisfied there was some proceeding provided by law, or by usage and custom having the force of law, whereby the estate of a deceased person could be preserved and, if need be, in proper cases, disposed of for the payment of debts"; Rhodes, J., dissenting, cites the principal case, on p. 91, to the contrary. Cited in *McNiell v. First Con. Soc.*, 66 Cal. 108, to the point that the act of 1850 "had no application to the estates of persons who died before its passage," and on page 112 to the point that under the act of 1850 the probate court acquired no jurisdiction of an estate on which letters of administration had been granted by a court of first instance prior to the act; and holding that under Mexican law the estate of an intestate vested in his heirs. Cited in *Seaverns v. Gerke*, 3 Sawy. 363, Fed. Cas. No. 12595, to the point that the probate acts did not apply to prior estates.

19 Cal. 97-101. QUIVEY v. HALL.

Limitation of Probate Claims.—Same point as *Smith v. Hall*, 19 Cal. 85-86. See note to that case, *ante*. Cited in 23 Cal. 28, and 65 Am. Dec. 601; also notes to 65 Am. Dec. 602, and 28 Am. Dec. 467, on same point.

19 Cal. 101-106. BREEZE v. DOYLE.

Findings of the Court, in a jury waived case, like a special verdict, must find the facts expressly and specially, and not generally or impliedly. Reference may be had to the pleadings in the finding, but the reference should be distinct and pointed, so as to leave no doubt as to what particular facts are intended, pp. 105, 106.

Cited in *Lucas v. San Francisco*, 28 Cal. 596, holding that the act of 1861, to regulate appeals, changed the practice regarding findings; and saying: "There must, of course, be a decision in favor of the prevailing party, but no finding of the facts is required," and defective findings will not cause the reversal of a judgment, unless exceptions to them were taken in the lower court. Cited in *Hihn v. Peck*, 30 Cal. 286, to the point that "facts are to be stated according to their legal effect. In cases of special verdicts even, if parties would have facts entirely free of legal terminology, it behooves them to submit special interrogatories to the jury, so framed that they can be intelligibly answered without using it, and cannot be so answered by using it." Cited in *Pralus v. Pacific Co.*, 35 Cal. 35, as authority for holding that a finding by the court that the allegations of the complaint are true and those of the answer untrue "is sufficient and conclusive of all the issues made by the pleadings"; also in *Pratalongo v. Larco*, 47 Cal. 382, to the point that "where specific facts are put in issue by the pleadings it is the duty of the court or referee to find distinctly as to those facts," but holding that where general facts were averred in the pleadings as to a long current account, the referee was not required to find the facts as to each item, but his report was a sufficient compliance with the statute in showing by a debit and credit statement how the indebtedness arose. Cited in *Ladd v. Tully*, 51 Cal. 278, holding that a finding that all the "material" facts in the complaint are true is insufficient; *Porter v. Woodward*, 57 Cal. 539, holding that a finding was specific enough in the absence of any special request for a different one; *Emeric v. Alvarado*, 64 Cal. 603, holding that the code requires "the court to find the facts specially, unmixed with the law, so that the judicial mind may see that the conclusion of law is a deduction of the law from the facts," and therefore a finding "there was no assessment" is improper; *Murphy v. Bennett*, 68 Cal. 536, in dissenting opinion, to the point that a finding is like a special verdict, a majority of the court holding that failure of the lower court to find upon affirmative defenses set up in the answer did no harm. Cited in *McCormack v. Phillips*, 4 Dak. 534, holding that an objection cannot be raised for the first time on appeal that a general verdict should have

been special; also, to the point that a finding is like a special verdict, in *Conlan v. Grace*, 36 Minn. 282, and *Kahn v. Smelting Co.*, 2 Utah, 381; *McFadden v. Friendly*, 9 Oreg. 224, holding that a finding sufficiently expressed that the complaint was true and the answer untrue; in *Bard v. Kleeb*, 1 Wash. St. 376, to same effect, as to truth of complaint, and *Abrahamson v. Lamberson*, 68 Minn. 456, to the point that the finding that all the material allegations in a pleading are true, is insufficient.

19 Cal. 109-113; 79 Am. Dec. 204. **BICKERSTAFF v. DOUB.**

Sheriff, seizing goods of a debtor in the possession of a stranger, must produce not only the writ but the judgment which authorizes its issuance, p. 112.

Cited in *Darville v. Mayhall*, 128 Cal. 618, noted under *Thornburg v. Hand*, 7 Cal. 562; *Aigeltinger v. Einstein*, 143 Cal. 611, 613; noted under *Heyneman v. Dannenberg*, 6 Cal. 376; *Fisher v. Kelly*, 30 Or. 10; noted under *Paige v. O'Neal*, 12 Cal. 483; *Knox v. Marshall*, 19 Cal. 622, where Field, C. J., says: "The same rule prevails whether the property seized be claimed under a sale or under a pledge from the debtor. The test is this: Is the stranger's right to the possession such as would prevent the debtor himself from retaking the possession; if it be such, the officer must produce not merely the writ, but the judgment on which it is based." Also affirmed in *Kane v. Desmond*, 63 Cal. 466; *Ford v. McMaster*, 6 Mont. 241. Cited in *Franklin v. Gumersell*, 9 Mo. App. 68, holding that after levy on the debtor's property, the creditor may question every element of the validity of the sale he alleges to be fraudulent; also in notes to 90 Am. Dec. 288, 290, and 10 Am. St. Rep. 216, on creditor's bills.

19 Cal. 113-118. **HAIGHT v. GREEN.**

Ejectment.—Plaintiff's possession as executor of the owner, held sufficient to maintain the action, p. 117.

Cited in *McCarthy v. Brown*, 113 Cal. 20, holding that the findings sufficiently showed plaintiff's right to possession.

Absence of Attorney, when case was called for trial, having been held by the lower court not to be a ground for new trial, its discretion cannot be reviewed, p. 117.

Affirmed in *Mulholland v. Heyneman*, 19 Cal. 606. Cited in *Brooks v. Johnson*, 122 Cal. 572, and *Smith v. Parkersburg etc. Assn.*, 48 W. Va. 241, holding showing for new trial insufficient; *Bailey v. Taafe*, 29 Cal. 423, reversing the order of the lower court setting aside a default for absence of counsel, and saying that the discretion referred to "is a legal discretion. . . . In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. . . . If we are satisfied beyond a reasonable doubt

that the court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other." Affirmed in *Smith v. Tunstead*, 56 Cal. 177; *McGuire v. Drew*, 83 Cal. 230, 231; *Baumberger v. Arff*, 96 Cal. 262. Cited in *Whiteside v. Logan*, 7 Mont. 383, holding that the lower court properly set aside a default; *Horton v. New Pass Co.*, 21 Nev. 193. in dissenting opinion, a majority of the court holding that the negligence of an attorney was excusable, and reversing the refusal of the lower court to set aside the appeal; and in notes to 58 Am. Dec. 394, 398, on discretion in opening default, 74 Am. Dec. 141, on discretion as to continuance; 74 Am. Dec. 150, on absence of counsel.

Ejectment.—Complaint in action for held sufficient, p. 117.

Cited in *Jones v. Memmott*, 7 Utah, 343, noted under *Payne v. Treadwell*, 16 Cal. 242.

Construing Stipulation in Ejectment suit as to ownership and entry, p. 117.

Approved in *Hackfeld v. United States*, 125 U. S. 598, in prosecution under 26 Stats. 1086, for escape of deported aliens from ship where there was stipulation that escape not caused by master or officers of ship, and court merely found defendant guilty, question of liability in absence of negligence not reviewable.

19 Cal. 118-119. **FORD v. THOMPSON.**

Appeal from order granting new trial stays proceedings pending appeal, and the new trial cannot be had until the appellate court orders it, p. 119.

Affirmed in *Pierce v. Birkholm*, 110 Cal. 671, holding that the granting of a new trial suspended the operation of the judgment, but "pending such appeal the judgment remained subsisting and, for the purpose of an appeal therefrom, stood as if no order for a new trial had ever been made."

19 Cal. 124-125. **BROOKS v. CALDERWOOD.**

Appeal does not lie from refusal of a district court to transfer a cause to the United States circuit court, p. 125.

Affirmed in *State v. Curler*, 4 Nev. 446.

Jurisdiction of such an appeal cannot be conferred by stipulation of the parties, p. 125.

Cited in *Rader v. Nottingham*, 2 Mont. 159, holding that consent does not give jurisdiction of an appeal from a nonappealable order for taxation of costs.

19 Cal. 125-126. **BURROUGHS v. LOTT.**

Contribution between Cosureties.—Insolvent sureties need not be

joined in a suit for contribution by a surety who has paid the debt, p. 126.

Cited in *Smith v. Mason*, 44 Neb. 616, holding that only the solvent sureties contribute; *Faurot v. Gates*, 86 Wis. 574, holding that a surety may sue cosureties at law for contribution; notes to 20 Am. Dec. 561, on contribution between principals, and 10 Am. St. Rep. 645, on contribution between sureties; note to 70 Am. St. Rep. 453, on general subject.

19 Cal. 127. **SWAIN v. NAGLEE.**

Clerical Errors in Judgment may be amended after the close of the term, when the record itself discloses them, p. 127.

Approved in *De Castro v. Richardson*, 25 Cal. 53, holding that after the close of the term the record could not be amended because there was nothing in the record to show the error; also in *Hegeler v. Henckell*, 27 Cal. 495, where the court refused to enter nunc pro tunc an alleged oral order, because there was not sufficient proof that an order had ever been made. Cited in *Casement v. Ringgold*, 28 Cal. 338, holding that a judgment could not be vacated after close of the term, and saying: "If any point can be considered as settled by judicial decision, it would seem that the question now made ought to be regarded as no longer open to doubt in this state; if erroneously settled, the remedy must now be sought in legislative action." Cited in *Estate of Schroeder*, 46 Cal. 316, holding that a judgment could be amended by the record several years after entry; also in *Dreyfuss v. Tompkins*, 67 Cal. 340, saying: "It is well settled that clerical errors in a judgment, where they are shown by the record, may be corrected at any time so as to make the judgment entry correspond with the judgment rendered"; and in *Fallon v. Brittan*, 84 Cal. 514, holding that after an interlocutory decree in partition had been affirmed on appeal, a clerical error in name of a street, patent on face of the record, could be amended. Cited in *Lovett v. State*, 29 Fla. 396, holding that where in a criminal case a remittitur had been sent down ordering a new trial, and thereafter material errors were found in the transcript on which the new trial had been granted, the supreme court had power to recall the remittitur and reinstate the case on the appeal calendar; also in *Comanche Co. v. Rumley*, 1 Mont. 205, holding that where the clerk had neglected to enter judgment on the verdict at the term, the court had power to enter it at the next term; *Territory v. Clayton*, 8 Mont. 15, holding that after conviction in a criminal case, the court could enter on the record a plea of not guilty made at a former term; and in notes to 12 Am. Dec. 353, 14 Am. Dec. 518, and 4 Am. St. Rep. 828, 830, 832, on amendments and judgments nunc pro tunc.

19 Cal. 128-129. **KAYS v. PHELAN.**

Wife may sue alone to recover her separate property from a third party, or may join her husband, p. 129.

Affirmed in Robinson v. Woodford, 37 W. Va. 385.

Pleading.—Deed of wife, under the allegations of a complaint defectively drawn—held to pass her estate, but defendant may show that the husband did not unite in the deed, or that the wife's acknowledgment was defective, p. 129.

Cited in *Banbury v. Arnold*, 91 Cal. 609, holding that a defectively drawn complaint did not show that a wife's contract was improperly acknowledged, because the acknowledgment was no part of the contract.

19 Cal. 130-131. EX PARTE BIRD.

Sunday Law is constitutional, p. 131.

Affirmed in Ex parte Burke, 59 Cal. 19, holding that the law "in no way interferes with the free enjoyment of religious profession or worship; it is purely a secular, sanitary, or police regulation" (p. 13). "It only forbids the carrying on of certain kinds of business on a certain day of the week, and the day selected, in deference to the feelings and wishes of a large majority of the community, is that day commonly denominated the Christian Sabbath or Sunday" (p. 20). **Affirmed in Ex parte Koser**, 60 Cal. 193, holding that the legislature has the right to prescribe what shall be *mala prohibita*, and saying: "In this state the policy of the law, as indicated in the decisions, is fully committed to the secular phase of the subject only" (p. 194). "The law simply expresses the intention of the legislature to establish a day of rest from secular employments" (p. 195). "Sunday is not set apart as a holy day, but it is set apart as a legal holiday" (p. 198). Referred to in dissenting opinion on page 214. **Affirmed in Scales v. State**, 47 Ark. 482; 58 Am. Rep. 770; *State v. Judge*, 39 La. Ann. 140, 141, 58 Am. Rep. 774, note. Cited in dissenting opinion in *Norfolk Co. v. Commonwealth*, 88 Va. 114, 29 Am. St. Rep. 715, a majority of the court holding that a statute forbidding interstate trains to run on Sunday is unconstitutional, being in conflict with the power of Congress to regulate commerce; and in note to 49 Am. Dec. 622, on this point.

Habeas Corpus "was not framed to retry issues of fact, or to review the proceedings of a legal trial," p. 131.

Affirmed in Ex parte Cottrell, 59 Cal. 422; 43 Am. Rep. 238; *Ex parte Lehmkuhl*, 72 Cal. 54. Cited in *Ex parte Long*, 114 Cal. 161, to the point that "the misapplication of the law to any given state of facts does not constitute excess of jurisdiction, but error merely, which cannot be reviewed by this means." Cited in *Knapp v. Thomas*, 39 Ohio St. 389, 48 Am. Rep. 469, holding that a pardon cannot be impeached in collateral proceedings; and in note to 26 Am. Dec. 49, on habeas corpus.

19 Cal. 133-140. EX PARTE BRANIGAN.

Commitment must not only state the offense charged, but such facts as are essential to constitute the offense against the prisoner, p. 136.

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Cited in *State v. Birchim*, 9 Nev. 100, holding that the same rule does not apply to recognizances, for the same reasons do not exist. Denied in *State v. Huegin*, 110 Wis. 228, 229, holding statement of offense with convenient certainty sufficient.

Second Commitment may issue to amend the original, if the magistrate has any order or entry on which to base it, but he cannot resort merely to his own recollection for the facts of the case," p. 137.

Cited in *Ex parte Keil*, 85 Cal. 310, holding that a magistrate "could at any time amend the warrants of commitment so as to make them fully and formally descriptive of the offense proved by the depositions."

Order of committal or discharge must be reduced to writing, p. 137.

Affirmed in *People v. Wilson*, 93 Cal. 379. Cited in *People v. Wallace*, 94 Cal. 499, holding where the justice has entered the order on his docket, "no further action on his part is necessary in order to authorize the district attorney to file an information."

19 Cal. 140-143; 79 Am. Dec. 206. **GRIM v. NORRIS.**

Reference of an ordinary suit to recover a debt cannot be ordered by the court, without consent of parties; they are entitled to a trial by the jury if they desire it, p. 142.

Affirmed in *Hendy Works v. Pacific Co.*, 99 Cal. 423. Cited in *Huston v. Wadsworth*, 5 Colo. 215, holding that under the constitution of that state the court may refer a civil case without consent of parties; dissenting opinion, *State v. Moores*, 56 Neb. 38, discussing right to jury trial in quo warranto proceedings; note to 93 Am. Dec. 198, on reference.

Trial by Jury.—The constitutional right is limited to those cases in which the right of trial by jury previously existed, p. 142.

Affirmed in *Woods v. Varnum*, 85 Cal. 645, saying that the provision of the constitution "refers generally to those cases in which the right of trial by jury existed at common law at the time of the adoption of the constitution," and holding that it does not include proceedings under section 772 of the Penal Code regarding removal of officials from office.

General citation: *Barnard etc. Mfg. Co. v. Monett Milling Co.*, 79 Mo. App. 155.

19 Cal. 147-150. **REESE v. GORDON.**

Note.—Partial failure of consideration cannot be pleaded in bar, p. 149.

Cited in *Fink v. Canyon Co.*, 5 Oreg. 311, where lack of consideration was held badly pleaded; also in *Packwood v. Clark*, 2 Sawy. 549, holding that where the failure is only partial, the defendant "can only come

in by way of recoupment of damages for the partial failure;" and in note to 13 Am. Dec. 379, on this point.

19 Cal. 150-158. **HENSHAW v. BOARD OF SUPERVISORS.**

Certiorari does not lie to review "the action of the board, except for excess or want of jurisdiction."

Cited in *People v. Spiers*, 4 Utah, 396, holding that where a justice of the peace acts wholly without jurisdiction, appeal is not an adequate remedy, and a writ of prohibition lies; also in *State v. Van Brocklin*, 8 Wash. St. 562, holding that quo warranto, not certiorari, is the remedy for testing the legality of the removal from office of an official for statutory causes by the mayor.

19 Cal. 162-171. **BREWSTER v. LUDEKINS.**

Insolvency.—The petition may be addressed to the judge or the court, p. 170.

Affirmed in *Wilson v. Creditors*, 32 Cal. 408.

Insolvency.—The petition must be verified by the insolvent, but may be signed by the attorney, like any other pleading, p. 170.

Distinguished in *Wilson v. Creditors*, 32 Cal. 409, holding that the schedule must be subscribed and verified by the insolvent personally, but the petition need not be subscribed or verified at all.

Insolvency.—"The court acquires its power to act by the filing of the petition or, at most, by the petition and notice," p. 171.

Affirmed in *Bennett v. Creditors*, 22 Cal. 42, saying: "The petition, which stands in the place of a complaint, and the notice, which stands in the place of a summons, when duly published, give the court jurisdiction over the subject-matter and the parties"; also in *Friedlander v. Loucks*, 34 Cal. 24, holding that where defendant in a suit on a note pleaded his discharge in insolvency, it could not be collaterally attacked if the court granting the discharge had jurisdiction.

General citation: *Louisville etc. R. R. Co. v. McDonald*, 79 Miss. 643.

19 Cal. 188-209. **TOWNSEND v. GORDON.**

Probate Courts, prior to 1858, were of limited and inferior jurisdiction, p. 205.

Cited in *Harmon v. Comstock Co.* 9 Mont. 247, holding that in pleading a probate judgment at common law, the facts giving jurisdiction must be set out, and an allegation that "the court rendered judgment" is not enough; also in notes to 63 Am. Dec. 84, 68 Am. Dec. 101, 257, and 70 Am. Dec. 710, on special jurisdiction of probate courts.

Sale of Real Estate, by order of probate court, must be made on petition, and the petition is the foundation of the jurisdiction, p. 208.

Cited in *Jones v. Falvella*, 126 Cal. 26, applying rule to proceedings for sale of homestead under statutes of 1873-74, 582; *Estate of Cook*, 137 Cal. 191, holding petition insufficient; note to *Estate of Porter*, 79 Am. St. Rep. 82, on probate sales; *Haynes v. Meeks*, 20 Cal. 312, where the court say: "The authority of the probate court to order a sale of real property of an estate is derived entirely from the statute. It is a limited and not a general authority. It may be exercised in certain specially designated cases; it can be exercised in no other"; and in same case, on page 314, to the point that the petition must show the necessity for the sale, "not by mere averment, but by an exhibition of the real property of the deceased. The necessity is a conclusion, which the court must draw for itself from the facts stated." Cited in *Pryor v. Downey*, 50 Cal. 398, 19 Am. Rep. 658, to the point that "the jurisdiction of the probate court depends absolutely on the sufficiency of the petition; in other words, on its substantial compliance with the requirements of the probate act"; and the court holds that the order of sale, made on a defective petition, was utterly void, and the act of 1866, confirming prior probate sales of real estate, "is without effect, in so far as it attempts to validate such void judgments." Cited in *Wright v. Edwards*, 10 Oreg. 305, holding that real estate can be ordered sold only upon the proper statutory petition; and in note to 76 Am. Dec. 561, on this point.

19 Cal. 210-219; 79 Am. Dec. 212. **WATERMAN v. LAWRENCE.**

Guardian ad Litem had "no power to admit away the rights of the infants, nor the court to give effect to any such admission, as to a matter and for a purpose not within the scope of the appointment or the purview of the complaint," p. 217.

Cited, on this point, in notes to 22 Am. St. Rep. 845, and 31 Am. St. Rep. 533.

Partition is a special proceeding, and the statute prescribes its course and effect, p. 218.

Cited in *Ryer v. Ryer Co.*, 126 Cal. 483, denying right of administrator of deceased cotenant to bring such action; dissenting opinion in *Goodale v. Fifteenth District Court*, 56 Cal. 35, a majority of the court holding that partition "is an equitable proceeding" (p. 29), and that there are cases "in which it is competent for the court below to appoint a receiver" (p. 33). Cited in *Robinson v. Fair*, 128 U. S. 89, holding that under the constitution, prior to 1880, a California probate court had jurisdiction to partition real estate.

19 Cal. 219-248. **CHATER v. SAN FRANCISCO SUGAR CO.**

Specific Enforcement of contract to issue shares of stock, decreed in equity, it appearing that one of several parties who agreed to in-

corporate on equal shares had performed his part of the contract and was therefore entitled to his share of the stock, pp. 237-238.

Cited in *Treasurer v. Commercial Mining Co.*, 23 Cal. 392, where specific enforcement of contract for issuing shares of mining stock was sought, and the court said: "In the peculiar condition of business and mining operations in this state, where numerous mining and other corporations are in existence whose stock is often of uncertain and fluctuating value, and where certain kinds of stocks have a peculiar value to those acquainted with their affairs, where the market value of stocks, if any they have, is often difficult to substantiate by competent evidence, and where the risk of the personal responsibility of individuals and corporations is so great, courts should be liberal in extending the full, adequate, and complete relief afforded by a decree of specific performance." Cited in *Moses v. Scott*, 84 Ala. 611, where the court declined to enforce an agreement between stockholders as to purchase and sale of stock.

Corporation is little more, under our laws, than a joint stock company under the English laws; indeed, in its true nature, more nearly resembling a limited partnership under special articles than a corporation at common law. The corporation would be the mere agency of the associates, created for the sake of convenience in carrying out the agreement, pp. 246-247.

Cited in *Scadden etc. Co. v. Scadden*, 121 Cal. 38, holding corporation bound by promoter's contracts of which it had accepted the benefit; *Hunt v. Davis*, 135 Cal. 34, discussing rights of members inter se; *Robinson v. Bidwell*, 22 Cal. 388, holding that as a creditor of a joint stock company or limited partnership would be bound by his agreement to waive personal liability of the members, so a party dealing with a corporation may by special contract waive all claim on the personal liability of the stockholders, even though their liability is declared by the state constitution; also in *Shorb v. Beaudry*, 56 Cal. 450, where the court treats the parties "in the light of their agreements between themselves, independently of their incorporation"; in dissenting opinion in *Cornell v. Corbin*, 64 Cal. 203, where a majority of the court held that in foreclosure proceedings against a corporation, one stockholder could show the fraud of another in organizing it; *Clute v. Loveland*, 68 Cal. 259, holding that a seat in the stock exchange may be mortgaged by a member and sold under foreclosure; and in dissenting opinion in *Kohl v. Lilienthal*, 81 Cal. 397, where a majority of the court say: "The bare fact that a man holds shares in the capital stock of a corporation gives him no legal title to the property of the corporation. That remains in the corporation and not in the shareholders."

19 Cal. 248-275. **ESTRADA v. MURPHY.**

Land Commission.—Whatever doubts may exist as to the validity of

the legislation of Congress, so far as it requires the presentation to the board of claims where the lands are held by perfect titles acquired under the former government, there can be none as to the validity of the requirement with respect to claims where the lands are held by imperfect or merely equitable titles, p. 269.

Cited in *Minturn v. Brower*, 24 Cal. 669, holding that owners of land, under perfect Mexican titles, could submit their claims to the commission if they chose, but were not compelled to, as their titles were as perfect under the new government as under the old; also in *Wilson v. Castro*, 31 Cal. 437, holding that an inchoate title under a Mexican grant was "property of a quality which could be assigned or transferred or devised, and which in this case descended upon the death of B, who died intestate, to his heirs at law." Affirmed in *Stevenson v. Bennett*, 35 Cal. 431, 434, holding that as the pueblo lands of Santa Cruz had not been located prior to the cession, the title to them was imperfect, "and being imperfect, was therefore within the operation of the act of Congress." Cited in *Bernal v. Lynch*, 36 Cal. 145, holding that the title to pueblo lands was inchoate until they were segregated, but it did not follow that the older pueblo title was better than a Mexican grant; *Morenhout v. Barron*, 42 Cal. 603, holding that a Mexican grant, although inchoate, passed a legal title; *Phelan v. Poyoreno*, 74 Cal. 452, holding a Mexican grant good; and in note 79 Am. Dec. 162, as to cession of California.

Confirmation of a claim by the land commission operates to the benefit of the confirmee and parties claiming under him, so far as the legal title to the premises is concerned. It establishes the legal title in the confirmee, and this must control in the action of ejectment, p. 272.

Cited in *McDonald v. McCoy*, 121 Cal. 70, discussing effect of decision in prior cases involving same patent; *Rico v. Spence*, 21 Cal. 511, holding that where a patent has issued to defendant, another claimant to the same land under an opposing unconfirmed grant "cannot call in question his rights either in law or equity." Affirmed in *Clark v. Lockwood*, 21 Cal. 221, 222; *Grattan v. Wiggins*, 23 Cal. 37; *Banks v. Moreno*, 39 Cal. 246. Cited in *Schmitt v. Giovanari*, 43 Cal. 622, holding that where the owner sold his land before filing his petition, but had it confirmed to himself, the vendee must rely on an estoppel by deed, unless he was named in the confirmation; *Hartley v. Brown*, 46 Cal. 204, 51 Cal. 467, holding that where an administrator sold land that was afterward confirmed to the intestate's heirs, the heirs took the legal title. Cited in *Treadway v. Wilder*, 12 Nev. 114, holding that the legal title to public lands is in the government until the issuance of a patent; *Carpentier v. Montgomery*, 13 Wall. 496, holding that a patent carries the legal title, and equitable rights must be sought not by ejectment, but by appropriate equitable proceedings; and in *Norton v. Meader*, 4 Sawy. 616, where Field, J., says that the land commission did not deal with equitable

claims, and that "the supreme court of California, whilst holding that the legal title was vested in the confirmer, has in repeated instances declared that equities between him and third parties remained unaffected." Affirmed in *Bouldin v. Phelps*, 12 Sawy. 310, 314; 30 Fed. Rep. 559, 561.

Trust.—If the confirmer, in presenting his claim, acted as agent, or trustee, or guardian, or in any other fiduciary capacity, a court of equity, upon a proper proceeding, will compel a transfer of the legal title to the principal, cestui que trust, ward, or other party equitably entitled to the same, or subject it to the proper trusts in the confirmer's hands; a court of equity will control the legal title in his hands so as to protect the just rights of others, p. 272.

Affirmed in *Lestrade v. Barth*, 19 Cal. 671; *Emeric v. Penniman*, 26 Cal. 124; *Salmon v. Symonds*, 30 Cal. 307; *Wilson v. Castro*, 31 Cal. 437, 438. Cited in *Estate of Fair*, 132 Cal. 536, 84 Am. St. Rep. 82, discussing construction in California of statute of uses; *De Castro v. Fellom*, 135 Cal. 230, but holding no trust relation established; *O'Connell v. Dougherty*, 32 Cal. 462, holding that until the patentee conveys to the beneficiary, suits based on the title must be brought in the patentee's name; and referred to in the dissenting opinion on page 463. Cited in *Bohall v. Dilla*, 114 U. S. 50, where the court refuses to declare a patentee of public lands trustee for a pre-emptor who had not complied with the statute as to continuous residence, Field, J., saying: "It must appear that by the law properly administered the title should have been awarded to the claimant"; also in *Sanford v. Sanford*, 139 U. S. 646, where the patentee is held to be trustee for another, Field, J., saying that a court of equity will prevent injustice arising from a misconstruction of the law by the land office or from misrepresentation and fraud; and in *McNee v. Donahue*, 142 U. S. 589, where the court, per Field, J., held that a patentee of state university lands held the title in trust for a prior locator. Affirmed in *Hardy v. Harbin*, 1 Sawy. 205, and in same case, 4 Sawy. 542, 544. Cited in *Manning v. San Jacinto Co.*, 7 Sawy. 425, 9 Fed. Rep. 732, holding that a patentee under a Mexican grant was not a trustee for the locator of a mine, who claimed that the lands under the patent were fraudulently located; also in *Santa Clara Assn. v. Quicksilver Co.*, 17 Fed. Rep. 658, where a patentee was held trustee for one having a better title; and in note to 12 Am. Dec. 567, on this point.

Equitable Defense may be set up in ejectment. The answer presenting such a defense is in the nature of a bill in equity, and must contain its essential averments. The defendant then becomes an actor with respect to the matter alleged by him, and his defense must be of such a character as may be ripened by the decree of the court into a legal right to the premises, or as will estop the prosecution of the action of the plaintiff, p. 272.

Cited in *Blum v. Robertson*, 24 Cal. 141, holding the answer insuf-

sufficient in form and substance to serve for an equitable defense. Affirmed in *Bruck v. Tucker*, 42 Cal. 352, holding that defendant's application for equitable relief is addressed to the sound discretion of the court. Cited in *McCauley v. Fulton*, 44 Cal. 362, to the point that an equitable defense must be pleaded and proved; to same effect in *Dale v. Hunneman*, 12 Neb. 224; *Rose v. Treadway*, 4 Nev. 460; 97 Am. Dec. 549; *South End Co. v. Tinney*, 22 Nev. 27; *McClory v. Ricks*, 11 N. Dak. 42, where, in action for possession of land, defendants deny title in plaintiff, and allege title in one of themselves and other as holding under him, but answer alleges no equitable title, evidence to show title in one of defendants cannot be resorted to to show equitable right of possession; *Peterson v. Philadelphia Mfg. etc. Co.*, 33 Wash. 470, in action to recover possession of land, answer showing defendant is mortgagee in possession with consent of owners of legal title and under assignment of rents for purpose of security until arrears are paid, and that same are not paid, and that plaintiff is not bona fide purchaser, states equitable defense first triable by court. In *Gibson v. Chouteau*, 13 Wall. 103, Field, J., said: "Neither in a separate suit in a federal court, nor in an answer to an action of ejectment in a state court, can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the statute of limitations of the state, be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issuance of the patent, under state legislation, in whatever form or tribunal such occupation be asserted." Cited in *Hardy v. Harbin*, 1 Sawy. 208, holding a legal title acquired from the patentee good as against equitable rights under a Mexican grant.

Equitable Defense must first be passed upon by the court and, until it is disposed of, the assertion of the legal remedy is in effect stayed. Upon the determination of the court upon relief prayed by the answer, the necessity of proceeding with the action at law will depend, p. 273.

Distinguished in *Swasey v. Adair*, 88 Cal. 180 to 182, holding that the principal case laid down this rule only as to ejectment, and that in other cases unless the trial of the equitable defense obviates the necessity, the issues of law must be tried by a jury. Affirmed in *Suessenbach v. First National Bank*, 5 Dak. 504, and *Quimby v. Conlan*, 104 U. S. 421. Cited in *Houser v. Austin*, 2 Idaho, 193, 194, holding that under the practice in that court legal and equitable issues may be submitted to the jury at the same time; *Hotaling v. Bank*, 55 Neb. 8, sustaining denial of jury trial on cases raised by equitable counterclaim in action for damages for breach of contract.

General citation: *Smith v. State*, 17 Neb. 362.

19 Cal. 275. PEOPLE v. SIMONDS.

Murder.—Declarations of Wife of defendant as to husband's statements to her are inadmissible against him, p. 278.

Cited in *Reaves v. State*, 6 Wyo. 249, discussing general rule that declarations of one person are not admissible against another.

19 Cal. 278-291; 79 Am. Dec. 215. MEEKER v. HARRIS.

Fraud must be pleaded with sufficient detail to show what facts are relied on; a general averment is not enough, p. 289.

Distinguished in *Hager v. Shindler*, 29 Cal. 60, holding that while in a creditor's bill to set aside a fraudulent conveyance an allegation of the debtor's insolvency is necessary, in a bill to set aside a fraudulent deed of a judgment debtor it is not necessary, because "insolvency is not a fact of jurisdictional consequence, nor is it per se a condition of relief." Cited in *King v. Davis*, 34 Cal. 106, holding that an objection cannot be made for the first time in the supreme court that the answer did not raise an issue of fraud; *Lawrence v. Gayetty*, 78 Cal. 131, 12 Am. St. Rep. 34, to the point that facts constituting fraud must be stated, and holding that they were, in a complaint to set aside a deed; *People v. McKenna*, 81 Cal. 159, where criminal fraud was charged, and the court say: "The question whether a thing has been done fraudulently is a matter of law, and an allegation of fraud in general terms presents no issuable fact"; *Wilson v. Sullivan*, 17 Utah, 351, holding allegations insufficient; *Spring Valley v. San Francisco*, 82 Cal. 321, 16 Am. St. Rep. 134, in dissenting opinion, a majority of the court holding that a complaint sufficiently showed fraud.

Fraudulent Preference of a creditor cannot be inferred from a confession of judgment by the debtor in his favor, p. 290.

Affirmed in *Pehrson v. Hewitt*, 79 Cal. 598. Cited in notes to 26 Am. Dec. 584, 585, 87 Am. Dec. 74, and 39 Am. St. Rep. 802, on this point.

19 Cal. 291-292; 79 Am. Dec. 218. WEBSTER v. WADE.

Wages of Servant.—The law is well settled that where a contract for service is made for a fixed period, if the employer discharge the servant before its termination, without good cause, he is still liable and the servant may recover the stipulated wages, p. 292.

Doubted in *Stone v. Bancroft*, 112 Cal. 657, where the court say: "It would seem that in later years the true rule has been recognized to be that an action in damages for the breach is the proper remedy in such a case." Distinguished in *White v. City*, 124 Cal. 96, holding driver of street wagon belonging to city, to be entitled to stipulated salary only when the services are performed. Cited in notes to 43 Am. Dec. 209; 84 Am. Dec. 421; 98 Am. Dec. 567; 12 Am. St. Rep. 859; 30 Am. St. Rep. 57; 38 Am. St. Rep. 253.

19 Cal. 294-299. MEADOR v. PARSONS.

Equitable Defense may be set up in ejectment, yet all the elements going to constitute such a defense, as against the legal title, should be distinctly set up and proved, p. 299.

Affirmed in *Hicks v. Lovell*, 64 Cal. 18; 49 Am. Rep. 690.

19 Cal. 302-305. DEPUTY v. STAPLEFORD.

Deed procured by fraud or duress is only voidable, and a subsequent vendee, purchasing in ignorance of the facts, can hold the property, p. 305.

Affirmed in *Isom v. Rex Crude Oil Co.*, 147 Cal. 661, in so far as complaint seeks to cancel lease of town lot for fraud of lessee against assignee of lease, it is fatally defective in not alleging that assignee took with knowledge or notice of fraud; *Connecticut Co. v. McCormick*, 45 Cal. 583, holding that in a foreclosure of a mortgage, given by husband and wife, the wife's claim that she signed and acknowledged the mortgage under duress of her husband did not invalidate it, the mortgagee having no notice of such duress; also in *Eberstein v. Willea*, 134 Ill. 108, holding duress not proven; *Jordan v. McNeil*, 25 Kan. 465, holding that an innocent subsequent vendee acquired a good title under a fraudulent deed; and *McNeil v. Jordan*, 28 Kan. 16, 17. Cited in *Reed v. Exum*, 84 N. C. 432, holding that after cancellation of a deed for fraud, the plaintiff was entitled to the land, with compensation for its use and any damages it had sustained, while the defendant could set up a counterclaim for any increased value of the land caused by his improvements; also in *Beals v. Neddo*, 1 McCrary, 209, 2 Fed. Rep. 44, holding that in foreclosure of a mortgage by an innocent purchaser from the mortgagee, duress in making the note and mortgage was no defense; *Smith v. Ewing*, 11 Sawy. 64, 23 Fed. Rep. 747, where the court was "of the impression" that an innocent purchaser from the holder of a certificate of purchase of pre-empted land takes the land, and the right to a patent therefor, purged of any fraud committed in obtaining the certificate; and in note to 28 Am. Dec. 378, on duress.

Motion for New Trial must be made and appealed from, otherwise the appellate court cannot review findings of fact in an equity case, p. 305.

Affirmed in *People v. Banvard*, 27 Cal. 475, in an information for usurpation of a public office. Cited in *Brown v. Willoughby*, 5 Colo. 8, holding that where the appeal is from the judgment, not from the refusal of a new trial, the evidence cannot be reviewed, but errors of law in admitting or excluding evidence, if made part of the record, may be reviewed.

19 Cal. 306-319. WOLF v. BALDWIN.

Actual Possession of Land is the possession which follows the subjection of the property to the will and dominion of the claimant, to the exclusion of others, and this possession must be evidenced by occupation

or cultivation or other appropriate use, p. 313. It must be an open, unequivocal, actual possession, notorious, apparent, uninterrupted, and exclusive, carrying with it all the marks and evidences of ownership, p. 317.

Affirmed in *Polack v. McGrath*, 32 Cal. 18, 22, saying: "The inclosure which is relied upon to establish prior possession must be shown to be substantial; . . . it should be of such strength as a prudent farmer erects to protect his growing crops. An inclosure that falls short of this serves no other purpose than to mark the lines of the tract of land, and is of no greater significance or value to prove actual possession than are corner posts or blazed line trees"; also in *Brumagin v. Bradshaw*, 39 Cal. 44, 46, 47, saying with regard to a boundary composed of natural and artificial barriers: "There can be no rule of universal application; . . . it is the province of the jury . . . to decide whether or not the artificial barriers were sufficient to notify the public that the land was appropriated." Cited in *Walsh v. Hill*, 41 Cal. 582, holding that where a general inclosure included the land in suit and two hundred acres of other land, some of which belonged to other parties, "it would be the extreme of assumption to maintain that this sufficed to subject the premises in controversy to the will and dominion of the then claimants of a portion thereof, to the exclusion of others, or to constitute an actual, exclusive possession of any claimant of a specific parcel within this general inclosure." Affirmed in *Davis v. Spring Valley*, 57 Cal. 546, where it was held there was no proper inclosure of a tract of land near the Presidio. Cited in *Schnepel v. Mellen*, 3 Mont. 134, holding that a similar possession was required under the Town Site Act of Montana; and in note to 60 Am. Dec. 604, on this point.

Van Ness Ordinance.—The object of that ordinance was to protect actual possessors. It is to be regretted that the ordinance did not fix a limit, in feet or lots, to the quantity of land of which the possessor might acquire the title of the city. But having declared that the title should go to the extent of the actual possession, it only remains for the courts to hold claimants to clear proof of such possession, p. 314.

Cited in *Carleton v. Townsend*, 28 Cal. 223, to the point that the ordinance, as confirmed by the legislature, "vested in possessors described in the ordinance a title to the lands therein mentioned, as against the city." Affirmed in *Davis v. Perley*, 30 Cal. 638, holding that the ordinance did not limit the quantity of land to be held by a claimant; and in same case, on page 643, saying that: "The possession required by the ordinance is as accurately defined as it can be, in general terms, in *Wolf v. Baldwin*." Cited in *Judson v. Malloy*, 40 Cal. 309, holding that there can be no title under the ordinance without actual possession.

19 Cal. 320-329. **ENGLES v. MARSHALL.**

Statute of Frauds requires bona fide change of possession of property sold, p. 329.

Cited in *George v. Pierce*, 123 Cal. 177, and *Hunt v. Hammel*, 142 Cal. 461, 462, noted under *Stevens v. Irwin*, 15 Cal. 503; *Gallagher v. Williamson*, 23 Cal. 334, 83 Am. Dec. 117, holding it was error to exclude the question, "Did you see any difference in the appearance or management of things after the sale?" Affirmed, on similar facts, in *Bunting v. Saltz*, 84 Cal. 172, holding that change of possession was not proven; and to same effect in *Mosgrove v. Harris*, 94 Cal. 165. Cited in dissenting opinion of Beatty, J., in *Gray v. Sullivan*, 10 Nev. 430, 436, a majority of the court holding that a vendee was shown to have taken sufficient possession, and that employment of the vendor's servant by the vendee was not fraudulent; also in *Howard v. Dwight*, 8 S. Dak. 402, holding that where seller and his clerks remained in charge of a shop after sale, there was no change of possession; and in notes to 76 Am. Dec. 504, and 97 Am. Dec. 341, on this point.

19 Cal. 330-354. **RICKETSON v. RICHARDSON.** S. C. 23 Cal. 636, 649.

Mortgage need not describe the debt secured by it with literal exactness, if the description be correct as far as it goes, and if enough be said to direct the attention of parties dealing with the property to sources of correct and full information, p. 350.

Cited in *Fetes v. O'Laughlin*, 62 Iowa, 534, 535, holding that a mortgage sufficiently identified the note for which it was security; to same effect in *Clementz v. Jones Co.*, 82 Tex. 428; and in notes on this point in 13 Am. Dec. 79, and 49 Am. St. Rep. 207.

Penalty named in a bond held not to be liquidated damages, p. 353.

Cited in *Brennan v. Clark*, 29 Neb. 393, holding that a penalty for noncompletion, named in a building contract, was not liquidated damages; and in note on this point in 1 Am. Dec. 338.

Note of Deceased Person may be presented to his executor before publication of notice by the executor, p. 354.

Cited in *Hibernia Soc. v. Hayes*, 56 Cal. 306, in dissenting opinion, a majority of the court holding that under the statute a failure to present a claim on a mortgage to the mortgagor's administrator, did not bar the claim. Affirmed in *Janin v. Browne*, 59 Cal. 43, saying: "It is not the publication of notice which is the prerequisite to the maintenance of an action or a claim, but the proper presentation of the claim and its rejection"; also in *McCann v. Pennie*, 100 Cal. 552, where Haynes, C., said: "I am not aware of any case holding that a complaint is bad on general demurrer, where it is alleged that the claim was presented in due form but contained no allegation touching publication of notice to creditors."

19 Cal. 354-364. **JUNGERMAN v. BOVEE.**

Fixtures.—Lessee cannot remove buildings at end of term, if lease

does not so stipulate, even though former leases of the same land between the same parties contained such provisions, p. 363.

Affirmed in *Marks v. Ryan*, 63 Cal. 110; *Hedderich v. Smith*, 103 Ind. 206; 53 Am. Rep. 512; *Watriss v. National Bank*, 124 Mass. 578; 26 Am. Rep. 699. Cited in *Wadman v. Burke*, 147 Cal. 354, where lessee has annexed trade fixtures and without removing them after expiration of term accepted new lease under different terms which was silent as to fixtures, injunction lies to prevent removal of fixtures; *Enyeart v. Davis*, 17 Neb. 236, holding that where a lessee accepts a new lease in place of a former one, he is bound by the covenants of the later; *Spencer v. Commercial Co.*, 30 Wash. 528, where tenant enters into new lease making no mention of former lease, and with no reservation for removal of fixtures placed under former lease, right to remove fixtures is precluded; note to 59 Am. Dec. 71, on this point. Affirmed in *Sanitary District v. Cook*, 169 Ill. 195; 61 Am. St. Rep. 167.

Contemporaneous Parol Agreement cannot be allowed to contradict a lease, p. 364.

Cited in *Solary v. Webster*, 35 Fla. 374, holding that parol evidence was admissible to explain a bond; *Bacon v. Green*, 36 Fla. 338, saying: "Defendant cannot, in either law or equity, be permitted to contradict or vary his written contract by showing that, notwithstanding he signed it, it was with the understanding that he was not to be bound as a party thereto"; *Johnson v. Tantlinger*, 31 Iowa, 502, where the court considers it unnecessary to decide whether parol reservations of growing crops could be shown in a suit regarding a deed of the land; *Stoddard v. Nelson*, 17 Oreg. 421, holding parol evidence incompetent to vary a lease.

Distinguished in *Green v. Gresham*, 21 Tex. Civ. App. 603, admitting parol evidence to show nonreversion of building erected on land.

New Trial ordered, on question of damages only; decree affirmed in other respects, p. 364.

Cited in *San Diego Co. v. Neale*, 78 Cal. 65, to the point: "It is settled that, upon an appeal from the judgment, the appellate court may order a new trial as to a part of the issues, leaving the decision in force as to the remainder"; holding that a party may move in the lower court for a new trial as to a part of the issues, and saying that *Lake v. Bender*, 18 Nev. 361 (which on page 373 cites the principal case), "held that a motion for a new trial as to a part of the issues was permissible. We are satisfied with the rule laid down in that case. It is possible that there may be cases where the issues are so inseparably blended as to render a separation impracticable. We express no opinion as to that."

19 Cal. 374-388. **KENNEDY v. HAMER.**

Writ of Restitution, in a case of forcible entry and detainer, may be issued by the county court, after reversing on appeal the judgment of a justice's court. When a court has general jurisdiction of a subject,

it has power to make a full disposition of the matter, and conclude the litigation respecting it, p. 386.

Affirmed in *Wright v. Hurt*, 92 Ala. 594, and *Enderlin Bank v. Rose*, 4 N. Dak. 337, 338; also in *Paul v. Armstrong*, 1 Nev. 104, saying: "The question seems too plain for argument. The right results from the principle that a power to decide litigated questions is accompanied by the power to make the decision effectual." Cited in note to 17 Am. St. Rep. 265, on this point.

19 Cal. 391-393. **FALL v. MAYOR.**

Tax may be levied by a city on a bridge, the franchise for which has been granted to a citizen, the city having a reversionary interest only, p. 393.

Cited in *Low v. Lewis*, 46 Cal. 552, holding that a tax deed on sale of a "city slip" lot for state and county taxes conveyed no title, for a municipal corporation cannot tax its own property; *Doyle v. Austin*, 47 Cal. 361, holding that in the extension of Montgomery avenue in San Francisco, lands belonging to the United States, the state, and the city, were properly exempted from assessment, for "it is well settled in this state and elsewhere that the property of the United States, or of the state, or of a municipal corporation, is not subject to taxation for revenue purposes"; *Detroit etc. Co. v. Common Council*, 125 Mich. 696, 84 Am. St. Rep. 606, sustaining taxation of street railway franchise; *Galveston Co. v. Galveston*, 63 Tex. 23, holding that where a wharf was owned jointly by a city and a corporation, the interest of the corporation was taxable, but not that of the city.

19 Cal. 393-397. **CLARK v. RUSH.**

Delivery of cattle bought at public sale held sufficiently shown, though the buyer left them for a time on the seller's land. It was not necessary to show that the cattle had been actually removed; it is sufficient that there were circumstances authorizing the inference of a change of ownership, p. 396.

Cited in *Ghiradelli v. McDermott*, 22 Cal. 541, saying of a sale of rice: "As between the parties, the delivery of the order to the defendant, on the warehouseman who had the goods in store, was clearly sufficient to pass the title of the goods to him, and rendered him liable to pay the price"; *Morgan v. Ball*, 81 Cal. 97, 15 Am. St. Rep. 37, holding that the circumstance of a husband using a mare and buggy after he had given them to his wife did not make the gift void as to debts contracted by him while so using them.

19 Cal. 397-410; 79 Am. Dec. 219. **GREGORY v. TABER.**

Probate Sale of Real Estate.—The petition must state amount of

personal property; and an account of it, filed with the papers but not referred to in the petition, is not enough, p. 409.

Cited in *Haynes v. Meeks*, 20 Cal. 314, holding that the petition must show the necessity for the sale, "by an exhibition of the real property of the deceased. The necessity is a conclusion which the court must draw for itself from the facts stated"; also in *Pryor v. Downey*, 50 Cal. 398, 19 Am. Rep. 658, holding that the jurisdiction depends absolutely on the sufficiency of the petition, and that if the petition is insufficient, a sale made under it is utterly void; *Sprigg v. Stump*, 7 Sawy. 295, 8 Fed. Rep., 219, holding that though a guardian's petition to sell was defective, for not properly showing the condition of the estate, yet as an exhibit on file was referred to for that purpose, the order of sale was properly made; and in notes, on probate sales, in 76 Am. Dec. 561; 87 Am. Dec. 246; 94 Am. Dec. 636; 95 Am. Dec. 115.

Confirmation of the sale, by the probate court, cannot validate it, if the sale was made by an order that the court had no jurisdiction to issue, p. 410.

Affirmed in *Townsend v. Tallant*, 33 Cal. 54, 91 Am. Dec. 621, saying: "Where there is no power to render a judgment or to make an order, there can be none to confirm or execute it, or none, at least, without the help of legislation."

19 Cal. 411-421. **PEOPLE v. KRUGER.**

Street, named as a boundary in the "Water Lot Act" of 1851, held not to have been dedicated thereby; the only object was to fix a boundary, in order to show what was conveyed, p. 421.

Affirmed in *Burr v. Dana*, 22 Cal. 20. Cited in *City v. McKay*, 123 Cal. 671, holding street on marsh land not dedicated under fact stated.

19 Cal. 425-426. **PEOPLE v. HALL.**

Indictment charging ownership of a horse to be in an estate is insufficient, p. 426.

Overruled in *People v. Smith*, 112 Cal. 335. Cited in *People v. Prather*, 120 Cal. 662, holding that the charge in an information that stolen cattle belonged to an estate was not demurrable.

19 Cal. 426-447. **PEOPLE v. BONNEY.**

Separation of Jury.—Visit of three jurors to a privy, in custody of an officer, after the jury had retired, is no ground for new trial, p. 445.

Cited in *Saltzman v. Sunset etc. Co.*, 125 Cal. 508, holding mere separation insufficient as ground for new trial under facts stated; *People v. Bush*, 68 Cal. 635, in dissenting opinion, a majority of the court holding that carrying the jury to a distant town in several wagons, and lodg-

ing them in several rooms in a hotel, was not a separation; also in *Stout v. State*, 76 Md. 330, holding that locking of a sick juror in his room at the hotel where the jury were boarded was not a separation; *State v. Robinson*, 20 W. Va. 753, holding that where the jury were kept in two separate rooms at a hotel, it was not a separation; and in notes on this point in 43 Am. Dec. 81, 85.

View by Jury.—Defendant need not be present. Ordering a view is in the court's discretion, p. 445.

Cited in *People v. Fitzpatrick*, 80 Cal. 540, doubting the propriety of witnesses being allowed to testify during a view, but holding that the objection could not be raised for the first time on appeal; also in *Garcia v. State*, 34 Fla. 334, holding that no witnesses should be examined during a view; *Shular v. State*, 105 Ind. 297, 55 Am. Rep. 215, holding that failure of defendant to accompany the jury on a view was no error, because he did not ask to go, neither was the judge required to go, because the statute did not so provide; *State v. Ah Lee*, 8 Oreg. 218, holding that failure of defendant to be present at the view was no error; and in note on this point in 92 Am. Dec. 344.

Court and Jury.—Oral direction to the jury to return with a general verdict of guilty and find the degree, is not a charge and need not be in writing, p. 446.

Cited in *People v. Jackson*, 57 Cal. 317, holding that telling the jury that they had nothing to do with the amount of punishment in answer to their question as to what was the lowest punishment, was not a charge; also in *McRae v. State*, 49 Ark. 198, holding that where the charge was grand larceny, and the jury offered to return a verdict of petty larceny, and the court refused it, sent them back, and discharged them on their failure to agree, this was not error sufficient to reverse a conviction of grand larceny on a second trial; *Grant v. State*, 33 Fla. 298, holding that where the verdict was manslaughter in first degree, and the court told the jury to correct it, as there were no degrees in manslaughter, and a verdict of murder was returned, there was no error in this, but that the evidence did not justify a conviction of murder; *Jenkins v. State*, 35 Fla. 835, 48 Am. St. Rep. 295, where the court ordered the jury to correct a verdict of "guilty as charged," and a new trial was ordered on other grounds; *State v. Potter*, 15 Kan. 316, where the verdict recommended the lowest possible punishment, the court ordered it corrected, and this was held no error; and in *State v. Jones*, 7 Nev. 416, holding there was no error in the court's oral remarks to the jury, who had been out a long time, before reading to them further instructions.

Presumptions "are in favor of the correctness of the acts and rulings of the judge. We only interfere to correct an erroneous instruction on appeal, where the facts are not stated, when under no imaginable state of facts could the ruling of the judge be maintained," p. 446.

Cited, without apparent relevancy, in *People v. Ramirez*, 56 Cal. 538, holding there was no error in certain (unreported) instructions on circumstantial evidence.

19 Cal. 447-461. **WEBER v. MARSHALL.**

Ejectment.—Equitable and legal defenses should not be submitted together to the jury. It is in the court's discretion whether to submit an equitable defense to the jury at all, p. 457.

Cited in *Estrada v. Murphy*, 19 Cal. 273, to the point that the equitable defense must first be passed upon by the court; to same effect in *Les-trade v. Barth*, 19 Cal. 671; *Blum v. Robertson*, 24 Cal. 141, to the point that an equitable defense is allowed in ejectment; *Fish v. Benson*, 71 Cal. 434, holding that "the fact that the cross-complaint charged fraud did not entitle defendants to a jury trial. . . . Where the case as made by the pleadings involves the application of the doctrines of equity and the granting of relief which can be obtained in a court of equity and not elsewhere, the parties are not entitled to a jury trial"; and in *Swasey v. Adair*, 88 Cal. 180, 181, holding that when trial of the equitable defense does not obviate the necessity of trying the legal issues, they must be referred to a jury, this being an action of replevin, while the rule cited was made for cases of ejectment. Cited in *Houser v. Austin*, 2 Idaho, 193, 194, holding that under Idaho practice legal and equitable issues may be submitted to the jury at the same time; *Mantle v. Noyes*, 5 Mont. 287, holding that in an action to quiet title, the findings of the jury were not binding on the court; *Rose v. Treadway*, 4 Nev. 460, 97 Am. Dec. 549, holding an equitable defense allowable in ejectment; *Treadway v. Wilder*, 12 Nev. 116, holding that on all legal issues defendant was entitled to a jury; *Kimball v. McIntyre*, 3 Utah, 81, holding that the equitable defense must be heard first; *Gibson v. Chouteau*, 13 Wall. 103, to the point that there may be an equitable defense in ejectment. In *Basey v. Gallagher*, 20 Wall. 681, Field, J., says, in a water right case: "If the remedy sought be equitable, the court is not bound to call a jury, and, if it does call one, it is only for the purpose of enlightening its conscience and not to control its judgment. . . . The relief which equity affords must still be supplied by the court itself, and all information presented to guide its action whether obtained through master's reports or findings of a jury, is merely advisory." Cited in *Crellin v. Ely*, 7 Sawy. 535, 13 Fed. Rep. 422, enjoining a suit in ejectment until an equitable action was determined; notes to 59 Am. Dec. 331, on equitable defenses, and 79 Am. Dec. 162, on patents to land.

Specific Performance.—Plaintiff must show due diligence on his part, p. 459.

Cited in *Fowler v. Sutherland*, 68 Cal. 418, holding on demurrer that a delay of over two years by plaintiff in offering to perform his part of the contract was laches; *Lux v. Haggin*, 69 Cal. 271, holding, in a water

right case, plaintiffs were not debarred from an injunction by delay, and distinguishing between delay, laches, and acquiescence; *Calanchini v. Branstetter*, 84 Cal. 255, holding that delay was acquiesced in and was not laches; and in notes to 7 Am. Dec. 492, and 70 Am. Dec. 739, on this point.

19 Cal. 463-476. **REGLA v. MARTIN.**

Fraud is not inferable from the fact that a decree for specific performance did not give minor defendants a day to affirm it after their majority, p. 475.

Affirmed in *Joyce v. McAvoy*, 31 Cal. 285, 89 Am. Dec. 182, holding that a decree against an infant is valid until reversed.

19 Cal. 476-485. **SMITH v. RICHMOND.** S. C. 15 Cal. 501.

Statute of Limitations must be pleaded by demurrer, when it appears on the face of the complaint that the statute is a bar; otherwise by answer, p. 481.

Cited in *Mason v. Cronise*, 20 Cal. 217, holding that the provision that suits on judgments are barred after five years includes domestic judgments; also in *Meeks v. Hahn*, 20 Cal. 626, holding that as no bar appeared in the face of the complaint, failure to plead the statute in the answer must be deemed an abandonment of the plea, *Field, J.*, saying: "Such is the rule where the action is upon a demand arising upon contract, and in our system of practice the same rule must apply where the action is to enforce a right to the possession of real property." Cited in *De Uprey v. De Uprey*, 23 Cal. 353, where the court doubted whether a demurrer should not specifically mention the statute as a ground but did not decide the point, as the answer had specifically pleaded the statute and a demurrer to the answer had been sustained; *Kelley v. Kriess*, 68 Cal. 213, holding that where the statute was not pleaded in demurrer or answer, it was waived; *Wise v. Hogan*, 77 Cal. 189, holding that no bar appeared on face of complaint, so the statute could not be pleaded by demurrer; and to same effect in *Pleasant v. Samuels*, 114 Cal. 39, holding that it cannot be inferred that the statute might have run. Cited in *McGehee v. Blackwell*, 28 Ark. 30, holding that the statute could be pleaded by demurrer or answer if the bar appeared on face of complaint, otherwise by answer only. Affirmed in *Meyer v. Binkleman*, 5 Colo. 263. Cited, to the point that if there are facts that suspend the operation of the statute, they must be alleged in the complaint, in *Humphrey v. Carpenter*, 39 Minn. 117, and *Knox v. Gerhauser*, 3 Mont. 271; and in *United States v. Williams*, 6 Mont. 385, holding that the complaint should not aver matters of defense; also in note on this point in 41 Am. Dec. 234.

Civil Actions embrace both legal and equitable actions, p. 481.

Cited in *Wa Ching v. Constantine*, 1 Idaho, 267, holding that an equitable defense may be pleaded to a legal cause of action.

New Promise, to pay a debt barred by the statute, must be alleged in the complaint; it is not the real cause of action, but the action is upon the original demand, and the new promise is only evidence that the statute does not operate as a bar to its prosecution, pp. 481, 482.

Denied in *Chabot v. Tucker*, 39 Cal. 438, saying that the above rule "was not necessary for the determination of that case, and is opposed to the general current of modern decisions upon the subject, and, so far as this doctrine is concerned, was entirely overruled by this court in *McCormick v. Brown*, 30 Cal. 180," and holding, with regard to a discharge in insolvency, that when "the original cause of action has been barred by the statute and a new promise is relied upon, the new promise must be pleaded"; the distinction between the cases of insolvency and the statute of limitations being "a distinction without a difference. . . . The legal liability is wanting in either case, and in both the moral obligation remains and will sustain a new promise to pay." Discussed and qualified in *S. P. Co. v. Prosser*, 122 Cal. 417, and held not overruled by *Chabot v. Tucker*, 39 Cal. 438; cited in *Pierce v. Merrill*, 128 Cal. 472, 79 Am. St. Rep. 62, on point that exception to, must be pleaded by plaintiff when complaint shows claim otherwise barred; *Pleasant v. Samuels*, 114 Cal. 39, to the point that a new promise must be alleged; and in notes on this point in 52 Am. Dec. 782, and 95 Am. Dec. 175.

Witness.—Payee is a competent witness in suit on a note, p. 485.

Affirmed in *Priest v. Bounds* 25 Cal. 189, holding that an indorser was a competent witness.

Instruction, erroneous in part, need not be given: The court was not bound to separate the concluding clause and give that by itself, p. 485.

Affirmed in *Williamson v. Tobey*, 86 Cal. 408.

19 Cal. 486-491. *DANA v. SAN FRANCISCO.*

County Warrant is not a negotiable instrument; it is not a new debt, or evidence of a new debt, but is the prescribed means the law has devised for drawing money from the county treasury, p. 490.

Cited in *Keller v. Hicks*, 22 Cal. 462, 83 Am. Dec. 80, holding that indorsers of warrants were not liable as indorsers of negotiable paper, or as assignors of bonds or duebills under the statute; also in *Shakespear v. Smith*, 77 Cal. 640, 11 Am. St. Rep. 329, holding that an order drawn by trustees of a school district on the superintendent of schools was not negotiable in the sense that an innocent holder for value was protected; *Greeley v. Cascade Co.*, 22 Mont. 589, denying right to bring ordinary action at law on such warrants.

Assignee of a county warrant may be protected as the holder of a claim against the county, not by reason of the indorsement, but because the transaction would be, in equity, the assignment of the debt on which the scrip issued, and an authority to the assignee to receive the money, p. 491.

Cited in *People v. Gray*, 23 Cal. 126, holding that "it is clear that the county treasurer cannot be compelled to pay a county warrant to any other person than the one in whose favor it is drawn, without at least an assignment by the payee"; also in *National Bank v. Herold*, 74 Cal. 607, 5 Am. St. Rep. 478, holding that the assignee of a warrant could sue on it, and the treasurer had no right to allege, as reasons for refusing payment, that the warrant omitted to state the official capacity of the payee, and that there was no evidence that the claims for which it was drawn had been paid; *People v. Johnson*, 100 Ill. 548, 39 Am. Rep. 68, holding that the assignee of a county order can sue on it in his own name; and in *State v. Cook*, 43 Neb. 323, holding that the indorsee of a warrant can sue on it, because the indorsement is an assignment of the debt.

19 Cal. 491-498. **AH HE v. CRIPPEN.**

Miner's License can be collected only from aliens mining in public lands of the state or the United States, p. 497.

Affirmed in *Ah Yew v. Choate*, 24 Cal. 566. Cited in notes to 63 Am. Dec. 93, 96, 103, and 79 Am. Dec. 139, on mining.

19 Cal. 499. **HILMAN v. VALLEJO.**

Default Judgment in action for specific performance cannot include property not described in complaint, p. 500.

Cited in *Balfour etc. Co. v. Sawday*, 133 Cal. 230, vacating such judgment in action to quiet title.

19 Cal. 501-513. **STATE v. CONKLING.**

Revision of Statutes is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is ignored, p. 512.

Cited in *Mack v. Jastro*, 126 Cal. 133, noted under *Pierpont v. Crouch*, 10 Cal. 315; *Sponogle v. Curnow*, 136 Cal. 584, *San Francisco etc. Co. v. Hartung*, 138 Cal. 230, and *Mercer v. Mercer*, 13 Colo. App. 247, holding repeal by implication so established; *Fraser v. Alexander*, 75 Cal. 152, holding the act of March 30, 1874, for removal of civil officers, was superseded by the County Government Act of 1883, and saying: "We think it may be stated as a general rule that acts of the legislature prohibiting the same offenses and injuries as former acts, but imposing different penalties or giving different remedies, repeal so far such former acts."

Cited in *People v. Henshaw*, 76 Cal. 442, holding that an act of 1885, regarding police courts, repealed by implication an act of 1866 relating to the police court in Oakland, saying: "The law does not favor the repeal of statutes by implication, . . . but where, as in the present case, the latter statute is repugnant to the former, and both cannot stand together, the latter will repeal the former." Cited in *Keese v. Denver*, 10 Colo. 121, holding that if a later statute is plainly intended to prescribe the only rule, it will repeal a former; to same effect in *Jernigan v. Holden*, 34 Fla. 534, 538; *Burgess v. Memphis Co.*, 18 Kan. 56, holding that if part of an older law is included in a revision, the intent to drop the remainder is presumed; *State v. Judge*, 37 La. Ann. 581, saying: "Where a revising statute embraces antecedent general laws on various subjects and reduces them to one system and one text, it repeals all prior statutes upon the same subjects not included in the body of the revision, if not by implication, certainly at least where it contains an express repealing clause"; *Montel v. Consolidation Co.*, 39 Md. 172, quoting the principal case and calling it "very well considered," says: "We have no hesitation in adopting the rule thus sustained by authority. It challenges approval upon every consideration, and, in our judgment, is justly made an exception to the general doctrine so frequently and emphatically announced by this court, that repeals by implication are things disfavored by law. . . . It is far better and safer for the courts to determine the new law to be a substitute for everything contained in the old." Cited in *Barden v. Wells*, 14 Mont. 464, holding that a general revenue act, giving a lien for taxes on real estate, without naming personal property, did not repeal a lien given by a former law for taxes on personal property; *Phillips v. Eureka Co.*, 19 Nev. 353, holding that a revision repeals former laws on the same subject; and in *Roche v. Mayor*, 40 N. J. L. 263, holding that a revision "is decisive evidence of an intention to prescribe the provisions contained in the later act as the only ones on the subject which shall be obligatory."

19 Cal. 513-536. **LATHROP v. MILLS.**

Statute unconstitutional in part is wholly void, unless it can be presumed that a constitutional provision therein, entirely disconnected from the vicious portions of the act, was intended to stand. We must intend that the legislature, knowing that the other provisions of the statute would fall, still willed that this particular section should stand, p. 530.

Affirmed in *Picche v. Paul*, 22 Cal. 109, 110, because two sessions of the legislature have been held since the decision in the principal case, and the legislature has not attempted to enact a proper law; also in *French v. Teschemaker*, 24 Cal. 547, holding one section of an act, if unconstitutional, to be "so interblended with the main designs of the act as to vitiate the whole," but the section is constitutional. Affirmed in *Central Branch Co. v. Atchison Co.*, 28 Kan. 460, where Brewer, J., says: "The

legislature never enacts laws upon the supposition that one part of them is in conflict with the constitution and must fail; it always proceeds upon the supposition that all that it does is within its constitutional power"; also in *State v. Lancaster Co.*, 6 Neb. 487; *State v. Harris*, 19 Nev. 224; and *State v. Sinks*, 42 Ohio St. 351, holding certain statutes wholly void, in spite of parts thereof being constitutional. Cited in dissenting opinion in *Moreland v. Millen*, 126 Mich. 406, majority holding invalid portion to be separable; dissenting opinion in *State v. Pond*, 93 Mo. 680, majority court holding that although one section of a statute might be unconstitutional, it did not invalidate the rest of the act, because it was separable from it; also in *State v. Curtis*, 9 Nev. 338, applying the same rule to a by-law of a corporation, and holding it wholly void because illegal in part; and in *Northern Pacific Co. v. Barnes*, 2 N. Dak. 385, in dissenting opinion, a majority of the court holding an act constitutional.

Statute of Limitations.—The act of 1856, providing that suits on a land patent must be brought within two years, is unconstitutional, p. 534.

Affirmed in *Anderson v. Fisk*, 36 Cal. 633.

19 Cal. 539-550; 81 Am. Dec. 77. **PEOPLE v. TINDER.**

Bail.—Finding of grand jury cannot be reviewed on application for bail, p. 542.

Cited in *In re Kennedy*, 144 Cal. 636, on point that upon habeas corpus sufficiency of evidence before grand jury cannot be considered.

Bail is a matter of right, except in capital cases, where the proof is evident or the presumption great. An indictment for a capital offense does of itself furnish a presumption of the guilt of the defendant too great to entitle him to bail as a matter of right under the constitution, or as a matter of discretion under the legislation of the state. It creates a presumption of guilt for all purposes except the trial before a petit jury, pp. 542, 543.

Cited in *Ex parte Brown*, 68 Cal. 177, holding that the "matter of right extends only to those cases where the party has not already been convicted," and that, pending appeal from conviction of a felony, bail is not a matter of right. Denied in *In re Losasso*, 15 Colo. 165, holding that "the absolute conclusiveness of the indictment as to guilt in capital cases should not be assumed," but in such cases the court must be cautious in allowing bail, and it must be sufficient to secure the prisoner's attendance at the trial; *In re West*, 10 N. Dak. 467, and *Ex parte Eastham*, 43 W. Va. 639, denying bail in murder case; note to *Ex parte Newman*, 70 Am. St. Rep. 742, on general subject. Affirmed in *State v. Brewster*, 35 La. Ann. 608, holding an indictment presumptive of guilt. Distinguished in *State v. Crocker*, 5 Wyo. 404, holding that under Wyoming laws the indictment does not conclusively establish that the proof

is evident or the presumption great. Cited in notes on bail, in 37 Am. Dec. 365, and 17 Am. St. Rep. 574; on habeas corpus in 43 Am. Dec. 115; on indictment in 3 Am. St. Rep. 279.

Evidence of defendant's innocence cannot be received to repel the presumption of guilt arising from the indictment, unless special and extraordinary circumstances exist, p. 545.

Denied in *Ex parte Dusenberry*, 97 Mo. 507, holding that although rape is a capital offense, defendant may be bailed after indictment, if he can offer evidence to remove the presumption raised by the indictment; to same effect, as to murder, in *State v. Madison Court*, 136 Mo. 325, and *Ex parte Smith*, 23 Tex. App. 124, and cited in dissenting opinion in latter case on page 131. Denied also in *Ex parte Finlen*, 20 Nev. 147, holding that defendant had the right to have the evidence of witnesses before the grand jury reviewed, to see whether the proof was evident or the presumption great.

Mistrial or New Trial will justify the allowance of bail, in the discretion of the court, without hearing other evidence as to the guilt or innocence of the accused, p. 549.

Affirmed in *State v. Vickers*, 47 La. Ann. 669, holding that mistrial is a fact for the court to consider, but it does not give an absolute right to bail; also in *Ex parte Goans*, 99 Mo. 198, 17 Am. St. Rep. 573, where bail was allowed after a mistrial; and in *Ex parte England*, 23 Tex. App. 99, holding that mistrial was a fact to consider on an application for bail.

19 Cal. 551-576. **RICKS v. REED.**

Special Case, within the most narrow construction ever given to those words by this court was created by the statute of 1860 relating to trial of title to lots in Humboldt County, under the Townsite Act of Congress of 1844; because the parties who are to be governed by the judgment are not litigants before the court or parties to the record, p. 574.

Affirmed in *Ryan v. Tomlinson*, 31 Cal. 15, saying: "Unless we should become satisfied that the decision was clearly and radically wrong—and we see no good reason to doubt its correctness—it ought not now to be changed, as it has become a rule of property, and every consideration is opposed to its disturbance." Cited in note to 63 Am. Dec. 78, on special cases.

Public Lands.—Congress did not intend to give the benefit of entry to mere temporary occupants, to the prejudice of the original settlers, p. 575.

Affirmed in *Rector v. Gibbon*, 111 U. S. 287, where Field, J., says: "Whenever Congress has relieved parties from the consequences of defects in their title, its aim has been to protect those who in good faith settled upon public land and made improvements thereon; and not those

who, by violence or fraud or breaches of contract, intruded upon the possessions of original settlers, and endeavored to appropriate the benefit of their labors" (p. 284). "In no instance in the legislation of the country have the claims of an intruder upon the prior possession of others, or in disregard of their rights, been sustained" (p. 287). Held, the assignee of a lessee is estopped from setting up an after-acquired title as against his lessor. Affirmed in *Downman v. Saunders*, 3 Okla. 235, 41 Pac. Rep. 107, holding that the rights of a prior settler are superior to those of a later trespasser who forcibly prevented the former from making the improvements required by statute.

Acknowledgment and Record of a deed are not necessary to pass the grantor's interest, except as to subsequent purchasers from him in good faith and for a valuable consideration, p. 576.

Cited in *Landers v. Bolton*, 26 Cal. 405, to the point that "a conveyance between the parties is valid and passes the title, without acknowledgment or record."

19 Cal. 577. SHARP v. MAGUIRE.

Statute of Limitations.—Filing of the complaint is all that is necessary to prevent the bar of the statute, p. 577.

Affirmed in *Pimental v. San Francisco*, 21 Cal. 368, and *Allen v. Marshall*, 34 Cal. 166. Approved in *Hawkins v. Donnerberg*, 40 Or. 110, voluntary appearance by defendant is equivalent to commencement of an action so as to stop running of limitations. Cited in note to 15 Am. Dec. 346, on beginning of action.

19 Cal. 578. PEOPLE v. GRIFFIN.

Burglary is not done in the night-time, if there is sufficient daylight to discern a man's features, p. 578.

Affirmed in *State v. McKnight*, 111 N. C. 692. Cited in *Leisenberg v. State*, 60 Neb. 632, holding crime not necessarily done in night-time because done between 6:30 P. M. and 9 P. M.; note to 2 Am. St. Rep. 388, on burglary.

19 Cal. 579-597. HEYNEMAN v. BLAKE.

Water Works, in San Francisco, organized under a law providing for the incorporating of persons for the purpose of engaging in any species of trade, is a corporation within the meaning of the statute, p. 594.

Cited in *Spring Valley v. Schottler*, 110 U. S. 357, in dissenting opinion of Field, J., a majority of the court holding that it was within the power of the legislature to amend the laws under which the water company was chartered, with regard to fixing of rates; Waite, C. J., saying: "Neither are the chartered rights acquired by the company under the law to be looked upon as contracts with the city and county of San Fran-

cisco. The corporation was created by the state. All its powers come from the state, and none from the city and county. As a corporation, it can contract with the city and county in any way allowed by law, but its powers and obligations, except those which grow out of contracts lawfully made, depend alone on the statute under which it was organized, and such alterations and amendments thereof as may from time to time be made by proper authority."

Water, when separated from source of supply, is personal property and vendible as such, p. 594.

Cited in *Dunsmuir v. Port Angeles etc. Co.*, 24 Wash. 114, holding water mains, pipes and franchises of water company mortgagable as personalty when not connected with ownership of land.

Condemnation of water and land, by a water company, vests title in the company only to the extent necessary for the purposes of the incorporation, p. 596.

Cited in *Ball v. Kehl*, 95 Cal. 613, to the point that "there is a plain and substantial distinction between the wrongful taking of water from the ditch or reservoir of another, and the wrongful diversion of it from a natural stream before it enters the ditch or reservoir." Also in *Oregon Ry. Co. v. Oregon Real Est. Co.*, 10 Oreg. 446, holding that an easement is all that can be taken by a railway by condemnation proceedings; and in notes to 48 Am. Dec. 190, and 42 Am. St. Rep. 407, 408, on condemnation.

Trial by Jury.—The constitutional right applies only to civil and criminal cases in which an issue of fact is joined. Condemnation proceedings need only to be conducted in some equitable and fair mode, to be provided by law, either with or without the intervention of a jury, p. 597.

Referred to in dissenting opinion in *Appeal of Houghton*, 42 Cal. 68, as an instance of a special case, where an appeal was allowed by statute. Cited in *In re Bradley*, 108 Iowa, 478, noted under *Koppikus v. Commissioners*, 16 Cal. 248. Affirmed in *Anderson v. Caldwell*, 91 Ind. 456, 46 Am. Rep. 617; *St. Paul v. Nickl*, 42 Minn. 264; and *Kendall v. Post*, 8 Oreg. 146.

General Citation.—*Rhode Island Hospital Trust Co. v. Hayden*, 20 R. I. 549.

19 Cal. 598-599. **PEOPLE v. AH SING.**

Indictment for larceny of property of a partnership, stating the firm name, is sufficient, without giving the names of the members, p. 599.

Cited in *People v. Ah Woo*, 28 Cal. 208, holding the description of a forged order sufficient; *People v. Hughes*, 41 Cal. 237, holding that ownership of property stolen must be alleged; *People v. Ribolsi*, 80 Cal. 496, holding that a charge of stealing goods of "Estate of T. & B., copart-

ners," was good. Denied in *McCowan v. State*, 58 Ark. 19, holding that names of members of firm must be stated. Distinguished in *Doan v. State*, 26 Ind. 497, holding that where an indictment for burglary named the firm and its members who owned goods taken, proof that the goods belonged to the firm, without giving the Christian names of members, was not sufficient. Affirmed in *State v. Mohr*, 68 Mo. 305, as to an indictment for embezzlement.

19 Cal. 600-601. **PEOPLE v. POGGL**

Indictment for larceny by a bailee must state the essential facts of the bailment, but the particulars of the mode of conversion need not be stated, p. 601.

Cited in *People v. Smith*, 23 Cal. 280, holding that if defendant did not intend to steal a horse when he hired it, it was larceny by a bailee; *People v. Garcia*, 25 Cal. 533, holding an indictment for larceny by a bailee to be good; *People v. Righetti*, 66 Cal. 185, holding that indictment for larceny need not aver the value to be in "current coin"; and in *People v. Johnson*, 71 Cal. 390, holding that if an indictment for larceny by a bailee states all the necessary facts, an omission to allege that he was a "bailee" is not fatal.

Affirmed in *State v. Griffith*, 45 Kan. 145, as to an indictment for embezzlement. Cited in *Gaddy v. State*, 8 Tex. App. 128, holding an indictment for embezzlement defective for not alleging by direct averments that defendant was a bailee. Denied in *State v. Chew Muck You*, 20 Oreg. 215, and *People v. Hill*, 3 Utah, 357, holding that averring defendant to be a "bailee" is sufficient. Cited in note to 57 Am. Dec. 280, on larceny.

19 Cal. 602-603. **STOYELL v. COLE**

Motion for a new trial may be withdrawn by party making it, after he has filed his notice and statement, p. 603.

Cited in *Cooney v. Furlong*, 66 Cal. 522, holding that if motion is made under section 657 of the Code of Civil Procedure on a statement of the case, the statement must be served within ten days thereafter, unless further time is allowed.

19 Cal. 603. **PEOPLE v. ECKERT**

Larceny.—Identity of property stolen must be shown beyond doubt, p. 604.

Cited in *People v. Swazey*, 6 Utah, 97, holding proof of identity insufficient in prosecution for felonious use of cattle brands.

19 Cal. 605-606. **MULHOLLAND v. HEYNEMAN**

Absence of Attorney, when case was called for trial, having been held

by the lower court not to be cause for setting aside the judgment on the ground of surprise, as the supreme court cannot undertake to say that this discretion has been improperly exercised, p. 606.

Cited in *Hall v. Bark*, 33 Cal. 525, to the point that "the party alleging error in granting or refusing a new trial must make the error affirmatively appear—must show abuse of discretion"; *Zimmerer v. Bank*, 50 Neb. 665, holding new trial properly denied under facts stated; also in the following cases (for which see note, ante, to *Haight v. Green*, 19 Cal. 113) viz.: 29 Cal. 424; 56 Cal. 177; 83 Cal. 230, 231; 7 Mont. 383; 21 Nev. 193; 58 Am. Dec. 394.

19 Cal. 607-608. CAPPE v. BRIZZOLARA.

Discretion of lower court, in setting aside report of a referee because the evidence did not justify the decision, cannot be interfered with, p. 608.

Affirmed, as to setting aside a verdict, in *Anthony v. Eddy*, 5 Kan. 133.

19 Cal. 609-616. BUTTE CO. v. MORGAN.

Water Rights.—Point of diversion may be changed, provided the change does not injuriously affect the rights of others, p. 616.

Affirmed in *Fuller v. Swan River Co.*, 12 Colo. 17, 18, and *Cole v. Logan*, 24 Oreg. 313. Cited in *Southern Cal. Inv. Co. v. Wilshire*, 144 Cal. 72, noted under *Kidd v. Laird*, 15 Cal. 181; *Hague v. Nephi etc. Co.*, 16 Utah, 433, denying right of prior appropriator to make change as against subsequent appropriator under facts stated, when to latter's prejudice; *Alder Gulch Co. v. Hayes*, 6 Mont. 38, holding that after water from a mining ditch has been used, on a claim, it must be returned to the ditch for use by others; and in note to 76 Am. Dec. 479, on water rights.

19 Cal. 617-623. KNOX v. MARSHALL.

Working Land on Shares creates a tenancy in common of the crops, and each tenant is entitled to the possession of the whole as against all persons but his cotenant, p. 621.

Cited in *Tully v. Tully*, 71 Cal. 346, holding that "there can be no adverse possession against a cotenant out of actual possession, until ouster and disseisin"; dissenting opinion in *Callender v. McLeod*, 74 Cal. 380, majority court holding that a transfer of grain by one farmer to another was a sale, void against attaching creditors of the seller, as the buyer had not taken possession, and that the parties were not tenants in common of the crop; *Baughman v. Reed*, 75 Cal. 321, 7 Am. St. Rep. 172, holding that where one cotenant of a crop threatens to sell the whole of it and appropriate the proceeds, his cotenant may bring an action for partition and have a receiver appointed; *Manchester etc.*

Co. v. Abrams, 89 Fed. 939, 61 U. S. App. 287, noted under Bernal v. Hovious, 17 Cal. 542; note 79 Am. Dec. 151, as to planting on shares.

Sale by a debtor, "even if void against creditors, is good as between himself and his vendee, and all the world except his creditors," p. 622.

Cited in note on this point in 79 Am. Dec. 206.

19 Cal. 623-626; 81 Am. Dec. 90. **LOGAN v. DRISCOLL.**

Mining.—Prior locator is entitled to damages for injury to his claim caused by tailings deposited thereon by a later locator, p. 626.

Affirmed in *Hobbs v. Amador Co.*, 86 Cal. 162. Distinguished in *Lincoln v. Rogers*, 1 Mont. 222, holding that while a prior locator cannot allow tailings to run free in a gulch, yet if he works his claim with reasonable care, injury caused thereby to a subsequent locator will be *damnum absque injuria*. Cited in notes to 11 Am. Dec. 501, and 1 Am. St. Rep. 376, on injunction against trespass.

19 Cal. 626-628; 81 Am. Dec. 91. **MAHONE v. MAHONE.**

Habitual Intemperance as a cause for divorce, is: A fixed habit of drinking to excess to such a degree as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, p. 628.

Cited in *Dennis v. Dennis*, 68 Conn. 192, 57 Am. St. Rep. 96, holding that where for two years the defendant had once in every three weeks been so drunk in the evening that he could not go to his shop next morning, it was not habitual intemperance; also in *Wheeler v. Wheeler*, 53 Iowa, 512, doubting whether habitual drunkenness during hours not devoted to business would not be cause for divorce; and in notes on this point in 38 Am. Rep. 616; 17 Am. St. Rep. 319; 24 Am. St. Rep. 722; 29 Am. St. Rep. 617, and 57 Am. St. Rep. 101.

Extreme Cruelty.—Acts of cruelty, such as are specified, need not be persistent, need not become a fixed habit, before relief and safety can be had by a divorce, p. 628.

Cited in *Cole v. Cole*, 23 Iowa, 441, holding that certain words and acts were extreme cruelty; and in note on this point in 97 Am. Dec. 185.

19 Cal. 629-632. **GRONFIER v. PUYSMIROL.**

Appointment of Guardian of nonresident minor may be made, under the statute, after such notice as the court may order. It is a matter for the exclusive judgment of the probate judge, subject, perhaps, to review on appeal to this court from the order of appointment. Third persons cannot question the validity of the order upon any allegation that insufficient notice was given of the hearing, pp. 631, 632.

Cited in *Asher v. Yorba*, 125 Cal. 515, quoting *Burroughs v. De Coutts*, 70 Cal. 373; *Estate of Henning*, 128 Cal. 219, 79 Am. St. Rep. 45, discussing right to appoint guardian in case of death of resident parents of non-resident minors; *Burroughs v. De Coutts*, 70 Cal. 373, holding that where the order of appointment recited that all the relatives of the minor within the county consented, it could not be attacked collaterally. *Angell v. Angell*, 14 R. I. 546, holding that the appointment of a guardian, on newspaper publication of notice, was legal. Distinguished in *Seaverns v. Gerke*, 3 Saw. 365; Fed. Cas. No. 12,595, holding appointment void when no notice of any kind given.

Guardian ad litem need not be appointed when there is a general guardian, except in special cases where the minor's interest requires it. It is the duty of the general guardian to appear in defense of any suit brought against the ward, p. 632.

Cited in *Spear v. Ward*, 20 Cal. 676, holding that a general guardian has power to bring suit for his ward, and the fact that in the title of the complaint he is wrongly styled guardian ad litem is immaterial; and in *Fox v. Minor*, 32 Cal. 119, 91 Am. Dec. 569, to the point that a guardian ad litem is unnecessary where there is a general guardian. Affirmed in *Smith v. McDonald*, 42 Cal. 486, where Wallace, J., says of the principal case: "It is believed that the authority of that case, upon the point involved, has never been doubted or called in question until now. . . . It has arisen to the importance of a rule of property, and even though it were conclusively shown to have been, as an exposition of the statute it attempted to construe, incorrect at the outset, I think it nevertheless our duty to maintain it now and not permit it to be disturbed. . . . The legislature can make such change if it be desirable, without the disturbance of titles and the destruction of individual rights which invariably follow such a change when brought about by a judicial decision." Cited, in the same case, in dissenting opinion of Crockett, J., op pp. 491, 492, saying that "the attention of the court does not appear to have been called to the provisions of the code requiring a personal service on the minor, as affecting the question of jurisdiction. . . . The general guardian has no right to appear for his ward in the action until after the latter shall have been served with process. . . . In so far as the decision in *Gronfier v. Puymirol* contravenes this proposition, it ought, in my opinion, to be overruled. I am not, however, to be understood as holding that if a minor be a nonresident, so that he cannot be personally served, the service may not in that case be made by publication of summons."

Affirmed in *Emeric v. Alvarado*, 64 Cal. 597, saying of the principal case and *Smith v. McDonald*, ante: "These decisions have stood so long as correct rulings that we would hardly undertake to overrule them." Cited in *Justice v. Ott*, 87 Cal. 532, holding that in suit against an incompetent person under section 411 of the Code of Civil Procedure

the summons must be served on him and his guardian, and the guardian must appear and defend; also in *Western Lumber Co. v. Phillips*, 94 Cal. 56, to the point that a general guardian must defend a suit against the ward. Cited in *Insurance Co. v. Bangs*, 103 U. S. 440, 441, holding that in a suit in a federal circuit court to cancel a personal contract, if the defendant is an infant, a decree against him is void on its face, for failure to show personal service on him, notwithstanding that he was represented by a guardian ad litem; also in *Manson v. Duncanson*, 166 U. S. 542, holding that where a nonresident minor had land in the District of Columbia, he was bound by a probate decree made there for the sale of the land, a guardian ad litem appearing at the hearing without personal service on the minor; and in note to 89 Am. Dec. 186, 191, on judgments against infants.

19 Cal. 632-635. **BARRETT v. GRAHAM.**

Opening Default.—The order of the lower court having been made on conflicting affidavits, the supreme court cannot undertake to say that an error has been committed, p. 635.

Cited in *Bailey v. Taafe*, 29 Cal. 424, holding that the discretion of the lower court to open a default is not a mental but a legal discretion, and in the present case the affidavit on which the order was made failing to show that absence of counsel was excusable, the order opening default must be reversed.

19 Cal. 640-643. **DUNNING v. RANKIN.**

Exception to allowance of a question must state the ground of the objection, as the difficulty might have been obviated by changing the form of the question, p. 643.

Affirmed in *State v. Dodson*, 4 Oreg. 67.

19 Cal. 644-645. **THOMAS v. FOGARTY.**

Adjournment for the Term, by the sheriff, in the absence of the judge, held premature and a nullity, p. 645.

Cited in *People v. Sanchez*, 24 Cal. 21, holding that where the sheriff opened court in the morning of the first day of the term, and the judge did not appear until afternoon, the term was legally begun. Also in *May v. People*, 8 Colo. 214, holding that failure of the clerk to adjourn court from day to day, in the judge's absence, did not cause the term to lapse; *Loesnitz v. Seelinger*, 127 Ind. 428, holding that county commissioners were presumed to be lawfully in session, though there was no proper record of their having convened on the first lawful day; *Union Pacific Co. v. Hand*, 7 Kan. 386, holding that when the term is once opened, it continues until it expires by limitation or is adjourned sine die; *In re Terrill*, 52 Kan. 32, 39 Am. St. Rep. 330, holding that in the

absence of a statute, if a judge does not appear on the first day, the term lapses, and if the clerk adjourns it from day to day until the judge appears, a conviction at that term is illegal, but defendant must be remanded, because it may be that such conviction does not put him in jeopardy; *In re Dossett*, 2 Okla. 386, 37 Pac. Rep. 1072, holding that a term regularly opened continues till the first day of the next term, unless adjourned sine die; and in *In re McClaskey*, 2 Okla. 575, 37 Pac. Rep. 857, holding that the term lapses if the judge does not appear on the first day, and if the clerk adjourns court from day to day, a conviction at that term is void, but defendant has not been put in jeopardy.

19 Cal. 646-660. **DUFF v. HOBBS.**

Setoff cannot be pleaded as an equitable defense when it is between parties some of whom are not of record, p. 658.

Cited in *Hobbs v. Duff*, 23 Cal. 626, 628, 629, holding that a court of equity has more extensive jurisdiction than a court of law over setoff; *Lyon v. Petty*, 65 Cal. 326, holding that in a suit by an administrator to foreclose a mortgage given to his intestate, a note of the mortgagee due before his death, and assigned to the mortgagor, but not presented as a claim against the mortgagee's estate, could not be set off; and in *Clark v. Sullivan*, 2 N. Dak. 107, declining to decide whether an equitable setoff must be pleaded by answer, or by a complaint in equity.

19 Cal. 660-676. **LESTRADE v. BARTH.** S. C. 17 Cal. 285.

Equitable Defenses may be pleaded in ejectment. The equity presented must be such as may be ripened into a legal right or constitute an estoppel. The equitable defense should first be passed upon, p. 671.

See notes on this point, ante, to *Estrada v. Murphy*, 19 Cal. 248, and *Weber v. Marshall*, 19 Cal. 447. Cited in the following cases, for which see both of said former notes; 24 Cal. 141; 88 Cal. 180; 13 Wall. 103; 2 Idaho, 193, 194. Also in the following for which see said former note to 19 Cal. 248; 42 Cal. 352; 44 Cal. 362; and in 71 Cal. 434; 4 Nev. 460, 97 Am. Dec. 549; 3 Utah, 81; for which see said note to 19 Cal. 447. Cited in *Clarke v. Huber*, 25 Cal. 597, holding that an equitable estoppel must be specifically stated in the answer or deemed waived; to same effect in *Davis v. Davis*, 26 Cal. 39; 85 Am. Dec. 165; *Hicks v. Lovell*, 64 Cal. 18, 49 Am. Rep. 680, holding that if defendant in ejectment relies on his ability and willingness to perform, as vendee, his part of the contract for sale of the land sued for, he must set it up in the answer; *Reece v. Roush*, 2 Mont. 590, holding that a prayer for costs in the answer is a request for equitable relief; and in *Ming v. Foote*, 9 Mont. 223, holding that as defendant did not set up his equitable defense in the answer, he must "abide by the position, as he announces it, that the action is a square-toed one of ejectment"; *Peterson v. Philadelphia Mfg. etc. Co.*,

33 Wash. 470, in action for recovery of possession of realty, answer showing defendant is mortgagee in possession with consent of legal owner under assignment of rents as security until arrears paid, and that same not paid, and that plaintiff is not bona fide purchaser, raises equitable defense first triable by court.

Mistake in description of land in a deed may be corrected in a court of equity, so as to make the instrument conform to the intention of the parties, nor does it make any difference whether the error be the result of fraud in one of the parties, or be committed under a mutual mistake, p. 672. The evidence must be clear and convincing, making out the mistake to the entire satisfaction of the court, p. 675.

Cited in *Hathaway v. Brady*, 23 Cal. 124, holding that the mistake may be proved by parol evidence, though it must clearly and fully establish the facts; also in *Leonis v. Lazzarovich*, 55 Cal. 54, holding it doubtful whether there was sufficient evidence in the case to order a deed reformed, but avoiding the deed on other grounds; *Hutchinson v. Ainsworth*, 73 Cal. 457, 2 Am. St. Rep. 827, saying: "The conclusion from the sum of all the authorities on the subject is, not that the relief must necessarily be denied because there is a conflict of testimony, . . . but that upon all the proofs . . . the mistake must be established in a clear and convincing manner and to the entire satisfaction of the court." Cited in *Ward v. Waterman*, 85 Cal. 503, where counsel claimed that the principal case and others laid down the rule that proof of mistake must be "so clear and convincing as to leave no room for doubt;" but the court said: "In each of the cases cited the court does use substantially the language above quoted, but in none of them is it used in such connection or under such circumstances as to justify this court in disregarding the finding of the court below where there is any evidence to support it. In each of the cases it is apparent that the mind to which the evidence is to be clear and convincing is the mind of the court below—the court which heard the evidence and is especially charged with the duty of passing upon the credibility of the witnesses—a duty which is not imposed upon and a right which is not vested in this court." Cited in notes on this point in 7 Am. Dec. 569, and 33 Am. Dec. 549. Notes, 65 Am. St. Rep. 482, 484, 493, 502, 509, on reformation.

Open, notorious, and exclusive possession and occupation of premises, plaintiff upon inquiry as to the interest, legal or equitable, which de-having valuable and lasting improvements thereon, is sufficient to put defendant held in the premises, p. 676.

Affirmed in *Dutton v. Warschauer*, 21 Cal. 628, 82 Am. Dec. 773. Cited in *Landers v. Bolton*, 26 Cal. 419, holding that possession by one holding a prior unrecorded deed was notice to a second vendee from the same vendor. Distinguished in *Fair v. Stevenot*, 29 Cal. 490, saying of the principal case: "It is not said, however, that the possession was per se notice and, if it could be so held, the inquiry in-

cumbent upon him [the vendee] would be useless, for he would be chargeable with notice, whether the inquiry could or could not result in a discovery of the real facts of the case. . . . Notice, therefore, is the ultimate fact to be proven, and possession is evidence upon that issue, and it may or may not be sufficient." Cited in *Smith v. Yule*, 31 Cal. 184, 89 Am. Dec. 170, where the court say: "It is insisted that the possession of the first vendee must be not only open and notorious, but also exclusive. This appears to have been the view of this court in all the later cases. . . . The regret has often and justly been expressed that the plain rule of the statute was ever departed from, or that if any exception was made, it had not been confined to cases of actual notice brought directly home to the persons to be charged; but as it has been made to include notices implied from the possession of the prior purchasers, the remedy, if any is needed, is with the legislature; but the court will confine the exception to cases of open, notorious, and exclusive possession—to the exclusion, at least, of the grantor." Cited in *Pell v. McElroy*, 36 Cal. 271, holding that: "The continued exclusive possession of a vendor, after his formal conveyance of the legal title, is a fact in conflict with the legal effect of his deed, and is presumptive evidence that he still retains an interest in the premises, and is sufficient to put a purchaser upon inquiry and subject him to the general rule, heretofore announced, in case of the party in possession being a stranger to the title as of record." Cited in *Hellman v. Levy*, 55 Cal. 119, where mortgaged land was in possession of another than the mortgagor, and it was held that this possession was not so open and notorious as to be notice to the mortgagee; also in *Peasley v. McFadden*, 68 Cal. 615, holding that where premises at time of sale are occupied by another than the vendor, the vendee is put on inquiry as to the equities of the occupant; and in *Scheerer v. Cuddy*, 85 Cal. 272, saying it was the vendee's "duty to know who was in possession of the property before making the purchase, and his purchase without ascertaining the fact must be regarded as the strongest evidence of bad faith on his part. The burden of making the proper inquiry was cast upon him by the mere fact of actual possession on the part of the appellant. If it were allowed that by failing to acquaint himself with the fact of possession on the part of another than the vendor, the vendee could avoid the effect of the rule above stated, he could purposely avoid any inquiry on the subject, and thereby evade the rule and its consequences entirely." Cited in *Gale v. Shillock*, 4 Dak. 196, holding that possession of any part of the land sold, by another than the vendor, is notice to the vendee; also in *School District v. Taylor*, 19 Kan. 292, holding that a mortgagee of land, part of which was occupied by a schoolhouse, took the mortgage subject to all the equities of the school; and in note to 73 Am. Dec. 549, on this point.

N. B.—The following cases cite the principal case, but intend the same case in 17 Cal. 235, viz.: *Farmer's Bank v. Stover*, 60 Cal. 396, and *Burns v. Scooffy*, 98 Cal. 276.

Notes Cal. Rep.—64.

19 Cal. 676-683. **PEOPLE v. LOVE.**

Penalty distinguished from liquidated damages, p. 681.

Cited in *Pogue v. Kaweah etc. Co.*, 138 Cal. 667, holding latter contemplated in contract construed.

Bail Bond.—Suit on it may be brought in the name of the people, p. 681.

Cited in *People v. De Pelanconi*, 63 Cal. 410, holding that the action may be brought in the name of the people or the county; also in *Bay Co. v. Brock*, 44 Mich. 46, holding that a statute was directory only in naming the state as obligee in a sheriff's official bond, and a bond made by him to the county, having been approved by the supervisors as required by statute, was valid; and in note to 65 Am. Dec. 549, on official bonds.

19 Cal. 683-691. **LAWRENCE v. FULTON.**

Secondary Evidence of contents of a deed can only be received after proper proof of its loss, p. 689.

Cited in *Wiseman v. Northern Pacific Co.*, 20 Oreg. 430, 23 Am. St. Rep. 138, holding secondary evidence inadmissible, because there was not sufficient proof of diligent search for a missing deed.

Occupation of Land.—The word "occupation" may be so used in connection with other expressions, or under peculiar facts of a case, as to signify a residence. But ordinarily the expressions "occupation," "possession pedis," "subjection to the will and control," are employed as synonymous terms, and as signifying actual possession, p. 690.

Cited in *McKenzie v. Brandon*, 71 Cal. 211, holding that a prior applicant for public land was sufficiently in "adverse occupation" thereof with regard to the claim of a later applicant; *McIntyre v. Sherwood*, 82 Cal. 143, saying: "Occupation is ordinarily synonymous with actual possession. . . . And as there may be actual possession without residence, it would seem to follow that there may be occupation, and consequently settlement, without residence. . . . We conclude, therefore, that the word 'settlers' as used in section 3442 [of the Political Code] does not require residence upon the land." Cited in *Staininger v. Andrews*, 4 Nev. 67, holding that a prior locator of public land, who diligently tried to do such things as the statute required, had priority over a later occupant; *United States v. Rogers*, 23 Fed. Rep. 666, holding that the Cherokee Nation has possession of the lands subject to its control; and in note to 10 Am. Dec. 611, on this point.

Abandonment.—Lapse of time constitutes a material element to be considered in deciding the question, p. 691.

Cited in *Moon v. Rollins*, 36 Cal. 338, 95 Am. Dec. 183, saying: "It is a question of intention, and has been so held over and over again, and not a question of time, except so far as the jury are entitled to con-

sider lapse of time in connection with other circumstances of claim or nonclaim, and acts of ownership and dominion, or a want of such acts, for the purpose of ascertaining the intention;" and in note to 40 Am. Dec. 464, on this point.

19 Cal. 693-706. TUIITE v. WAKELEE.

Agent of Express Company, acting beyond scope of his employment, does not bind the company, p. 706.

Cited in extended note to *Bullard v. American Exp. Co.* in 61 Am. St. Rep. 381, on liability of express companies.

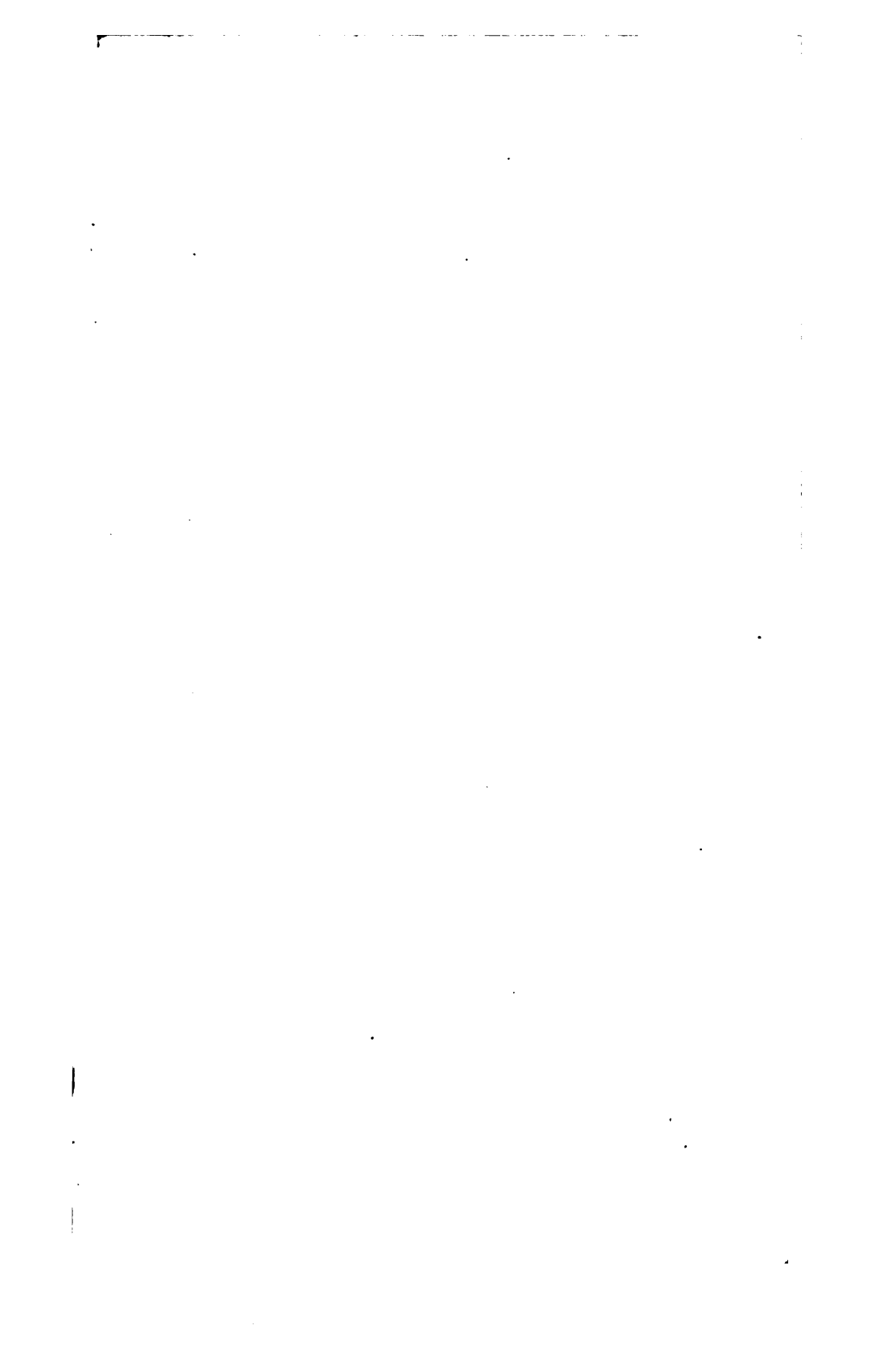
19 Cal. 706-709. BELL v. THOMPSON.

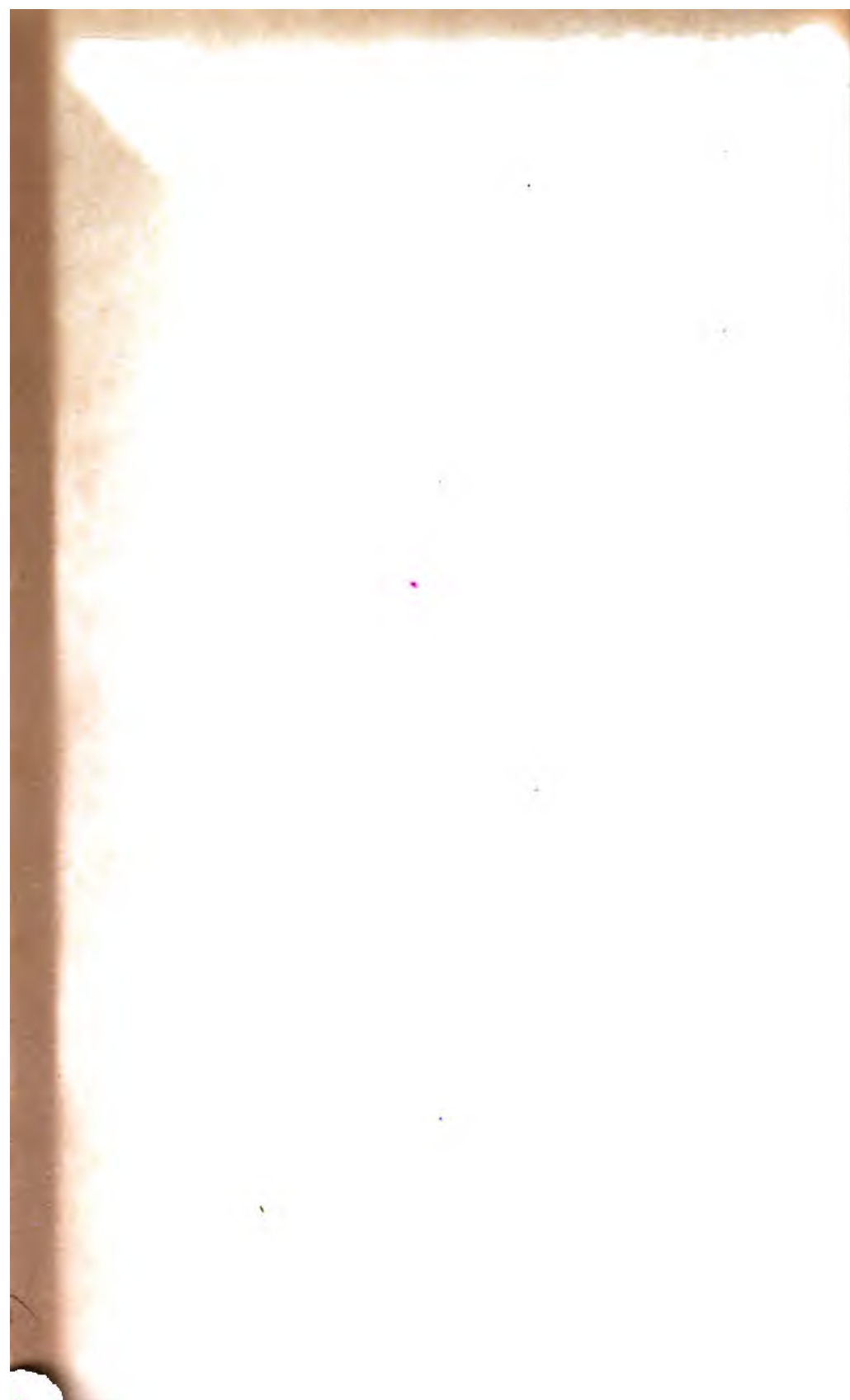
Vacating Judgment After Term.—No motion can be entertained by a district court to set aside a judgment on any ground, including that of want of jurisdiction over the person of the defendant in the action in which the judgment was entered, after the expiration of the term in which it was entered, unless its jurisdiction is saved by some motion or proceeding at the time, except in the case provided for by the sixty-eighth section of the Practice Act, p. 708.

Cited in *White v. White*, 130 Cal. 600, noted under *Carpentier v. Hart*, 5 Cal. 406; *Park v. Higbee*, 6 Utah, 418, but vacating default judgment after term on condition that defendant answer; *Lewis v. Rigney*, 21 Cal. 273, holding that section 68 of the Practice Act (Code of Civil Procedure, section 473), applies to cases of judgments entered erroneously without any service of summons; also in *De Castro v. Richardson*, 25 Cal. 52, holding that this rule does not "derogate from the power of court to make an order nunc pro tunc, or to correct a mere clerical error"; also in *Casement v. Ringgold*, 28 Cal. 338, holding that steps to obtain relief, under section 68 of the Practice Act, must be taken before end of term, except where defendant has not been personally served; *Sanchez v. Carriaga*, 31 Cal. 173, holding that an injunction could not issue against an execution on a void judgment, for there was an adequate remedy by application to the court that rendered the judgment; to virtually the same effect in *Murdock v. De Vries*, 37 Cal. 529; *Wakelee v. Davis*, 62 Cal. 514, holding that a judgment could not be vacated three years after it was rendered; *Wiggin v. Superior Court*, 68 Cal. 401, holding that under the code a superior court can vacate a probate decree on the day after making it, on the ground that it was made "inadvertently and ex parte;" *Wharton v. Harlan*, 68 Cal. 423 to 425, holding that under section 473 of the Code of Civil Procedure a judgment of default, void on the face of the judgment-roll, may be set aside at any time after the six months named in the statute; to same effect in *People v. Greene*, 74 Cal. 403, 405; 5 Am. St. Rep. 451, 452. Cited in *People v. Harrison*, 84 Cal. 608, holding that a motion to vacate a judgment will not lie after lapse of the statutory time, unless it is

void on its face, and in such case "an action regularly brought is preferable and should be required"; *Moore v. Superior Court*, 86 Cal. 496, holding that after six months a court cannot vacate on motion a prior order not void on its face; *Norton v. Atchison Co.*, 97 Cal. 301, 302, 33 Am. St. Rep. 200, 201, holding that a court has power to vacate within a reasonable time a void judgment by default, rendered upon a false return of service of summons, and that the matter is not governed by section 473 of the Code of Civil Procedure, although, by analogy to that section, six months might be deemed, perhaps, the extent of a reasonable time; and in *Brackett v. Banegas*, 99 Cal. 626, holding that an application for relief under section 473 of the Code of Civil Procedure may be made by either party to a judgment, but in no case after the expiration of six months. Cited in *Daniels v. Daniels*, 12 Nev. 121, holding that a court could not vacate its judgment after the term, as the jurisdiction had not been saved by any proceeding within the statutory time.









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